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Supreme Court of Virginia

RECORD NO. 941562

RACHEL P. CHANEY,

Appellant,

v.

CASPER B. HAYNES, JR. et al.,

Appellees.

JOINT APPENDIX

Jonathan A. Smith-George
PATTEN, WORNOM & WATKINS, L.C.
Patrick Henry Corporate Center
12350 Jefferson Avenue, Suite 360
Newport News, Virginia 23602
(804) 249-1881

Counsel for Appellant

Robert H. Smallenberg
AYERS & STOLTE, P.C.
Hamilton Professional Building
710 North Hamilton Street
Richmond, Virginia 23221
(804) 358-4731

Counsel for Appellee

The LEX Group / 1205 East Main Street, Suite 2 East / Richmond, VA 23219
Ph: (804) 644-4419 / (800) 856-4419 / Fax: (804) 644-3256

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VIRGINIA: IN THE CIRCUIT COURT OF KING AND QUEEN COUNTY

CASPER B. HAYNES, JR. and WANDA F. HAYNES, HOWARD J. COOK, JR. AND CHARLENE R. COOK CHARLES L. GARNETT, JR. AND EVELYN J. GARNETT MICHAEL Y. DAY AND DORIS B. DAY ROBERT L. FRASER, III AND RUTH S. FRASER JOSEPHINE ERWIN JOHN S. HILTON AND PATRICIA L. HILTON JAMES CARLYLE AND CATHERINE CARLYLE GARLAND M. PIERCE AND PAULA K. PIERCE Plaintiffs,	Chancery No. 92-26
v.	
RACHEL P. CHANEY, 639 River Bend Court, No. 304 Newport News, Va. 23602 Defendant.	

PETITION FOR TEMPORARY INJUNCTION

COMES NOW the plaintiffs, by counsel, asking that the Court grant a temporary injunction upon the prayer for a temporary injunction contained in Plaintiff's bill; and upon a hearing ore tenus.

UPON CONSIDERATION WHEREOF, the plaintiffs pray that the Court find that Plaintiffs are entitled to the relief prayed for, and thereby ORDER, ADJUDGE and DECREE that defendant and all other

parties are and that they shall be restrained and enjoined from obstructing or interfering in any way with the free use by Plaintiffs and Defendant of the right of way across the land of the defendant, which is 10 feet wide and runs from the public Highway (Route 667) on the East of Defendant's property to the low water mark of the York River to the West of Defendant's property. The plaintiffs ask that the order allow Mrs. Josephine Erwin to mow the grass on the right of way, this activity being necessary to the maintenance of said right of way. Defendant should be further restrained and enjoined from suing out and having issued criminal warrants for trespass against Plaintiffs on account of Plaintiffs' use of said right of way, until further order of this court.

Plaintiffs ask that this injunction order shall be effective from ~~May~~ June ___, 1992, the date of this order, until the ____ day of _____ 1992, at which time it shall stand dissolved unless prior thereto it shall have been enlarged or a further injunction shall have been granted by further order of this Court.

Plaintiffs further pray that an injunctive bond not be required as the plaintiffs have an interest in the maintenance of the right of way and will cause no harm to come to said right of way.

I ask for this:

J. Flippo Hicks

J. Flippo Hicks
HERSHNER, JACOBS, METZGER & HICKS
Seven South Adams Street
Richmond, Virginia 23220
(804) 788-1956

CERTIFICATE

I hereby certify that a true copy of the foregoing Petition for a Temporary Injunction was mailed this twenty-second day of May, 1992, to the Defendant, Rachel Chaney, 639 River Bend Court, No. 304 Newport News, Virginia 23602, and counsel desires to state orally and in person the reasons for granting this temporary injunction.

J. Flippo Hicks
HERSHNER, JACOBS, METGER & HICKS
Seven South Adams Street
Richmond, Virginia 23220
(804) 788-1956

VIRGINIA: IN THE CIRCUIT COURT OF KING & QUEEN COUNTY

CHARLES L. GARNETT, JR. AND EVELYN J. GARNETT CASPER B. HAYNES, JR. AND WANDA F. HAYNES HOWARD J. COOK, JR. AND CHARLENE R. COOK MICHAEL Y. DAY AND DORIS B. DAY ROBERT L. FRASER, III AND RUTH S. FRASER JOSEPHINE ERWIN JOHN S. HILTON AND PATRICIA L. HILTON JAMES CARLYLE AND CATHERINE CARLYLE GARLAND M. PIERCE AND PAULA K. PIERCE Plaintiffs, v. RACHEL P. CHANEY 639 River Bend Court, No. 304 Newport News, Virginia 23602 Defendant.	CHANCERY NO. 92-26

PETITION FOR DECLARATORY JUDGMENT

Plaintiffs, Casper B. Haynes, Jr., et al., by counsel and pursuant to Section 8.01-184, et seq., Code of Virginia, 1950, as amended, files herein a petition for declaratory judgment on the following grounds:

1. There is an actual controversy existing between Plaintiffs and Defendant regarding the rights of the parties hereto to the use of a certain easement of right of way; the use of certain beachfront area; rights to and obligations regarding maintenance of said easement area; rights pertaining to certain beach area; rights and obligations regarding certain bulkhead and

the repair and/or replacement of same; rights to destroy trees within a certain easement of right of way and to place fencing material in the easement of right of way described hereinafter; and other rights and obligations of the parties resulting from their ownership of certain parcels of land lying and being in Buena Vista Magisterial District, King and Queen County, more particularly described hereinafter.

2. Plaintiffs are the owners of certain parcels of land in the Re-Subdivision as follows:

A. Casper B. Haynes, Jr. and Wanda French Haynes owners of 1/3 acre known as lot 1.

B. Howard J. Cook, Jr. and Charlene R. Cook owners of 1/4 acre known as lot 12.

C. Charles L. Garnett, Jr. and Evelyn J. Garnett owners of 1/4 acre known as lot 11.

D. Michael Y. Day and Doris B. Day owners of 1/4 acre known as lot 9.

E. Robert L. Fraser, III and Ruth S. Fraser as owners of 1 acre which is in the eastern part of the property formerly owned by J. M. Garnett.

F. Josephine T. Erwin as the owner of 3/4 acre in the western part of the lot formerly owned by J.M. Garnett.

G. John S. Hilton and Patricia L. Hilton as owners of 1/4 acre known as lot 2 and 1/4 acre known as lot 3.

H. James Carlyle and Catherine Carlyle as owners of 1/2 of lot 5, 1/2 acre known as lot 6, 1/2 acre known as lot 7 and 8.

I. Garland M. Pierce and Paula K. Pierce as owners of lot

4 and 1/2 of lot 5.

3. Defendant is the owner of a certain lot or parcel in King and Queen County, Virginia, known as Lot 11 in the Sutter subdivision and more particularly described in a deed of sale dated May 20, 1991, between David N. Sutton, Jr., Frances S. Oliver and Raymond E. Oliver, and the Defendant, of record in the Clerk's Office of the Circuit Court of King and Queen County, Virginia, in Deed Book 122, page 705.

4. Plaintiffs were unaware of any controversy regarding any rights of way of the property owners until on or about April 15, 1991, when Defendant placed, or caused to be placed, a fence restricting Plaintiffs' access to said easement of right of way thus blocking rights of Plaintiffs to the beach beside Defendant's house.

5. Said easement being the right to use a strip of land 10 feet wide extending from the public highway on the East to low water mark of the York River on the West for purposes of access to the York River and to the public highway, all of which is more definitely set forth in a certain deed dated March 18, 1952 from J. M. Garnett and wife to Charles L. Garnett, Jr., recorded in the Clerk's Office of the Circuit Court of King and Queen County, Virginia, on March 22, 1952, in Deed Book 42, page 204.

6. The original grantor of said easement having erroneously indicated its location to Plaintiffs or their predecessors in interest thus manifested his implied consent to moving the location of said easement.

7. Alternatively, Plaintiffs or their predecessors in

interest have used this right of way adversely, under a claim of right, continuously, uninterrupted and with knowledge and acquiescence of owners of the property over which it passes for at least 20 years and thus establishing an easement by prescription.

WHEREFORE, Plaintiff prays that this Court determine the rights and obligations of the parties hereto regarding the easement of right of way leading to the river; whether Defendant has wrongfully damaged Plaintiffs by their actions and if so, Plaintiffs seek judgment against the Defendant for such damage; which parties have which rights in and to this easement and whether any party has the right to block or partially obstruct said easement with fencing material or any other material; that the Court enjoin Defendant from further action regarding the easement of right of way until the issues between the parties have been litigated; that the Plaintiffs be compensated for any damage sustained as a result of any injurious conduct of Defendant; and for such other and further relief as the Court may deem appropriate.

Charles L. Garnett, et. al

By _____
Of Counsel

J. Flippo Hicks
HERSHNER, JACOBS, METZGER & HICKS
7 South Adams Street
Richmond, Virginia 23220
(804) 788-1956

CERTIFICATE

I hereby certify that a true copy of the foregoing Petition for a Declaratory Judgment was ~~mailed~~ Hand delivered this eighth day of June, 1992, to the ~~Defendant,~~ Attorney for Rachel Chaney, 639 River Bend Court, No. 304 Newport News, Virginia 23602, and counsel desires to state orally and in person the reasons for granting this temporary injunction.

J. Flippo Hicks
HERSHNER, JACOBS, METGER & HICKS
Seven South Adams Street
Richmond, Virginia 23220
(804) 788-1956

FILED
12:30 P.M.
JUN 8 1992
By [signature]
DEP. CLERK

VIRGINIA: IN THE CIRCUIT COURT OF KING & QUEEN COUNTY

CHARLES L. GARNETT, JR., et ux, et al

Plaintiffs

vs. Chancery No: 92-26

RACHEL P. CHANEY,

Defendant

ANSWER

For answer to the Petition for Declaratory Judgment, the Defendant, Raechal P. Chaney (*sic*) now comes and says:

1. She denies all allegations contained in paragraph 1 and states that no actual controversies exist between the parties, that neither the Plaintiffs, their predecessors in title, nor any other individual, firm or corporation have any rights whatsoever to the use of the Defendant's property and have not acquired any easement by prescription or in any other manner.

2. The Defendant is not advised of the allegations contained in paragraph 2 of the Petition and calls for strict proof thereof.

3. The Defendant admits the allegations contained in paragraph 3. of the Petition and says that the Plaintiffs have no rights whatsoever to the use of any portion of the said property.

4. The Defendant denies all allegations contained in paragraph 4 of the Petition.

5. The Defendant admits all allegations of paragraph 5 of the Petition and states that the easement described therein is the actual easement for the benefit and use of the Plaintiffs.

6. The Defendant denies each and every allegation contained in paragraphs 6 and 7 of the Petition.

Now having fully answered, Defendant prays that the Petition be dismissed at the cost of Plaintiffs.

RAECHAL P. CHANEY

By: _____
Of Counsel

I. Leake Wornom, Jr., p.d.
PATTEN, WORNOM & WATKINS
12350 Jefferson Avenue, Suite 360
Newport News, VA 23602

CERTIFICATE

I hereby certify that on the 22 day of June, 1992, I mailed a true copy of the foregoing Answer to counsel for the plaintiffs, J. Flippo Hicks, Esq., Hershner, Jacobs, Metger & Hicks, Seven South Adams Street, Richmond, VA 23220.

_____

FILED
11:00 A.M.
JUN 25 1992
By _____
DEP. CLERK

941562

VIRGINIA:

IN THE CIRCUIT COURT OF KING AND QUEEN COUNTY

CASPER B. HAYNES, JR. AND WANDA F. HAYNES, HOWARD J. COOK, JR. AND CHARLENE R. COOK, CHARLES L. GARNETT, JR. AND EVELYN J. GARNETT MICHAEL Y. DAY AND DORIS B. DAY ROBERT L. FRASER, III AND ROTH S. FRASER, JOSEPHINE ERWIN, JOHN S. HILTON AND PATRICIA L. HILTON JAMES CARLISLE AND CATHERINE CARLISLE, GARLAND M. PIERCE AND PAULA K. PIERCE	
Plaintiffs,	
v.	Chancery No. 92-26
RACHEL P. CHANEY,	
Defendant.	

COMMISSIONER'S HEARING, HEARD ON APRIL 28, 1993, COMMENCING AT 9:00 A.M.; BEFORE L. MCCAULEY CHENAULT, COMMISSIONER IN CHANCERY FOR KING AND QUEEN COUNTY, IN AYLETT, VIRGINIA.

APPEARANCES:

C. FLIPPO HICKS, ESQUIRE
J. FLIPPO HICKS, ESQUIRE
Counsel for Plaintiffs

I. LEAKE WORNOM, JR., ESQUIRE
Counsel for Defendant

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9 EXHIBITS Page

1 P R O C E E D I N G S

2 (April 28, 1993) (9:15 a.m.)

3

4 MR. WORNOM: Mr. Commissioner, I think we

5 are able to stipulate certain things. I would like to

6 introduce as Exhibit No. 1, which I understand that there is

7 no objection--

8 MR. CHENAULT: Let the record show that it

9 is Defendant's Exhibit No. 1.

10 (Review of document.)

11 MR. WORNOM: That is the plat by which Mr.

12 Garnett acquired title to the property, which is that strip

13 right there.

14 MR. C. F. HICKS: This--well when you say

15 that strip right there, it is strip which has-- Is that

16 Garnett's name written on it?

17 MR. CHENAULT: It is J. M. Garnett written

18 on it.

19 (DEFENDANT'S EXHIBIT NO. 1, marked for

20 identification and admitted into evidence.)

21 MR. WORNOM: This is a deed to one of the

22 lots in the subdivision.

23 (Review of document.)

24 MR. WORNOM: And in this deed, Mr.

1 Commissioner, this is one of the lots that Mr. Garnett sold.
2 And in the deed he says that "The grantee shall have the
3 right to use a strip of land ten feet wide over and along the
4 northern boundary of his lot and over and along the northern
5 boundary of all other lots in the re-subdivision and over and
6 along the remaining property of J. M. Garnett extending from
7 the public highway on the east to the low water mark of the
8 York River on the west for purposes of access to the York
9 River and to the public highway. This right shall be in
10 common with a similar right of use by the parties of the
11 first part and the owners of all the land now owned by J. M.
12 Garnett and by the owners of all the lots in the
13 re-subdivision herein recited."
14 That is the ten foot strip we can stipulate
15 is right down that line right there. (Indicating.)
16 MR. CHENAULT: Let the record show that he
17 is pointing to the northern boundary line of James Garnett
18 property on Defendant's Exhibit No. 1.
19 We will mark the deed from J. M. Garnett
20 and Marguerite Thomas Garnett to Charles Leonard Garnett, Jr.
21 as Exhibit No. 2.
22 (DEFENDANT'S EXHIBIT NO. 2, marked for
23 identification and admitted into evidence.)
24 MR. WORNOM: I believe we could stipulate

1 that one of the plaintiffs is Mrs. Erwin who owns a lot now
2 immediately next to the property in dispute. We would like
3 to introduce her deed as Exhibit No. 3. And in her deed it
4 says that the property conveyed and particular
5 reference--they are talking about easement--"particular
6 reference is made to an easement ten feet wide over and along
7 the northern boundary thereof for the benefit of all the lots
8 in the J. M. Garnett re-subdivision" and that is this piece
9 of property. And that is the same easement that this lot
10 right here, one of the plaintiffs, has made subject to that
11 easement right there. And I would like to introduce that as
12 Exhibit No. 3. (Indicating.)
13 MR. C. F. HICKS: Let me just say that that
14 is the same easement that is described in the Defendant's
15 Exhibit No. 2.
16 MR. WORNOM: Same easement. Hers is
17 subject --
18 MR. C. F. HICKS: Exactly--
19 MR. WORNOM: But she owns the property.
20 MR. CHENAULT: Is that stipulated,
21 gentlemen?
22 MR. J. F. HICKS: That is stipulated with
23 the addition that she did not--her real estate has easement
24 going over her property, she does not have easement in her

1 deed. The deed just shows her property is burdened. But
2 that she has used what we are hoping to acquire today on
3 prescriptive easement, the other eighteen feet.
4 MR. WORNOM: Well your pleadings ask for
5 ten feet. The pleadings say you have a prescriptive easement
6 over ten feet of land. And as I understand your position, I
7 assume you are contending--I don't really know what you are
8 contending, Mr. Hicks. I know you got a ten foot easement
9 over client's property--
10 MR. J. F. HICKS: Right--
11 MR. WORNOM: Now I don't know whether you
12 are contending that you are moving it ten feet on my
13 property, or what you contention is--
14 MR. J. F. HICKS: We are trying to acquire
15 ten to eighteen feet at this time. And the evidence will
16 show that it is straight down and it is ten to eighteen feet
17 depending on what particular area you area on. (Indicating.)
18 MR. CHENAULT: Gentlemen, we are out of
19 stipulations so let's--
20 Mr. Hicks, you have the burden of going
21 forward with this. Do you want to call your first witness?
22 MR. J. F. HICKS: Yes, sir, I do.
23 MR. WORNOM: Are you going to have it up
24 here?

  

1 it--

2 MR. WORNOM: That is all right, it has been

3 recorded.

4 MR. CHENAULT: That will be No. 4.

5 (DEFENDANT'S EXHIBIT NO. 4, marked for

6 identification and admitted into evidence.)

7 MR. CHENAULT: And the plat in deed book

8 122, page 708 will be Defendant's Exhibit No. 5.

9 (DEFENDANT'S EXHIBIT NO. 5, marked for

10 identification and admitted into evidence.)

11 MR. WORNOM: If we can move things along a

12 little bit. This is the subdivision that Mr. Garnett made

13 out of the property he acquired. If we can introduce that.

14 MR. J. F. HICKS: I think that this has

15 already been put in.

16 MR. WORNOM: No, it hasn't been put in.

17 the original deed, the conveyance to him was put in.

18 MR. J. F. HICKS: That is right, okay.

19 MR. C. F. HICKS: Let me see this.

20 (Review of document.)

21 MR. WORNOM: I believe that we stipulated

22 that all of the deeds out of Mr. Garnett contain the access

23 easement to the river over the north property line of the

24 front piece.

1 MR. CHENAULT: Is that substantially
2 similar to the access that was described in Defendant's
3 Exhibit No. 1?
4 MR. WORNOM: That is correct.
5 MR. J. F. HICKS: Yes.
6 MR. WORNOM: We would also like to
7 introduce--
8 MR. CHENAULT: Just a minute, we haven't
9 introduced this yet--
10 MR. C. F. HICKS: Do you have the deed that
11 goes with this plat?
12 MR. WORNOM: That was just recorded in the
13 Clerk's Office.
14 MR. C. F. HICKS: It says, deed recorded
15 December 15, 1949, Deed Book 40, page 77.
16 MR. WORNOM: 40, page 77?
17 MR. C. F. HICKS: Yes.
18 MR. WORNOM: Was that introduced already?
19 MR. C. F. HICKS: No, I don't--
20 MR. J. F. HICKS: Must be Deed Book 42,
21 page 207--
22 MR. CHENAULT: No, Mr. Wornom, it has not.
23 MR. WORNOM: What does it say, Deed Book
24 40, page 77?

* * *

1 Book 42, page 206--

2 MR. WORNOM: Yes. I think it is

3 stipulated, Mr. Commissioner, that that ten foot easement is

4 given to every lot owner in that subdivision in the front

5 piece it was subject to the right-of-way.

6 MR. CHENAULT: All right, gentlemen, let's

7 redirect your attention. The original proposition here was

8 that Mr. Wornom wanted to present this plat as evidence and--

9 MR. C. F. HICKS: Let me see. I think that

10 this is the deed that ought to go along with it.

11 MR. WORNOM: I don't have any problem with

12 that.

13 (Review of documents.)

14 MR. C. F. HICKS: I have no problem, but

15 this deed ought to go with it, they were recorded together.

16 MR. WORNOM: That is fine. And I would

17 like--

18 MR. CHENAULT: Just a minute, Mr. Wornom.

19 We will make Defendant's Exhibit No. 6 a combination of a

20 plat called "Resubdivision of East Portion of Lot 4B Property

21 of J. M. Garnett" with the attached deed in Deed Book 40,

22 page 77, dated April 13, 1948. The two of those will be

23 Defendant's Exhibit No. 6.

24 (DEFENDANT'S EXHIBIT NO. 6, marked for

1 JIMMY M. CARLISLE, a plaintiff, called as a
2 witness on his own behalf, and having been first duly sworn,
3 was examined and testified, as follows:
4 DIRECT EXAMINATION
5 BY MR. J. F. HICKS:
6 Q Mr. Carlisle, state your full name for the
7 record.
8 A Jimmy Monroe Carlisle.
9 Q Mr. Carlisle, I am going to show you a
10 document here out of King and Queen Courthouse, Deed Book
11 124, page 346. Can you identify that?
12 A Yes I can.
13 MR. WORNOM: Could I see it please?
14 (Review of document.)
15 MR. WORNOM: Are you going to introduce it?
16 MR. J. F. HICKS: Yes.
17 Q Mr. Carlisle, what is this document?
18 A This is a deed of trust to the property
19 that I am currently buying.
20 Q Deed of trust? It is actually a deed,
21 isn't it?
22 A Deed, right.
23 Q Is that your deed?
24 A Yes it is.

1 MR. WORNOM: We will stipulate that,
2 Counselor.
3 MR. J. F. HICKS: At this time I would like
4 introduce this. And for convenience, Mr. Commissioner, I
5 would ask that it be marked Plaintiffs' Exhibit No. 1A.
6 MR. CHENAULT: Any objection?
7 MR. WORNOM: No, sir, none at all.
8 (PLAINTIFFS' EXHIBIT NO. 1A, marked for
9 identification and admitted into evidence.)
10 Q Mr. Carlisle, who did you buy the property
11 from?
12 A From Jack and Elizabeth Gardner.
13 Q And you purchased that property in--
14 A Actually '82.
15 Q You actually--
16 A I lived there, I rented it for a year
17 before I purchased it --
18 Q So you rented in--
19 A In '81.
20 Q And then in 1982 you executed a document
21 with Mr. Gardner?
22 A Right.
23 Q And what was that document?
24 A That was a lease ownership document.

1 Q When did you finally close on the property?
2 A I closed in '90.
3 Q Mr. Carlisle, we are here on an easement
4 issue today. Since you have been in the property, since 1981
5 when you first started living there, have you used your--have
6 you gone down to the water?
7 A Many times.
8 Q How have you gone down to the water?
9 A On foot, on bike, and in vehicle.
10 Q In a vehicle?
11 A Yes.
12 Q I want you to look at this picture here and
13 tell me if you can identify that.
14 A Yes, sir.
15 MR. WORNOM: Could I see it, Counselor?
16 (Review of photograph.)
17 Q What is that a picture of?
18 A That is a picture of the road in front of
19 my house that extends down to the river.
20 Q Down to the river?
21 A Yes.
22 Q Can you see the river in that picture?
23 A It is not clearly defined between the water
24 and the sky, no.

* * *

1 on the left here, and that is the end of pavement on the road
2 that was in the picture--the previous picture, and the
3 continuation of that road down to the river.
4 MR. J. F. HICKS: Mr. Commissioner, if I
5 could get this, there was no objection, entered in, I am
6 going to use my witness to testify but I would like to enter
7 that as Plaintiffs' Exhibit No. B.
8 MR. WORNOM: Well I don't think that there
9 is any dispute that the road ends on Plaintiffs' Exhibit
10 which has been introduced with the survey. He is talking
11 about the road continuing. I think that he is in error, Mr.
12 Commissioner. The state road stops right there.
13 MR. J. F. HICKS: Mr. Wornom, you will have
14 a chance to cross examine my client.
15 MR. CHENAULT: Mr. Wornom, do you have any
16 objections?
17 MR. WORNOM: No, sir, no objections.
18 MR. CHENAULT: We will mark this
19 Plaintiffs' Exhibit --
20 MR. J. F. HICKS: B, straight B.
21 MR. CHENAULT: Exhibit B.
22 (PLAINTIFFS' EXHIBIT B, marked for
23 identification and admitted into evidence.)
24 Q Mr. Carlisle, if you could tell me,

1 starting back in 1981, when you first rented the property,
2 did you use--what area in that picture did you use? And you
3 can describe it by bushes, trees, or any way that --
4 Remember that we are being recorded here, she is typing this,
5 so you need to be real precise in your description, your
6 verbal description.
7 A Okay. The area I used, in fact all of us
8 used, was to the left of these tall trees here, this area
9 here all the way down to the river. (Indicating.)
10 Q So here on the left the picture shows tall
11 trees that you used to describe. What type of trees are
12 they?
13 A I believe they are cedars and the first
14 tree is a pine. The ones behind it, the bushy one are
15 cedars.
16 Q So if you are standing at the end of the
17 state road and looking towards the river, to your right hand
18 side you say that you used all of this area from these trees
19 to egress to go to and from the river?
20 A Right, to and from the river. All the area
21 over to these bushes.
22 Q To the bushes--
23 A To the shrubs.
24 Q And you used all of that area?

1 A Yes, sir.

2 Q Have you used that since 1981?

3 A Certainly.

4 Q Did you ever have any permission from

5 anyone to use it, or why did you use it?

6 A We--it was our understanding that we had

7 deeded access--

8 MR. WORNOM: I object to what his

9 understanding is.

10 MR. C. F. HICKS: Mr. Commissioner, I think

11 there is a standard thing to the hearsay is that if it is

12 shown that there is a general understanding or knowledge in

13 the community about something that the person can testify,

14 not to the truth of it, but he is testifying to the

15 understanding within the community or the knowledge of the

16 community. It doesn't admit the truth of it, but it--

17 MR. J. F. HICKS: The other thing there is

18 hearsay exception to reputation of boundaries, Mr.

19 Commissioner, on that I think he can testify to it--

20 MR. WORNOM: Boundary is not in dispute, is

21 it Mr. Hicks?

22 MR. J. F. HICKS: We are now talking about

23 the prescriptive easement that we are trying to acquire. And

24 in terms of that prescriptive easement there is a boundary in

1 question, I believe--

2 MR. WORNOM: I don't think there--

3 MR. CHENAULT: Overruled. I think he can

4 testify as to his understanding.

5 Q What was your understanding, please?

6 A Well I had deeded access all the way to

7 the, I believe it was the low water mark to the river. And

8 so we used this area quite frequently. (Indicating.)

9 Q That whole area between the bushes and the

10 trees?

11 A Yes, sir.

12 Q You now know that the area nearest the

13 trees on your right if you are facing the river from the

14 state road, you now know that that was not your easement, is

15 that correct?

16 A No I don't.

17 Q You still don't--

18 A I have heard that, but no, I do not know

19 that that is not my easement.

20 Q But you have used this continuously since

21 1981 going to and from the river?

22 A Yes, sir.

23 Q About how often?

24 A At a minimum a couple of times a month.

1 Q A couple times a month you and your family?
2 A Yes.
3 Q And the reason that you used it was because
4 you thought that it was yours, is that what you stated?
5 A Yes.
6 Q You thought you had a claim of right?
7 A Yes.
8 Q Did you ever hide your use of it?
9 A No reason to.
10 Q No reason to?
11 A No.
12 Q You never got any permission from anybody
13 except what you got in the deed; correct?
14 A Correct.
15 Q Did Mr. Sutton ever give you any permission
16 concerning that area that we have discussed?
17 A No, I never spoke to Mr. Sutton.
18 Q You never spoke to Mr. Sutton. Did you
19 ever receive anything in writing from Mr. Sutton giving you
20 permission?
21 A No I have not.
22 MR. J. F. HICKS: I have no further
23 questions. Please answer my esteemed colleague's questions.
24

* * *

* * *

1 Q And do you know that the property line for
2 her house runs approximately down her shrub line right there?
3 A No I do not.
4 Q You don't know where her property line is?
5 A I could not state specifically, no.
6 Q You know, as a matter of fact, that the
7 young lady owns this property over to that post that you have
8 seen in the ground over the there, the post, the pipe that
9 the surveyor put--
10 A That the other people put up?
11 Q Yes.
12 A Now repeat your question.
13 Q Are you aware that the survey of the lady's
14 property over here shows her property line to be over there;
15 are you aware of that? (Indicating.)
16 A That is what I was told.
17 MR. WORNOM: I have no other questions--
18 Well--
19 BY MR. WORNOM: (Cross Examination Cont'd.)
20 Q You never asked anybody for permission to
21 use the land?
22 A No I have not.
23 Q And you never told anybody that you were
24 using it under a claim that you had a right to use it?

1 A I was using it under a claim that I had a
2 right to use it?
3 Q Yes, sir.
4 A Yes.
5 Q Who did you tell?
6 You didn't tell the owner of the property,
7 did you?
8 A No, the owner of the property told me.
9 Q Mr. Sutton?
10 A No, no. I am talking about the owner of
11 the property when I bought my place--
12 Q You are talking about the property that you
13 bought, from who you bought it from?
14 A Right.
15 Q He told you that you had a right of access
16 to the York River?
17 A Yes.
18 MR. WORNOM: That is all that I want to ask
19 him.
20 MR. CHENAULT: Redirect.
21 REDIRECT EXAMINATION
22 BY J. F. HICKS:
23 Q Mr. Carlisle, Mr. Wornom brought up the
24 previous land owner, who you bought it from. Who did you buy

1 the property from?

2 A Jack and Elizabeth Gardner.

3 Q Gardner?

4 A Yes.

5 Q And they showed you where your right-of-way

6 was--

7 MR. WORNOM: I object.

8 Q Where on the picture were you shown that

9 you had a right-of-way?

10 A I was--from what I recall I was walked down

11 here and shown this total area through here and that was

12 considered area of right-of-way all the way down to the

13 river. (Indicating.)

14 Q On this picture, show us the boundaries

15 that you are talking about.

16 A The boundaries--

17 Q Standing on the state road facing the York

18 River--

19 A Right --

20 Q --and standing there, what were the

21 boundaries you--

22 A Well from the inside of the shrubs and

23 inside of the trees all the way down.

24 Q Okay. Let me ask you this. What is this

* * *

1 (Brief discussion off of the record.)
2 (Witness excused.)
3 MR. J. F. HICKS: The next witness that I
4 would like to call would be Patricia Hilton.
5 (Witness sworn.)
6
7 PATRICIA HILTON, a plaintiff, called as a
8 witness on her own behalf, and having been first duly sworn,
9 was examined and testified, as follows:
10 DIRECT EXAMINATION
11 BY MR. J. F. HICKS:
12 Q State your name for the record.
13 A Patricia Lynn Hilton.
14 (Review of document.)
15 Q Ms. Hilton, can you identify this
16 document--
17 MR. WORNOM: We will stipulate, that is
18 just the deed to the property, we will stipulate that.
19 MR. C. F. HICKS: Stipulated, Deed Book 73,
20 Page 141 is deed to John S. Hilton and Patricia L. Hilton.
21 MR. WORNOM: What is the date of the deed?
22 MR. C. F. HICKS: Fifteenth day of
23 November, 1974.
24 MR. J. F. HICKS: Also would like to show

1 and have record reflect that it comes from James T. Lynn and
2 Mildred W. Lynn.
3 MR. CHENAULT: We will mark this as
4 Plaintiffs' Exhibit C--
5 MR. J. F. HICKS: No, I would like that
6 marked Plaintiffs' Exhibit 2A.
7 MR. CHENAULT: Any objection?
8 MR. WORNOM: No, sir.
9 MR. CHENAULT: It is Deed Book 73, page
10 141, has been changed to Plaintiffs' Exhibit 2A.
11 (PLAINTIFFS' EXHIBIT 2A, marked for
12 identification and admitted into evidence.)
13 Q Ms. Hilton, you bought the property in
14 1974, is that correct?
15 A Yes it is.
16 MR. J. F. HICKS: Can I see Defendant's
17 Exhibit No. 8?
18 Q Ms. Hilton, you heard the testimony of Mr.
19 Carlisle earlier.
20 A Yes I did.
21 Q To shorten things up, since 1974, when you
22 bought the property, until this fence was put up did you go
23 down to the river?
24 A Yes we did.

1 Q And this is Defendant's Exhibit No. 8 that
2 I am showing you, which is a photograph. Can you tell me if
3 that shows where you went?
4 A Yes, we used the piece of property straight
5 from the road to the river, the width of the road.
6 Q And what you used, what is it bordered by?
7 A It is bordered by shrubs on the left and a
8 row of cedars on the right.
9 Q And that is if you are standing at the end
10 of the state road looking down to the York River?
11 A Right.
12 Q And you have used that continuously since
13 1974?
14 A And prior.
15 Q Who are the Lynns, the people that you--
16 A My parents.
17 Q When did you first start living in the
18 property you now own?
19 A We moved into Brookeshire in January--in
20 the home that I live in now in January of 1963 when I was
21 nine years old.
22 Q From 1963, when you were nine years old, up
23 to 1974, when you bought the property, did you use this area
24 here between--in Defendant's Exhibit No. 8, between the

1 bushes on the left and the cedar trees on the right side,
2 facing the York River from the state road; did you use that?
3 A Yes we did.
4 Q About how often did you use it?
5 A Several times a week during the summer and
6 once a month during the winter.
7 Q Did there come a time when your parents
8 still owned the property that someone else was in possession
9 of the property?
10 A We maintained ownership but rented the
11 house out for five years.
12 Q During that time of five years that there
13 were renters, did you ever go down and use this--
14 (Indicating.)
15 A We would, a couple of times a year, drive
16 down to the river, look at the river, and back straight out
17 and leave.
18 Q You drove a vehicle all the way down there?
19 A Yes, drove a vehicle down.
20 Q Back in 1963, when you were nine years old,
21 right here in Defendant's Exhibit No. 8 we see a nice green
22 grass path bordered by cedar trees on the right and bushes on
23 the left going down to the river. What did that look like
24 back then, can you remember?

1 A The cedar trees are not that old. They
2 have been planted since then. It was a dirt path where
3 people had used it going to the river.
4 Q Dirt path, was that "dirt path" as you
5 described in your own words capable of a motor vehicle
6 traveling down there?
7 A Yes, it was.
8 Q How wide was that dirt path? If you had to
9 say, if you had to point--
10 A Approximately the width of the road.
11 Q When you say "road", you mean--
12 A At first it was a dirt road and then it was
13 paved road.
14 Q The width of the state road?
15 A Right.
16 Q Are you saying that that width would
17 continue to the cedar trees on the right and the bushes on
18 the left?
19 A Between them, but more centered.
20 Q Between them but a little more centered?
21 A Right.
22 Q How did you come to use this, why did you
23 come to use this area?
24 A We knew when we bought the house that we

1 had a deeded right-of-way, and as a kid when you are playing
2 with everyone else and you go to the river and you are riding
3 three or four bicycles wide, you just go whatever is most
4 convenient, straight ahead.
5 Q And in 1974 when you bought the property--
6 A Right.
7 Q --and were a property owner, what did you
8 consider your easement to be?
9 A The same as I had in 1963.
10 Q And describe that in detail verbally, using
11 Defendant's Exhibit No. 8.
12 A Defendant Exhibit No. 8, the property on
13 the north by the cedar trees, on the south by the brush, from
14 the state road to the river.
15 Q And the brush would be to your left if you
16 were standing at the end of the state road looking at the
17 river and the trees to your right?
18 A That is the way it is.
19 Q How did you come to think that that was
20 your right-of-way?
21 A I knew we had a right-of-way at the end of
22 our road, and that appeared to be at the end of our road, and
23 that is what we used.
24 Q You believe that to be your land, you used

1 it under a claim of right?

2 A Yes.

3 Q Did you ever hide your use of it?

4 A No.

5 Q I mean if a car would ride down there-- Do

6 you know Mr. Sutton?

7 A When I see him.

8 Q Were you ever using that when Mr. Sutton or

9 anyone associated with the property, which is now the Chaney

10 property, were you ever using that when any one of them was

11 around?

12 A I don't recall any specific incident, but I

13 never tried not to.

14 Q By not recalling any specific incidents,

15 then were you using it openly and without any concern of who

16 saw you use it?

17 A Right.

18 Q Was that use uninterrupted since 1963?

19 A By us or the people using our house while

20 we had moved out, yes, it was uninterrupted.

21 Q Who were the people who rented your house?

22 A Glen Palmer.

23 Q Let me ask you this. Who else uses this

24 area? (Indicating.)

1 A Everyone who lives on the road.

2 Q Is there anybody else?

3 A Unless they are accompanied by one of us,

4 no.

5 Q If you saw somebody else using it, what

6 would you do?

7 A Tell them that it was not a public road.

8 Q So you want exclusive use of it --

9 A Right--

10 Q --with your neighbors?

11 A Right.

12 Q But you personally want exclusive use--

13 A Right.

14 Q When you were talking about everybody else

15 on the road, what road are you talking about?

16 A Route 687.

17 Q Route 687?

18 A Yes.

19 MR. J. F. HICKS: I have no further

20 questions.

21 CROSS EXAMINATION

22 BY MR. WORNOM:

23 Q Ms. Hilton, you had a ten foot right-of-way

24 deeded to you for access to the York River; you knew that?

1 A I know we had a right-of-way in our deed.
2 Q And that is what you were using, when you
3 had access to the water, you were assuming that you were
4 using the 10 foot easement access?
5 A Right.
6 Q Did you ever ask Mr. Sutton for permission
7 to use his property?
8 A No, sir.
9 Q Nobody ever objected to you using his
10 property, did they?
11 A No, sir.
12 Q The trees that you are referring to, these
13 cedars, I believe that they were planted by Mrs. Erwin, is
14 that right.
15 MR. CHENAULT: Mr. Wornom, you are pointing
16 to --
17 MR. WORNOM: Defendant's Exhibit No. 8.
18 Q These cedar trees were planted by Mrs.
19 Erwin? (Indicating.)
20 A As I recall they were.
21 Q And was that in about 1984?
22 A She planted them periodically. There are
23 some that have been planted as recently as seven or eight
24 years ago.

* * *

1 PAULA PIERCE, a plaintiff, called as a
2 witness on her own behalf, and having been first duly sworn,
3 was examined and testified, as follows:
4 DIRECT EXAMINATION
5 BY MR. J. F. HICKS:
6 Q State your name for the record, please.
7 A Paula Kyle Pierce.
8 Q Ms. Pierce, where do you live?
9 A I live in the third house from the
10 beginning of Route 687.
11 Q From the beginning of Route 687?
12 A Yes.
13 Q Ms. Pierce, when did you purchase your
14 property?
15 A May 26, 1982.
16 Q May 26, 1982?
17 A Yes.
18 Q Who did you purchase the property from?
19 A Alex Lowery and Louise Lowery.
20 Q Ms. Pierce, when you bought the property
21 did you understand that you had a right-of-way, so to speak,
22 to the river?
23 A Yes. Mr. Lowery took my husband and I down
24 to the end of the road and showed us the area between the

1 trees --

2 Q Okay, let's go ahead-- This is Defendant's

3 Exhibit No. 8, and if you would like to use this for your

4 testimony. You said that Mr. Lowery took you down and showed

5 you something.

6 A He said it was off of the end of the

7 highway straight down to the river.

8 Q You can use this photograph--

9 MR. WORNOM: I really should object to

10 this, Mr. Commissioner, it is hearsay on what somebody told

11 her--

12 MR. J. F. HICKS: It is not what somebody

13 told her, Mr. Commissioner, it is what somebody showed her.

14 It is not a statement, not a verbal statement.

15 MR. CHENAULT: I will let her testify as to

16 what her understanding of her right-of-way was, which is what

17 we agreed to--I ruled earlier.

18 And ma'am, when you point to the

19 photograph, would you please verbally describe what you are

20 looking at because it has to go on to the record.

21 A There is a row of cedar trees on the right

22 side and a row of shrubs on the left, and a grassy area in

23 between.

24

1 BY MR. J. F. HICKS: (Direct Examination Cont'd.)

2 Q And that was your understanding of what

3 your right-of-way was?

4 A Yes, down the middle of that area, off of

5 the highway.

6 Q From 1982 up until the present have you

7 used that right-of-way?

8 A Yes we have.

9 Q You use the full area between the bushes

10 and the trees?

11 A Yes.

12 Q About how often do you use it?

13 A Well we go frequently. I have a son that

14 fishes and he would take his lawnmower and his cart and put

15 his equipment in it and drive down, and he would go down the

16 center. My husband and I have walked--we had bikes. Also I

17 have had a lot of back surgery, and when I first--I couldn't

18 walk and he would put me in the car and drive me down there

19 to look around.

20 Q He would actually take you in a motor

21 vehicle down there?

22 A Yes he did.

23 Q And you used that whole area why?

24 A Well it was your understanding that we had

1 the area between these trees as our right-of-way.

2 Q Your understanding--

3 A From Mr. Lowery.

4 Q From Mr. Lowery?

5 A Yes.

6 Q Have you ever seen anybody from the general

7 public using that easement?

8 A No I haven't.

9 Q If you did see somebody from the general

10 public, and when I say "general public" I mean other than

11 your neighbors, what would you do?

12 A Well I would ask them--tell them that it

13 was a private area for the use of the people that lived on

14 the street.

15 Q Do you know Mr. Sutton?

16 A No I don't. I saw him this morning, and

17 that was actually the second time-- When we had the hearing

18 before was the first time I had ever seen him.

19 Q When you use this full area, did you ever

20 try to hide your use?

21 A No.

22 Q In other words, if a car came down the

23 state road and you were over here on the right by these cedar

24 trees, would you try to hide?

1 A No.

2 Q And once again, you said that you have used

3 this since when?

4 MR. WORNOM: 1982.

5 MF. J. F. HICKS: Thank you, Mr. Wornom.

6 (Review of document.)

7 MR. J. F. HICKS: Mr. Wornom, that is not a

8 deed, that is a deed of trust. The copy machine has been out

9 in King and Queen Courthouse for the last three days and

10 created some undue burden. It shows that Ms. Pierce owned

11 the property, same legal description as what is in the--

12 MR. WORNOM: I am not objecting, I agree

13 that she owns the property.

14 (Review of documents.)

15 MR. J. F. HICKS: These are two predecessor

16 deeds--

17 MR. WORNOM: That is okay.

18 Q And you bought the property from--

19 MR. CHENAULT: Wait a minute, gentlemen,

20 are you going to introduce these--

21 MR. J. F. HICKS: Yes.

22 MR. CHENAULT: All right, this is deed in

23 Deed Book 92, page 419, dated 25th day of May, 1982. It is

24 Garland M. Pierce and Paula K. Pierce and Johseph R. Caprio

* * *

1 Garnett which --

2 MR. WORNOM: Okay, that is fine.

3 MR. CHENAULT: Mr. Hicks, I believe you

4 were questioning.

5 MR. J. F. HICKS: I have finished

6 questioning.

7 MR. CHENAULT: Mr. Wornom.

8 CROSS EXAMINATION

9 BY MR. WORNOM:

10 Q Ms. Pierce, you were aware that your deed

11 contained a right-of-way over a strip of land ten feet in

12 width from the public road west to the York River for access?

13 A End of the road.

14 Q And that is the right-of-way that you were

15 using?

16 A The center area.

17 Q Well you were using the right-of-way that

18 you got in your deed?

19 A Off of the west of the road to the river.

20 Q It reads like this, "together with the

21 right in common with all of the parties owning lots in this

22 re-subdivision to use a ten-foot strip of land from the

23 easterly terminus of the public road in a westerly direction

24 to the low water mark of the York River for the purposes of

1 access". And that is the right-of-way that you were using?
2 A The center of the road.
3 Q Well, that is the right-of-way that you
4 were referring to?
5 A Yes.
6 Q Now you never asked anybody that owned the
7 land on the other side of the road for permission to use it,
8 did you?
9 A No, sir.
10 Q Nobody objected to you using it, did they?
11 A No, sir.
12 Q Would you agree that if Mr. Sutton knew
13 that you were using his land and didn't object to it, that
14 that was a permissive use?
15 MR. C. F. HICKS: Your Honor, I would have
16 to object to that question because that is calling for the
17 witness to give a legal conclusion. That is the whole
18 question here--
19 MR. CHENAULT: Sustained.
20 Q Nobody ever did object to you using it
21 until Mr. Nance put the fence up?
22 A No, sir. I never considered that because
23 we just had always used it. And that was what Mr. Lowery had
24 explained to us was our access.

* * *

1 Exhibit 8, the cedar trees you are describing are the cedar
2 trees, if you are looking at the photograph, on the right
3 hand side of the road leading down; and the shrubs or bushes
4 on the left hand side and the grassy area in between; is that
5 correct?
6 WITNESS: Yes, sir.
7 MR. CHENAULT: Is the big tree that you are
8 talking about, is that the tree that can be seen behind the
9 cedar trees on the right in the photograph marked Defendant's
10 Exhibit 8?
11 WITNESS: Yes, sir.
12 REDIRECT EXAMINATION
13 BY MR. J. F. HICKS:
14 Q Using Defendant's Exhibit No. 8, standing
15 at the end of the state road facing the York River, Ms.
16 Pierce, you used the whole area from the big oak tree--
17 MR. C. F. HICKS: Walnut--
18 Q I'm sorry--from the walnut tree over to the
19 bushes on the left, correct?
20 A Yes, sir.
21 Q I want to clear this up. I don't think it
22 makes any difference. But were these cedar trees here when
23 you moved in, I mean were they little trees that were growing
24 up, had been freshly planted or were they--

1 It looks like Michael Day is elected by
2 default.
3 (Witness sworn.)
4
5 MICHAEL Y. DAY, a plaintiff, called as a
6 witness on his own behalf, and having been first duly sworn,
7 was examined and testified, as follows:
8 DIRECT EXAMINATION
9 BY MR. J. F. HICKS:
10 Q Please state your name for the record.
11 A Michael Yarborough Day.
12 Q Mr. Day, where do you live?
13 A I live in the fifth house on the left on
14 state road 687.
15 Q Approximately how long have you lived
16 there?
17 A I think the house closed in May of 1985.
18 Q And can you identify this document, please?
19 A Yes, sir. This is my deed to that property
20 that I have there.
21 Q Who did you buy this property from?
22 A From Mrs. Marion E. Kyger.
23 MR. J. F. HICKS: I would like to get this
24 introduced into evidence as Plaintiffs' Exhibit No. 4A, if

1 few questions concerning it. When you bought your property,
2 did you understand that you had an access to the river?
3 A Yes.
4 Q Using Defendant's Exhibit No. 8, could you
5 describe, as we are standing on the end of the state
6 maintained road facing the York River, could you describe
7 what you have used as access to the river, what it is
8 bordered by in the picture?
9 A What I have used is the grassy strip
10 extending from the paved road to the York River that lies
11 with the shrubs on the left and the cedar trees located on
12 the right hand side.
13 Q And you have used that since 1985?
14 A Yes, sir.
15 Q How often do you use it?
16 A My sons and myself probably use it two or
17 three times weekly.
18 Q Using this whole area you stated, and
19 referring to Defendant's Exhibit No. 8, between the cedar
20 trees on the right and the bushes on the left as you are
21 standing at the end of the state maintained road facing the
22 York River, you stated that you used that whole area--
23 A Yes.
24 Q Why did you use that whole area?

1 A The realtor that sold the house to me
2 stated that I had a right-of-way--
3 Q Did he state it, or did he show it to you?
4 A He showed it to me.
5 Q He went down there and showed you that?
6 A Yes, sir.
7 Q So you have been using that since 1985
8 because you thought that it was yours under a claim of right;
9 is that correct?
10 A Yes, that is correct.
11 Q Mr. Day, have you seen anybody else in the
12 community, and when I say, I mean in terms of excluding your
13 neighbors; has anybody from the the public used that--
14 A No.
15 Q If you saw somebody from the public using
16 that area between the cedar trees on the right and the bushes
17 on the left in Defendant's Exhibit No. 8 standing at the end
18 of the state maintained road looking at the York River, if
19 you saw somebody else using that area, what would you do?
20 A I have never seen someone down there other
21 than neighbors using that area.
22 Q So if you saw somebody else down there--
23 When you use this area, do you use it
24 openly?

1 A Yes.
2 Q In other words, if an automobile came down
3 to the end of the state maintained road and you were over
4 here to the right by the cedar trees, would you hide?
5 A No.
6 Q Or would you stand there on the property?
7 A Yes.
8 Q Do you know Mr. Nelson Sutton?
9 A I have met him a few times very briefly.
10 Q If you saw Mr. Sutton down around this area
11 when you were over here to the right of the cedar trees,
12 would you leave that area?
13 A No. But I have never seen Mr. Sutton down
14 there.
15 Q Did you ever obtain any permission from
16 anyone--
17 A No I did not.
18 Q Never in writing or verbally?
19 A No.
20 MR. J. F. HICKS: That is all the questions
21 that I have of this witness.
22 CROSS EXAMINATION
23 BY MR. WORNOM:
24 Q Nobody ever objected to you using it, did

1 they?

2 A No.

3 Q In your deed, Mr. Day, you have conveyed to

4 you a ten foot strip of land from the easterly terminus of

5 the public road in a westerly direction to the low water mark

6 of the York River for purposes of acces to the York River and

7 to the public highway.

8 That is the easement that you have been

9 using?

10 A Yes.

11 Q That is given you in your deed?

12 A Yes.

13 Q Do you recall seeing some trucks parked

14 down there, great big trucks?

15 A No, sir.

16 Q You didn't see the trucks?

17 A No, sir.

18 Q None of your neighbors have any trucks, do

19 they, great big trucks?

20 A Big trucks, no, sir.

21 MR. WORNOM: Thank you.

22 MR. CHENAULT: Redirect?

23 MR. J. F. HICKS: No, sir.

24 MR. CHENAULT: Is this witness free to go?

1 MR. J. F. HICKS: Yes, sir.
2 MR. WORNOM: Yes.
3 MR. CHENAULT: Mr. Day, thank you, you are
4 free to stay go as you please.
5 MR. J. F. HICKS: Can I call him back for
6 redirect for one second?
7 MR. CHENAULT: Any objection, Mr. Wornom?
8 MR. WORNOM: No, sir.
9 MR. CHENAULT: Mr. Day, you are still under
10 oath.
11 REDIRECT EXAMINATION
12 BY MR. J. F. HICKS:
13 Q Mr. Day, in the area that you just
14 described that you use in Defendant's Exhibit No. 8, standing
15 at the end of the state highway looking towards the river,
16 what did you consider your ten feet to be?
17 A The--
18 MR. WORNOM: Judge, I object to that, what
19 he considers-- It is a matter of record what his ten feet
20 is.
21 MR. CHENAULT: He can ask him what he used
22 as--
23 MR. WORNOM: No question, he has asked him
24 what he used. I understand that. He has testified to that.

1 BY MR. J. F. HICKS: (Redirect Examination Cont'd.)

2 Q What did you use as your ten feet?

3 A What I used was a ten foot strip extending

4 out the end of the paved road into the York River in a direct

5 line.

6 Q Between the shrubs or between the--

7 A A strip ten foot wide in the center of the

8 shrubs and the cedars.

9 Q You are saying that you drew an imaginary

10 straight line down the middle and said I have got ten feet to

11 the left and I have got ten feet to the right?

12 A Well, center it up and then five to the

13 left and five to the right.

14 Q That is what you considered--

15 A Ten foot, yes.

16 Q But you used the whole area over here to

17 the cedar trees?

18 A Yes I did.

19 MR. CHENAULT: Mr. Wornom--

20 Excuse me one second, he is not finished--

21 MR. J. F. HICKS: No further questions.

22 RECROSS EXAMINATION

23 BY MR. WORNOM:

24 Q Were the cedar trees there when you first

1 MICHAEL S. DUVALL, a plaintiff, called as a
2 witness on his own behalf, and having been first duly sworn,
3 was examined and testified, as follows:
4 DIRECT EXAMINATION
5 BY MR. J. F. HICKS:
6 Q State your full name for the record,
7 please.
8 A Michael Steven Duvall.
9 Q Mr. Duvall, where do you live?
10 A I live in the sixth house on the left on
11 Route 687.
12 Q I am going ask you to look at a document
13 here in a minute after Mr. Wornom looks at it.
14 (Review of document.)
15 MR. WORNOM: That is a deed to his
16 property?
17 MR. J. F. HICKS: Yes, sir.
18 MR. CHENAULT: Any objection, Mr. Wornom,
19 to entering this?
20 MR. WORNOM: No, sir, no objection.
21 MR. CHENAULT: Let's go ahead and mark it
22 then before we get started. Deed recorded Deed Book 113,
23 page 534, deed between American Development Corporation and
24 Michael S. Duvall, Unmarried.

1 Leonard Garnett, Jr. and William Dixon Jones. And I will
2 mark this Plaintiffs' Exhibit 5D.
3 (PLAINTIFFS' EXHIBIT NO. 5D, marked for
4 identification and admitted into evidence.)
5 MR. WORNOM: Mr. Commissioner, I have no
6 problems stipulating, and I thought that I made that clear,
7 to all of the deeds to the lot owners in that subdivision on
8 that side of the road, I have no problem with that--
9 MR. J. F. HICKS: And that includes
10 previous owners also, Mr. Wornom, is that correct?
11 MR. WORNOM: That is correct. I mean we
12 stipulated that all of them had a right to use the ten foot
13 strip of land as access to the river in their deeds.
14 MR. J. F. HICKS: I would still like to get
15 them marked as exhibits as the witnesses come up.
16 BY MR. J. F. HICKS: (Direct Examination Cont'd.)
17 Q Mr. Duvall, how long have you owned your
18 property?
19 A I believe it is February of '89.
20 Q Mr. Duvall, I am going to ask you to look
21 at this photograph which has been marked as Defendant's
22 Exhibit No. 8, and I am going to put you in a particular
23 point which will be standing at the end of the state
24 maintained road facing the York River, and I want to ask you,

1 have you used any area on this picture as an access to the
2 York River?
3 A Yes, I drive my truck right down the middle
4 of it.
5 Q You drive your truck down the middle of it?
6 A Right.
7 Q When you say the middle of it; the middle
8 of what? Can you describe the outside borders as you are
9 standing--
10 A There are indentations in this piece of
11 land here where there was a dirt road. I just go right down
12 that dirt road.
13 Q What is that bordered by on the left and on
14 the right as you are standing--
15 A Shrubs on the right and cedar trees on the
16 left.
17 Q Shrubs on the--
18 A Shrubs on the left and cedar trees on the
19 right. I am sorry.
20 Q And that is standing at the end of the
21 state road facing the York River?
22 A That's right.
23 Q Why did you use that area?
24 A I drive my truck down there in the mornings

1 to find out what the winds were doing, what the tides were
2 doing.
3 Q Buy why do you use this piece of land to go
4 down there?
5 A Because there was a road down there and
6 that is my assumption that that was the right-of-way.
7 Q That that was your right-of-way?
8 A Right.
9 Q So you--
10 A The same piece that everybody on the street
11 used.
12 Q How often do you use it?
13 A In the summer time I go down there maybe
14 twice a week before I go fishing.
15 Q When you used it with your truck or what
16 have you, did you ever--if somebody drove down here on the
17 state road and you were down here either in your truck or on
18 foot; would you try to hide? (Indicating.)
19 A No.
20 Q If you were over here by the cedar trees,
21 would you try to hide?
22 A No.
23 Q Do you know Mr. Sutton?
24 A Yes, I do.

1 Q Have you ever been down there when Mr.
2 Sutton has been around?
3 A No, sir.
4 Q If Mr. Sutton was down around here and you
5 were down over here by the cedar trees; would you try to
6 hide?
7 A No, I would probably talk to him.
8 Q So you use it openly?
9 A Yes, sir.
10 Q Did Mr. Sutton or anybody else give you
11 permission to use this area over here by the cedar trees that
12 you have described that you have used?
13 A No.
14 Q No one has ever given you permission
15 verbally--
16 A No--
17 Q --written?
18 A No.
19 MR. J. F. HICKS: That is all of the
20 questions that I have.
21 CROSS EXAMINATION
22 BY MR. WORNOM:
23 Q You obtained in your deed a right-of-way
24 ten feet wide access to the York River, that is in your

1 deed--

2 A Okay.

3 Q And that is what you were using as

4 access--that you thought you were using as access to the York

5 River, what you got in your deed?

6 A I don't know that I was on the land that

7 says--that my deed says. I was on the land that was right

8 down the middle of those--

9 Q But you knew that you had access to the

10 York River over a ten foot strip of land?

11 A Yes, sir.

12 Q And as far as you knew that is what you

13 were using?

14 A That's right.

15 MR. WORNOM: That is all I have to ask.

16 REDIRECT EXAMINATION

17 BY MR. J. F. HICKS:

18 Q Mr. Duvall, if you used between these

19 bushes and these trees, as you have stated, that is more than

20 ten feet, isn't it?

21 A Yes, sir, went down the center of it where

22 the road was.

23 Q You stated that you also used over here by

24 the cedar trees?

  

1 (Witness excused.)

2 MR. J. F. HICKS: For the record, the

3 injunction was denied, a bill of complaint--I mean petition

4 for declaratory judgment--

5 This is off of the record between

6 co-counsel.

7 (Brief discussion off of the record.)

8 MR. J. F. HICKS: The next witness that I

9 would like to call is Ms. Garnett.

10 (Witness sworn.)

11

12 EVELYN J. GARNETT, a plaintiff, called as a

13 witness on her own behalf, and having been first duly sworn,

14 was examined and testified, as follows:

15 DIRECT EXAMINATION

16 BY MR. J. F. HICKS:

17 Q State your full name for the record,

18 please.

19 A Evelyn Jones Garnett.

20 Q Ms. Garnett, where do you live?

21 A I live on Route 687 in Brookeshire, the

22 seventh house on the left.

23 Q The seventh house on the left?

24 A Yes.

* * *

1 Q Ms. Garnett, I am going to ask you to look
2 at this picture, which is Defendant's Exhibit No. 8, and give
3 you a perspective point of standing at the end of the state
4 road facing the York River, from 1959 I believe your deed is
5 dated, have you used any access-- Or tell us what you have
6 used as access down to the river from the state road.
7 A Well it was not paved in 1959.
8 Q Okay--
9 A It was a dirt road that went all the way
10 from Route 661 I believe it is, and all the way to the river,
11 just right on straight down to the river.
12 Q A full dirt road back in 1959?
13 A Right and just where it is now. This is
14 where it was located. (Indicating.)
15 Q The whole road was located in between
16 here--
17 A Right, well of course those cedars were not
18 there then.
19 Q From 1959 up until today what do you use
20 and have you used as access down to the river?
21 A Well we used this area in here.
22 (Indicating.)
23 Q And what is that area bordered by?
24 A Well right now it is bordered by shrubs and

1 cedars, shrubs on the left and cedars on the right. And what
2 did we use the road for?
3 Q Why did you use that area to get to the
4 river?
5 A Because that was the road there, said that
6 the road was the right-of-way to the river.
7 Q That road was the right-of-way--
8 A That is what we was told, that the road
9 itself was the right-of-way to the river, the dirt road and
10 that is what we used.
11 Q And the cedar trees weren't there but--
12 A No.
13 Q If the road was still there--
14 A These shrubs were not there either.
15 (Indicating.)
16 Q --would the road come to the shrubs and the
17 cedar trees?
18 A Just where it is, right.
19 Q Just where it is?
20 A Just where it is located there, right.
21 Q So the shrubs--
22 A The same location all of these years.
23 Q So the shrubs to the left and the cedar
24 trees to the right, they would be the boundaries of the road

1 back in 1959?

2 A Yes--

3 Q If they were there in 1959?

4 A Right.

5 Q And you used this because you, under a

6 claim of right, you thought that that was your property,

7 right?

8 A We were told that the road was the

9 right-of-way.

10 Q How many times have you used that?

11 A Well sometime we use it more than others.

12 And later I have been using it more for riding my bike and

13 walking. When we first went over there we put boats over.

14 They didn't have the bulkhead there then.

15 Q Didn't have the bulkhead--

16 A No, just the road went all the way to the

17 river.

18 Q And you have used that uninterrupted since

19 1959?

20 A Right, yes.

21 Q Do other members of the public use this?

22 A The public?

23 Q Other than your neighbors--

24 A No, the public doesn't use it.

1 Q They don't use it?

2 A No.

3 Q You used this openly, didn't you?

4 A Yes we did.

5 Q Do you know Mr. Nelson Sutton?

6 A Yes I do.

7 Q Have you ever used it when he has been

8 around?

9 A Well the property on the right belonged to

10 his mother at first. And we used it when she was there,

11 and--

12 Q Did she ever say--

13 A And he may have been there too, I don't

14 know. I mean, she had a cottage over there.

15 Q Did Mr. Sutton--

16 A She had a cottage and the family would come

17 over and stay at the cottage, visit, have picnics.

18 Q Did Mr. Sutton or Mr. Sutton's mother ever

19 tell you that you could or could not use this?

20 A No.

21 Q Did you ever ask them for permission?

22 A No because the road was the right-of-way

23 supposedly.

24 Q And they never came over and--

1 A And nobody ever said anything or wrote
2 anything to us about it.
3 MR. J. F. HICKS: That is all I have.
4 Please answer any questions that my esteemed colleague may --
5 CROSS EXAMINATION
6 BY MR. WORNOM:
7 Q Ms. Garnett, in your deed you are aware of
8 the fact that the boundary line was the center of the 20 foot
9 dirt road that divided your property from Mr. Sutton's
10 property, his mother's property?
11 A Yes, I know it is in the deed.
12 Q It says that the lot fronts a hundred feet
13 along the center of a twenty foot road, the dividing line
14 between the property of J. M. Garnett and the property of
15 Frances S. Sutton, and it went back 123 feet.
16 A Yes.
17 Q And then it also give you the right to use
18 a strip of land ten feet wide over and along the northern
19 boundary line of your lot along with all of the other owners
20 in the subdivision, extending from the public highway on the
21 east to the low water mark of the York River. And that is
22 the access that you have been using?
23 A Right.
24 Q What you got in your deed?

1 A Right, and that is what we were using and
2 that was part of the road, too.
3 Q Well, I am saying that the easement that
4 you have been using--
5 A And another thing, we also assumed that the
6 people on other side had a right-of-way too.
7 Q You assumed that in error. You know that
8 now--
9 A Well, I know it now but I didn't know it
10 then.
11 Q Now do you recall when--
12 A And since they were using--
13 Q Let me ask you a question. Do you recall
14 when these cedar trees were planted?
15 A No.
16 Q Was it within the last ten years?
17 A I wouldn't want to say.
18 Q And Mr. Sutton never objected to using that
19 land--
20 A No.
21 MR. WORNOM: All right, that is all I have
22 to ask you.
23
24

1 REDIRECT EXAMINATION

2 BY MR. J. F. HICKS:

3 Q Ms. Garnett, I want you to continue on.

4 You were about to answer a question and Mr. Wornom stopped

5 you. But go ahead and tell us what you were about to say--

6 MR. WORNOM: Judge, that is not proper

7 redirect--

8 MR. J. F. HICKS: He was bringing it up.

9 MR. CHENAULT: I am not going to allow you

10 to ask the question in that manner. If you have a proper

11 question, that is fine.

12 Q Is what you were using and you said you

13 used where the road was on Defendant's Exhibit No. 8,

14 standing on the state road facing the York River, between the

15 bushes on the left and the trees on the right I think is what

16 you said is what you were using. This whole area that you

17 were using, is that what you thought was your right-of-way?

18 A That is right.

19 Q And that is why, because you thought it was

20 yours--

21 A Yes.

22 Q Claim of right?

23 A Yes.

24 Q The whole thing?

1 A Yes.

2 MR. WORNOM: Do you want to testify, Mr.

3 Hicks?

4 MR. J. F. HICKS: I would like to--

5 MR. WORNOM: I object, Mr. Commissioner, to

6 the comments made by Mr. Hicks.

7 Q Why did you use this--

8 MR. WORNOM: Objection--

9 MR. C. F. HICKS: He objected--

10 MR. J. F. HICKS: I thought was stricken

11 from record-- No further questions.

12 RECROSS EXAMINATION

13 BY MR. WORNOM:

14 Q The right-of-way you are using is

15 right-of-way you thought you got in your deed; it is as

16 simple as that; isn't it ma'am?

17 A I guess that is one way to look at it.

18 MR. WORNOM: Thank you, ma'am.

19 MR. CHENAULT: Ms. Garnett, you have lived

20 there since 1959; is that correct?

21 WITNESS: Right.

22 MR. CHENAULT: You don't know who planted

23 the cedar trees that show up on Defendant's Exhibit No. 8 on

24 the right hand side?

1 WITNESS: It was either Mr. Erwin or Mrs.
2 Erwin, I don't know which.
3 MR. CHENAULT: You don't remember how long
4 ago that was?
5 WITNESS: No, I don't.
6 MR. CHENAULT: How about the shrubs on the
7 left; how long have those shrubs been there, do you know?
8 WITNESS: It has been there a long time but
9 you know--I mean you can see from the size of it. I don't
10 have a date.
11 MR. CHENAULT: Has it been there as long as
12 you have been living there?
13 WITNESS: Maybe not those bushes, but some
14 bushes.
15 MR. CHENAULT: In that same area?
16 WITNESS: Right, some shrubs.
17 MR. CHENAULT: Who maintained the grass,
18 cut the grass in between the cedars on the right and the
19 bushes on the left?
20 WITNESS: Mr. and Mrs. Erwin.
21 MR. CHENAULT: Thank you.
22 BY MR. WORNOM: (Recross Examination Cont'd.)
23 Q Do you know when they started cutting the
24 grass, how long ago?

1 A No I don't.

2 MR. WORNOM: That is all I have.

3 MR. CHENAULT: Gentlemen is this witness

4 free to go?

5 WITNESS: Probably ever since they lived

6 there.

7 MR. J. F. HICKS: Yes.

8 MR. WORNOM: Yes.

9 MR. CHENAULT: Ms. Garnett, you are either

10 free to go or stay as you please. Thank you.

11 (Witness excused.)

12 MR. J. F. HICKS: I have lost my notes, Mr.

13 Commissioner, if you can give me one second.

14 (Review of documents.)

15 MR. J. F. HICKS: I would like to call Mr.

16 Cook.

17 (Witness sworn.)

18

19 HOWARD J. COOK, JR., a plaintiff, called as

20 a witness on his own behalf, and having been first duly

21 sworn, was examined and testified, as follows:

22 DIRECT EXAMINATION

23 BY MR. J. F. HICKS:

24 Q State your name please, for the record.

1 A Howard June Cook, Jr.

2 Q State your occupation, please.

3 A I am a special agent with the Virginia

4 Department of State Police.

5 Q And where do you live, Mr. Cook?

6 A I live on Route 687, and I am the third

7 house from the river, which would make me the eighth house

8 from Route 661 on the left.

9 Q Mr. Cook, if you would just look at that

10 and say out loud what it is and what the date of it is--

11 A This is a copy of my deed from Deed Book

12 77, page 33, dated the 9th day of April, 1976 between Edward

13 Norman Dinwiddie and Carolyn Hudgins Dinwiddie and Howard J.

14 Cook--

15 MR. WORNOM: We stipulated--

16 MR. J. F. HICKS: I just wanted to--

17 MR. CHENAULT: We will mark this

18 Plaintiffs' Exhibit--

19 MR. J. F. HICKS: 7A--

20 MR. CHENAULT: Plaintiffs' Exhibit 7A.

21 (PLAINTIFFS' EXHIBIT 7A, marked for

22 identification and admitted into evidence.)

23 MR. J. F. HICKS: And these as next--

24 MR. CHENAULT: We will mark Deed Book 66,

1 page 419, deed dated 29th day of May, 1972 between James Earl
2 Jarrell and Edward Norman Dinwiddie as Plaintiffs' Exhibit
3 7B. And deed in Deeb Book 62, page 419, dated 13th day of
4 August, 1969, between Raymond Kyger and James Earl Jarrell as
5 Plaintiffs Exhibit 7C.
6 (PLAINTIFFS' EXHIBIT NOS. 7B and 7C, marked
7 for identification and admitted into evidence.)
8 MR. J. F. HICKS: Thank you, Mr.
9 Commissioner.
10 BY MR. J. F. HICKS: (Direct Examination Cont'd.)
11 Q Mr. Cook, I am going to ask you to look at
12 this picture, which has already been identified as
13 Defendant's Exhibit No. 8, and I am going to put you at a
14 point so you will have a perspective, of standing at the end
15 of the state road looking to the York River. And when you
16 bought your property in 1976 and since that time, have you
17 used any of this area in this photograph that I just
18 described, as access to the river?
19 A Yes, sir I have. I have used the area as
20 shown in the picture between the shrubs on the left hand side
21 and a row of cedars on the right-hand side. I may want to
22 bring to your attention that there is a very large cedar
23 along the line with the smaller cedars also.
24 Q Is that cedar or oak tree?

1 A There are several trees down there, but
2 there is a large cedar down there also.
3 Q And your testimony is that you used between
4 these shrubs and the cedars?
5 A Yes, sir.
6 Q Since 1976?
7 A Yes, sir. Well actually I have been--when
8 I was a road trooper assigned to King William, King and Queen
9 as a probationary trooper and when I transferred back to the
10 area, I have been down this road since 1972, I believe it
11 was. When I first came to work for the department I was
12 assigned to King William, King and Queen County and I have
13 been down to the river since 1972.
14 Q As a trooper?
15 A As a trooper, yes, sir.
16 Q In your official duties?
17 A Yes, sir.
18 Q Why did you use this area between, as you
19 stated, between the bushes on the left and the cedars on the
20 right?
21 A When I bought the property it was my
22 understanding that I had a deed of access to the river that
23 basically extended down from the center line ten foot to the
24 south, running along the edge of the roadway, running ten

1 feet down down to the water down to the low water mark of the
2 York River.
3 Q But now this area between the bushes on the
4 left and the cedar trees on the right, that is bigger than
5 ten feet; isn't it?
6 A Yes, sir, it is.
7 Q But you used the whole area?
8 A Yes, sir.
9 Q Let me ask you this. Did you ever seen any
10 other members of the public use that area that you just
11 described?
12 A I have seen people on very limited
13 occasions drive down there. Once I moved into the area and
14 had a marked car sitting in front of my house, people really
15 limited their access to coming down that road. And then when
16 I assigned a marked car naturally people still knew I lived
17 there and to this day know that I live there and very few
18 people drive down-- Normally they come down and stop--there
19 is a wide area over on this side of the road. And what they
20 will do, they will come down and back into that wide area and
21 come out, before this fence was even put up. (Indicating.)
22 Q When you say "wide area", you are
23 describing in Defendant's Exhibit No. 8, you are describing a
24 wide area at the end of the state maintained road--

1 A Yes, sir. It is almost like a turn-around.
2 I have seen the newspaper man come in and use that as a
3 turn-around and come back down the road.
4 Q But that was on the state road; he never
5 went past this fence on this--
6 A No, sir.
7 Q Have you ever had occasion in the past to
8 actually question someone down in this area?
9 A I have on Mr. Sutton's property over here.
10 (Indicating.) I really never have had any problem at night
11 time with anyone being down there or during the day time.
12 But over on Mr. Sutton's actual property, this area over
13 here-- (Indicating.)
14 Q On the other side you are pointing--
15 A Other side--
16 Q --on Exhibit No. 8, the right side of the
17 cedar trees--
18 A The north side of the cedar trees.
19 MR. CHENAULT: Mr. Hicks, please try to
20 give the witness time to answer the question before you ask
21 another one.
22 MR. J. F. HICKS: Sorry about that.
23 Q Do you know Mr. Sutton?
24 A Yes I do, quite well.

1 Q Have you ever been down in this area that
2 you described that you have used as access to the river when
3 Mr. Sutton has been present?
4 A As far as I can remember in the time that I
5 have been there maybe once or twice.
6 Q And Mr. Sutton saw you in this area?
7 A Yes, sir. As a matter of fact I walked
8 over and talked to him.
9 Q At that time did he--what did he say to you
10 at that time?
11 A Nothing, just general conversation.
12 Q Did he ever give you permission to use that
13 area?
14 A No, sir. I didn't think that I needed it.
15 Q Did he ever tell you not to use that area?
16 A No, sir.
17 Q And you stated that you have used it since
18 1976 up until the present?
19 A Yes.
20 Q Did anybody else other than Mr. Sutton give
21 you permission to use that area?
22 A No, sir.
23 Q And your deed--
24 MR. WORNOM: I understood him to say that

1 Mr. Sutton never gave him permission, he never asked any
2 permission--
3 Q But Mrs. Sutton owned the property--
4 A Mrs. Sutton owned the property prior--
5 MR. J. G. HICKS: I am just asking if
6 anybody other than Mr. Sutton give him permission--
7 MR. WORNOM: Well, did anybody give him
8 permission--
9 MR. J. F. HICKS: That was the question
10 that I asked--
11 Q Did anybody give you permission to use this
12 area?
13 A No, sir, I didn't think that I needed it.
14 MR. J. F. HICKS: That's all.
15 CROSS EXAMINATION
16 BY MR. WORNOM:
17 Q You didn't ask anybody?
18 A No, sir, I didn't think that I had to.
19 Q Because in your deed, Mr. Cook, you were
20 aware, in fact you described it, that the center line of the
21 ten foot road--I mean the center line of the road which was
22 at that time dirt, I believe, wasn't it?
23 A It wasn't when I was there, when I first
24 came here. It has been paved up and to the terminus of the

1 roadway.

2 Q The road ends right there-- (Indicating.)

3 A Yes, sir.

4 Q That is the end of the road, right there?

5 (Indicating.)

6 A Yes, sir.

7 Q And that has always been the end of the

8 road?

9 A Yes, sir, as long as I can remember, as

10 long as I have been here.

11 Q The road actually ends right there--

12 A There used to be sign down here that said,

13 end of state maintenance.

14 Q That is where the road--

15 A I think it is seven-tenths of a mile from

16 Route 661 to the terminus.

17 Q And it is a fact that the road, the dirt

18 road that you are talking about before the state took it over

19 actually ended there?

20 A I don't know where the state road ended

21 prior to the state taking it over.

22 Q Well as I understand in your deed you

23 acquired a ten foot strip of land over and along the original

24 northerly boundary of this lot, from this lot to the low

1 water mark of the York River--

2 A Yes--

3 Q That is the right-of-way that you have been

4 using?

5 A I have been using the right-of-way between

6 the shrubs and the cedar trees as shown in this picture.

7 Q Well you have been using that under this

8 claim in your deed?

9 A Yes.

10 Q The right-of-way that you are claiming is

11 in your deed?

12 A Yes, sir.

13 MR. WORNOM: Okay, that's all I have.

14 MR. CHENAULT: Clarify something for me,

15 Mr. Cook. The right-of-way that you are claiming in your

16 deed is ten feet wide.

17 WITNESS: Yes, sir.

18 MR. CHENAULT: But what I understood you to

19 testify to is that you have been using the area between the

20 cedar trees and the shrubs on the left--

21 WITNESS: Yes, sir. It was my

22 understanding that I had ten feet from the edge of the

23 roadway-- I am sorry-- Ten foot from the center line

24 because my property showed I believe it was 120 foot and 20

1 foot was given to the State to put the highway--to maintain
2 the highway. So I took it to be from the center of the
3 roadway running down to the river.
4 And also it was my understanding that I
5 could use ten foot this side and I could use ten foot that
6 side because the person that owned his property over here was
7 using his ten foot to the center of the roadway and ten foot
8 on my side. It was kind of, from my understanding, it was a
9 mutual usuage. They were using my ten foot and I was using
10 their ten foot.
11 MR. CHENAULT: So there were two ten foot
12 right-of-ways that you are talking about?
13 WITNESS: From my understanding, yes, sir.
14 MR. CHENAULT: Any further questions?
15 MR. WORNOM: Yes, sir.
16 BY MR. WORNOM: (Cross Examination Cont'd.)
17 Q Do you recall when they planted the cedar
18 trees over there?
19 A They have been planted over the years.
20 Like I said, there is one large cedar tree that has been
21 there ever since I have been down there, it is a big cedar.
22 Q It has been there for years?
23 A Yes, sir. And these have been there--I
24 would be very, very hesitant to guess how long they have been

1 there. I know Mr. Erwin would plant one or two at a time
2 over the years while he was alive. I don't remember when he
3 passed away. But there may have been one or two planted
4 since he passed away.
5 Q Now you made reference to the
6 Commissioner's question that you thought that there was a ten
7 foot easement on both sides of that road?
8 A Yes, sir.
9 Q But you were using the one that you got in
10 your deed, the ten feet on the south side of the road?
11 A Yes, sir, I was using on the south side--
12 Q The south side--
13 A Yes, sir. But when I went down, I would
14 use all of it, that whole area.
15 If you look at the picture it doesn't
16 really depict it, but there is an indentation in there like
17 an old roadway would run down that way where it has been
18 traveled over the years and there is a slight indentation
19 there. And that picture really doesn't depict it properly.
20 You can see it better if you are actually down there.
21 MR. WORNOM: That is all I have.
22 MR. J. F. HICKS: And the picture he
23 referred to is Defendant's Exhibit No. 8.
24 (Review of photographs.)

* * *

* * *

1 A The river would be at the bottom of the
2 photograph and looking east towards Route 687.
3 Q Now, on cross examination you said that you
4 thought--that you used ten feet, you drew an imaginery line
5 down the center and used ten feet to each side, ten feet
6 showing on Defendant's Exhibit No. 8, it would be an
7 imaginery line with ten feet going to the left to the bushes
8 and ten feet going to the right to the cedar trees. And you
9 said that, I believe -- Explain to me what you mean that you
10 thought it was mutually used easement--you never got
11 permission to use it?
12 A No, sir. As I said earlier, I didn't think
13 I needed any permission to use it. It was in my deed, the
14 right-of-way to the river and I felt that my deed gave me the
15 authority to use it.
16 Q And you used the other ten feet also?
17 A Yes, sir.
18 Q Now you mentioned that--
19 A This by the way is an older photograph. I
20 don't know when this was taken, but it has been a while.
21 Q Let me ask you this. It was July of '92.
22 A Okay.
23 Q Let me ask you to identify Plaintiffs'
24 Exhibit D.

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1 questions.

2 RECROSS EXAMINATION

3 BY MR. WORNOM:

4 Q You were using your ten feet under your

5 claim in your deed and you thought that it was a ten foot on

6 the north side of the line too, is that correct?

7 A Yes, sir.

8 Q That is what you thought?

9 A Yes, sir.

10 MR. WORNOM: That is all I have.

11 REDIRECT EXAMINATION

12 BY MR. J. F. HICKS:

13 Q And you were using the entire twenty feet?

14 A Yes, sir.

15 Q Under claim of right--

16 A Under claim of right, yes, sir.

17 MR. WORNOM: Well, that is not a proper

18 question, Mr. Commissioner, and I move it be struck.

19 MR. CHENAULT: Sustained.

20 Trooper Cook, you said that you had gone

21 down--or Special Agent Cook I guess would be the proper--

22 WITNESS: I answer to just about anything.

23 MR. CHENAULT: You said that you went down

24 there under your official duties?

1 WITNESS: Yes, sir.

2 MR. CHENAULT: Did you ever use this area

3 as a private citizen on your own?

4 WITNESS: Not prior to buying the property

5 down there. One of the reasons I bought in the location that

6 I bought was that I knew under my salary I would probably

7 never be able to afford waterfront property and I felt this

8 was probably about as close as I could get to being able to

9 afford it.

10 MR. CHENAULT: But you still use it --

11 WITNESS: Yes, sir--

12 MR. CHENAULT: --from the time you bought

13 the property?

14 WITNESS: Pretty close to every day. I

15 walk down there four, five, six times a week. And the summer

16 time, probably every day in the summer. And in the winter

17 time, three, four, five times a week.

18 MR. CHENAULT: Thank you, Mr. Cook.

19 Any further questions, gentlemen?

20 RECROSS EXAMINATION

21 BY MR. WORNOM:

22 Q Why did you stop going down there? You

23 have got a right-of-way.

24 A I didn't stop going down there. I stopped

1 driving down there.
2 Q You still go down there, don't you?
3 A Yes, sir.
4 Q Over the right-of-way?
5 A Yes, sir, right along the edge.
6 MR. WORNOM: Thank you.
7 MR. CHENAULT: Any further questions? Is
8 this witness free to go?
9 MR. J. F. HICKS: Yes.
10 MR. WORNOM: Yes.
11 (Witness excused.)
12 MR. J. F. HICKS: At this time I would
13 like to call Ms. Erwin.
14 (Witness sworn.)
15
16 JOSEPHINE ERWIN, a plaintiff, called as a
17 witness on her own behalf, and having been first duly sworn,
18 was examined and testified, as follows:
19 DIRECT EXAMINATION
20 BY MR. J. F. HICKS:
21 Q State your full name for the record,
22 please.
23 A Josephine Erwin.
24 Q Ms. Erwin, where do you live?

1 A I live in the last house on Route 687, on
2 your left.
3 Q Maybe this will help. This is Defendant's
4 Exhibit No. 8, and as you are standing at the end of the
5 state road looking towards the York River. And we see a
6 house to the left there. Whose house might that be?
7 A That is my house.
8 Q How long have you lived there, Ms. Erwin?
9 A Eighteen years.
10 Q Eighteen years?
11 A Yes.
12 Q And there have been some questions, earlier
13 you heard testimony concerning these cedar trees. When you
14 moved there eighteen years ago were those cedar trees there?
15 A No, sir, just the one large one and the
16 walnut tree.
17 Q Could you tell us when those cedar trees
18 were planted?
19 A Well I don't know exactly, but my husband
20 has been dead six years and he had surgery for cancer five
21 years before that, so it was before that time because he was
22 wasn't able to--at least 13 maybe, I would say.
23 Q At least 13 years they have been there?
24 A Yes.

1 Q Why this location for these--
2 MR. WORNOM: I object to that question--
3 MR. CHENAULT: On what basis do you object?
4 MR. WORNOM: Well, Mr. Erwin planted them.
5 I mean that is pure speculation on why he planted them. But
6 let her go on and answer it. I withdraw my objection.
7 MR. CHENAULT: Gentlemen, let's try to keep
8 it-- Go ahead and answer the question, Ms. Erwin.
9 A Because when we were looking at the house,
10 thinking about buying it, we were told that the
11 right-of-way--
12 MR. WORNOM: Objection to what somebody
13 told her, that is hearsay.
14 MR. CHENAULT: Sustained.
15 Q What was your understanding?
16 A That from this large cedar tree over to the
17 bushes was the right-of-way for all people up the street to
18 go to the water.
19 Q And so --
20 A So I assume that is why my husband planted
21 along the same row.
22 Q Along the same row--
23 MR. WORNOM: Objection, same reason,
24 assumption.

1 MR. CHENAULT: Strike that from the
2 evidence, the assumption.
3 Q Ms. Erwin, did you ever help plant these
4 trees?
5 A No, but I have replaced a couple of them
6 because they died after my husband.
7 Q Why did you replace them?
8 A Because there was empty spots there, I
9 guess.
10 Q Why did you replace them right on that
11 line?
12 A Well because of the ones that were missing.
13 Q When you first moved here you are saying
14 that your understanding was that the large cedar tree and the
15 shrubbery was the right-of-way?
16 A Yes.
17 Q In relation to that large cedar tree you
18 discussed before, how were these cedar trees, let's say the
19 little cedar trees situated in regards to the large cedar
20 tree?
21 A Well they are in line, in a perfect line.
22 Q In a perfect line?
23 A Yes, sir.
24 Q When you say perfect line, give us a

1 reference, I mean running from the York River to the state
2 road--
3 A Yes, from the York River to the state road.
4 Q You live right here, and it is your
5 testimony that this is your house here to the left in
6 Defendant's photograph No. 8?
7 A Yes, sir.
8 Q Does the general public use this area
9 between the bushes on the left and the cedar trees on the
10 right?
11 A No, just the people up the street.
12 Q People up the street, your neighbors?
13 A Yes, neighbors.
14 Q People who testified--
15 A Right, yes.
16 Q Did you plants these shrubberies next to
17 your house?
18 A No, they were there when we bought the
19 house.
20 Q And you bought the house 18 years ago?
21 A Yes.
22 MR. J. F. HICKS: No further questions.
23 Answer any questions that my esteemed--
24

* * *

1 Q You can explain it. I think it was your
2 brother, wasn't it?
3 A Yes.
4 Q And you haven't seen any other people come
5 down there?
6 A I have seen people turn around in my
7 driveway, or in that turnaround place there and maybe
8 occasionally I have seen people ride down there and back out,
9 through the years.
10 MR. WORNOM: Can I see her deed?
11 MR. J. F. HICKS: We don't have her deed--
12 MR. WORNOM: We stipulated--
13 MR. C. F. HICKS: She is not claiming that
14 she has a right-of-way over this property as such--
15 MR. WORNOM: I know, the right-of-way is
16 over her land.
17 BY MR. WORNOM: (Cross Examination Cont'd.)
18 Q Were you aware when you bought the property
19 that the people that owned lots in the subdivision had a ten
20 foot right-of-way over your northerly boundary line for
21 access to the water?
22 A Yes.
23 Q That is in your deed--
24 A We were told that this whole area was

1 right-of-way.
2 Q My question was, you were aware when you
3 bought your house that the other lot owners in that
4 subdivision had a ten foot right-of-way as access to the
5 water over your lot?
6 A I wasn't aware of any ten foot
7 right-of-way. I was aware that it was right here.
8 (Indicating.)
9 Q Did you read your deed, ma'am?
10 A No. My husband took care of those things,
11 and I did not.
12 But I have read it since.
13 MR. WORNOM: I think we have got the deed--
14 I thought that we had the deed in--
15 MR. CHENAULT: Ms. Erwin, you stated that
16 your understanding was that the right-of-way was right here
17 and pointed to the photograph. Were you pointing to the area
18 from the cedar trees across the grassy area to the shrubs; is
19 that correct?
20 WITNESS: Yes.
21 BY MR. WORNOM: (Cross Examination Cont'd.)
22 Q Did I understand you to say that you have
23 since read your deed and now you know that the people that
24 own the lots in that subdivision have a right-of-way ten feet

1 wide over your northerly property line?

2 A I know that they have a right-of-way here.

3 I don't know exactly where you are talking about.

4 Q I am talking about your north property

5 line, the line that divides your property from this young

6 lady's property. You know that the people that bought lots

7 in there have a right-of-way ten feet wide over your land; do

8 you not?

9 A Over my land?

10 Q Yes.

11 A Well if you consider this my land.

12 (Indicating.)

13 Q We know that that is not your land, don't

14 we?

15 A Well I don't know.

16 Q Where do you think that your property line

17 is?

18 A Well there is a stake back here now.

19 Q You were there when the engineer put it in;

20 weren't you?

21 A When what?

22 Q Were you there when the engineer put it in?

23 A No, I was not.

24 Q Is that stake your property line?

1 A I assume it is.

2 Q Have you had your land surveyed?

3 A Not recently.

4 Q Have you ever had it surveyed?

5 A When we bought it, maybe.

6 Q Do you have a copy of the survey?

7 A No I don't.

8 Q Did the survey show a ten foot easement on

9 it?

10 A I don't know.

11 Q You are not being very direct, Ms. Erwin.

12 A Well I am being honest. I don't know. And

13 if I don't know, I can't tell you.

14 Q Are you telling this Commissioner that you

15 don't know or you do know--do you or do you not know that the

16 property owners have a ten foot easement over your northerly

17 boundary line?

18 A Yes, I know in my deed it says they have

19 it.

20 Q Thank you, ma'am.

21 Now, you and Mr. Sutton were very friendly,

22 weren't you?

23 A Not good friends, I have known him for

24 years.

1 Q Well you were friends. And he never
2 objected at all to you using the land, did he?
3 A No.
4 Q In fact he was glad for you to cut the
5 grass, wasn't he?
6 A I would think that anyone would be glad for
7 you to cut the grass.
8 Q Right. And no body has lived on that land
9 since right after World War II, have they?
10 A On what land?
11 Q The land next door to you.
12 A No one lived there since we have been
13 there, except for the cottage--
14 Q As a matter of fact after Mrs. Sutton died,
15 Mr. Sutton went out there and started cleaning the place up a
16 little bit, didn't he?
17 A Yes.
18 Q It was all grown up in bushes, wasn't it?
19 A That is correct.
20 Q In fact the bushes came all the way over
21 here to where your property line is?
22 A No, no.
23 Q He went out there and cleaned it up?
24 A He did not clean that area up.

1 Q You cleaned this area--

2 A We always cut it ever since we have been

3 there. But that was way before Mr. Sutton cleaned the other

4 area up.

5 Q Did you add an addition to your house?

6 A Yes.

7 Q Is that the addition? (Indicating.)

8 A Yes.

9 MR. J. F. HICKS: For the record, Mr.

10 Wornom is pointing at Defendant's Exhibit No. 8.

11 Q You never asked Mr. Sutton for permission

12 to use this?

13 A To use what?

14 Q To use that land to get to the river?

15 A No I never asked him.

16 Q And he never told you that you could use

17 it?

18 A No.

19 Q And you never claimed to Mr. Sutton that

20 you had a right to use it?

21 A No.

22 Q So people other than neighbors, the general

23 public have used the land on occasion, and I don't mean all

24 the time--

1 A I have seen a couple of cars ride down
2 there and maybe turn around and go back out, but they didn't
3 make a practice of it.
4 MR. WORNOM: Thank you, ma'am, that is all
5 I have.
6 REDIRECT EXAMINATION
7 BY MR. J. F. HICKS:
8 Q When you bought the property, you described
9 earlier on cross examination, that your understanding was
10 that your neighbors' access between these bushes on the left
11 and the trees on the right--
12 MR. WORNOM: Objection, that is a
13 conclusion--
14 MR. CHENAULT: He asked her what she stated
15 earlier --
16 MR. J. F. HICKS: On cross examination--
17 MR. WORNOM: Well--
18 MR. CHENAULT: What is your objection?
19 MR. WORNOM: I believe that has been
20 covered, Mr. Commissioner. She has testified that she
21 knew--that she does know and did know that a ten foot
22 right-of-way existed along her northerly property line. And
23 what she understood other than that, I guess he can ask her.
24 MR. CHENAULT: What was your understanding

1 of the right-of-way to the river?

2 WITNESS: My understanding was that it was

3 between the bushes on the left and this big cedar tree on

4 your right.

5 MR. CHENAULT: Any further questions?

6 MR. WORNOM: I have no further questions.

7 BY MR. J. F. HICKS: (Redirect Examination Cont'd.)

8 Q Has that changed since you bought the

9 property?

10 A No.

11 Q Let me ask you one more thing. Did you

12 ever get Mr. Sutton's approval to cut the grass?

13 A No.

14 Q One more question. You said on cross

15 examination that there were cars that came down and turned

16 around--

17 A Yes.

18 Q Did they stay there long enough where you

19 could have called law enforcement for them to come down--

20 A No--

21 MR. WORNOM: That is not proper question--

22 A They just--I guess when they realized they

23 were where they didn't belong, they just backed out.

24 MR. CHENAULT: Allow her to answer the

1 question.

2 Are there any further questions?

3 MR. J. F. HICKS: No.

4 MR. WORNOM: No.

5 MR. CHENAULT: Is Ms. Erwin free to go?

6 MR. WORNOM: Yes, sir.

7 MR. J. F. HICKS: Yes.

8 MR. CHENAULT: Ms. Erwin, you are free to

9 go or stay as you please.

10 (Witness excused.)

11 MR. CHENAULT: Next witness.

12 MR. J. F. HICKS: I would like to call my

13 homerun hitter, Mr. Fraser.

14 (Witness sworn.)

15

16 ROBERT L. FRASER, III, a plaintiff, called

17 as a witness on his own behalf, and having been first duly

18 sworn, was examined and testified, as follows:

19 DIRECT EXAMINATION

20 BY MR. J. F. HICKS:

21 Q State your your name for the record,

22 please.

23 A Robert L. Fraser, III.

24 Q Mr. Fraser, this has already been--just

1 describe what that is for the record.
2 A Its appears to be my deed to my property.
3 MR. J. F. HICKS: I would like to introduce
4 this, Mr. Commissioner.
5 MR. CHENAULT: This will be Plaintiffs'
6 Exhibit 8A, it is a deed recorded in Deed Book 59, page 202,
7 dated the 23rd day of May, 1967, between Robert J. Walsh and
8 Roberta H. Walsh and Robert L. Fraser, III.
9 (PLAINTIFFS' EXHIBIT NO. 8A, marked for
10 identification and admitted into evidence.)
11 Q Mr. Fraser, where do you live?
12 A I live in the ninth house on 687 on the
13 left.
14 Q How long have you lived there?
15 A We moved in on July 1, 1967.
16 Q Mr. Fraser, when you bought that house and
17 that property, did you understand that you had an access to
18 the York River?
19 A Yes.
20 Q I want to you to refer to this picture, and
21 this is Defendant's Exhibit No. 8. And in this picture, and
22 remember you are on record so you need to describe it in
23 detail. What have you been using as the access to the river
24 and for how long?

1 A With the cedar trees on the right and the
2 bushes on the left, I have used consistently roughly the
3 middle of that to the river, middle of that right down
4 through there. (Indicating.)
5 Q Have you used over to the bushes and over
6 to the cedar trees?
7 A Sir, I have probably used that whole area
8 at one time or another.
9 Q About how often do you use that area?
10 A Up until the fence was there, in the summer
11 months I used it on a regular basis, once or twice a week
12 probably to walk down. In years past I sometimes kept a
13 small boat down there and use it more frequently.
14 Q And that has been uninterrupted?
15 A Yes, sir.
16 Q Did you ever ask anybody permission to use
17 that area?
18 A No, sir.
19 Q Why not?
20 A When I acquired the property it was my
21 understanding that we had a right-of-way to the river. I
22 have since learned it was ten foot. I really never paid much
23 attention to that. I tried to be a good neighbor and go
24 straight down, generally speaking using the previous

1 definition between the cedar trees on the right and the
2 bushes on the left, using the grassy area to the river.
3 Q Have you been open about your use?
4 A Yes, sir.
5 Q So if somebody was down here and you were
6 over here by the cedar trees, you wouldn't try to hide?
7 A No, sir.
8 Q Do you know Mr. Sutton?
9 A Yes, sir.
10 Q Has Mr. Sutton ever seen you in this area
11 here?
12 A I don't think so. I have tried to think
13 back. I don't really think-- I have seen Nelson there, well
14 Mr. Sutton, once or twice, but I don't think I was in the
15 area when he was there.
16 Q But if he had been there--
17 A I would not have hesitated to --
18 MR. WORNOM: Objection--
19 MR. J. F. HICKS: That is fine. We strike
20 the question.
21 Q Let me ask you this. And once again I am
22 pointing to Defendant's Exhibit No. 8. Is your house--where
23 is your house?
24 A All right, my house is off of the picture.

1 bushes on the left and the-- (Indicating.)

2 A Right.

3 Q Did you have enough time to call law

4 enforcement?

5 A I don't recall anyone ever staying. The

6 only time, as I previously stated was the time that they were

7 actually on the property over here, that Trooper Cook took

8 care of that. (Indicating.)

9 Q When you say property over here, in

10 relation to this picture--

11 A The Sutton property which is on the right

12 side of the cedar trees. (Indicating.)

13 Q As depicted in Defendant's Exhibit No. 8?

14 A That is correct.

15 Q You said you would see cars go down here,

16 but did you ever seen anybody stop and get out and go fishing

17 or crabbing, or any of that, members of the general public?

18 A I don't recall that. I really don't recall

19 that. It may have occurred, but I don't recall it.

20 Q It has been a long time between now and

21 1967.

22 A I don't recall it.

23 Q And you have used that area between the

24 bushes on the left and the trees on the right continuously

1 and uninterrupted since 1967?

2 A Yes, sir.

3 Q Mr. Fraser, earlier you heard Mr. Carlisle

4 testify that he bought his property in '90 and rented in

5 1981. Do you know who Mr. Carlisle bought his property from?

6 A Yes, sir.

7 Q Who did he buy it from?

8 A Jack and Ann Gardner.

9 Q Did you ever see Jack and Ann Garnder use

10 any area in here on Defendant's Exhibit No. 8, did you ever

11 see them using the area here as an access to the York River?

12 (Indicating.)

13 A Yes, sir. They had a young daughter that

14 was a little younger than my daughter and they all used the

15 property.

16 Q And when you say that they all used the

17 property, what property did they use?

18 A Property between the cedar trees and the

19 bushes as access riding their bikes and going down to the

20 beach.

21 Q About when did Jack and Ann Gardner

22 purchase the property, do you know?

23 A Oh, yes. Let me see here. They purchased

24 the property I believe in 1972.

1 Q Do you know, from your own knowledge, who
2 Jack and Ann Gardner bought their property from?
3 A Yes, sir.
4 Q Who did they buy it from?
5 A Bill George and Pat George.
6 Q Now I know you can only testify since 1967
7 when you moved in.
8 A Yes.
9 Q But did you ever see Bill and Pat George
10 use the property?
11 A Yes, sir.
12 Q And what property did you see them use?
13 A The property between the hedges and the
14 cedar trees, as well as their daughters and his step-son.
15 Q And they used that as an access to the York
16 River?
17 A Yes, sir.
18 Q I believe you were in here for Ms. Pierce's
19 testimony.
20 A Yes, sir.
21 MR. WORNOM: That is not proper to refer to
22 the testimony of another witness, I don't believe, Mr.
23 Commissioner--
24 MR. J. F. HICKS: They are all party

1 plaintiffs--

2 Q Do you have a neighbor by the name of Ms.

3 Pierce?

4 A Yes, sir.

5 Q How long has Ms. Pierce lived there?

6 A Ms. Pierce has lived there since 1982.

7 Q Who did Ms. Pierce buy her property from?

8 A Alex Lowery.

9 Q And did you ever see Alex Lowery or his

10 family use this area between-- (Indicating.)

11 A Yes, sir.

12 Q And they used it for access to the York

13 River?

14 A Yes, sir.

15 Q When did you first see them start using

16 that as access to the York River?

17 A Well they had young children also. In 1967

18 when I first went there, their children used it.

19 Occasionally Alex and his first wife, she is deceased, also

20 would use it, you would see them go down there. Which would

21 be a true statement about every one of our neighbors on that

22 road, sir.

23 Q That they have used it?

24 A Yes, sir.

1 Q Let's go on and get it on the record.
2 Do you have a neighbor by the name of Mr.
3 and Mrs. Day?
4 A Yes, sir.
5 Q Approximately how long have they lived in
6 their house?
7 A I believe that they purchased it in 1985.
8 Q Who did they buy their house from?
9 A They bought it from Marion Kyger.
10 Q Did you know Marion Kyger?
11 A Yes, sir I knew Ms. Kyger, her former
12 husband and her daughter.
13 Q And were they living in that house in 1967?
14 A Yes.
15 Q Did they use this area between the bushes
16 and the trees as access to the York River?
17 A Yes, sir.
18 Q Did they use it on a normal basis?
19 A Yes, sir.
20 Q And they sold it to the Days?
21 A Yes, sir.
22 Q Let's go on to--do you have a neighbor by
23 the name of Michael Duvall?
24 A Yes, sir.

1 Q How long has Mr. Duvall lived in your
2 neighborhood?
3 A I have known Mr. Duvall a very long time,
4 but he has only lived there since 1989.
5 Q Who did Mr. Duvall buy his property from?
6 A According to the deed from the American
7 Development Corporation, and I did not know them.
8 Q You did not know them?
9 A No.
10 Q Before American Development Corporation--
11 How long was that house vacant, or did you not see anybody
12 living in it?
13 A According to the records from October 12,
14 1988 to June 6, 1989.
15 Q Who did American Development Corporation
16 acquire the property from?
17 A The Alfriends.
18 Q And when did the Alfriends acquire the
19 property?
20 A They bought it in 1981.
21 Q And from 1981 up until American Development
22 Corporation, did you ever observe the Alfriends use this
23 access between the bushes and the cedar trees to get to the
24 York River?

1 A Yes, sir, Mr. Alfriend used to walk their
2 little Daschund.
3 Q And they used it on a regular basis?
4 A Yes, sir.
5 Q And they were open about it?
6 A Yes, sir.
7 Q Who did the Alfriends buy the property
8 from, do you know?
9 A Yes, Ava Lu and Dixon Jones.
10 Q And when did you first have the occasion to
11 meet the Jones?
12 A When we moved over there, they had been
13 living there for a considerable amount of time. I think they
14 moved there in '52--
15 Q --1967?
16 A '67, yes, sir.
17 Q And did Ava and Dixon Jones use this area
18 in Defendant's Exhibit No. 8 between the bushes and the trees
19 as access down to the York River?
20 A Yes, sir, extensively.
21 Q Extensively?
22 A Yes, sir.
23 Q On a regular basis?
24 A Yes, sir.

1 Q And they were open about it?
2 A Yes, sir.
3 Q Do you have neighbors by the last name of
4 Cook?
5 A Yes, sir.
6 Q How long have they lived in your
7 neighborhood?
8 A They bought the property, according to the
9 record, in 1976.
10 Q And who did they buy the property from?
11 A They bought it from Norman and Carolyn
12 Dinwiddie.
13 Q Did you know the Dinwiddies?
14 A Yes, sir.
15 Q And how long did the Dinwiddies live there?
16 A The Dinwiddies lived there from 1972 to
17 '76.
18 Q Did you ever see them use this area between
19 the bushes on the left and the trees on the right --
20 A Yes, sir, we used it together. We were
21 very good friends. He was an assistant coach of mine.
22 Q He was assistant coach--
23 A Yes, sir.
24 Q And from 1972 to 1976, you saw the

1 Dinwiddies use it?

2 A Yes.

3 Q Do you know who the Dinwiddies bought the

4 property from?

5 A Yes, sir, James Jarrell and I forget his

6 wife's name, he was principal at West Point High School.

7 Q When did the Jarrells acquire the property?

8 A '69.

9 Q Approximately two years after you acquired

10 yours?

11 A Yes, sir.

12 Q Did you ever see the Jarrells use this area

13 between the bushes on the left and the trees on the right, in

14 Defendant's Exhibit 8, did they use that property as a access

15 to the York River?

16 A Yes, sir.

17 MR. J. F. HICKS: If you could give me one

18 minute, Mr. Commissioner.

19 (Brief discussion off of the record.)

20 Q Let me ask you, all the testimony that you

21 gave about all the neighbors from 1967 on, did they all use

22 it openly?

23 A Yes, sir.

24 The neighborhood has been a very close

1 neighborhood. We have certain times of the year that we all
2 socialize together in groups. Halloween is always a big
3 occurrence in our neighborhood. We do things together. So I
4 knew these people, I knew them well and we did things openly.
5 Q And the location of your house, did they
6 have to pass by your house to use this? (Indicating.)
7 A Yes, sir.
8 Q And when I say "this", I am referring to--
9 A To get to the river they had to go by my
10 house, yes, sir.
11 Q And also to get to this area between the
12 bushes and the trees in Defendant's Exhibit No. 8--
13 A Yes, sir.
14 Q They had to go right by your house?
15 A Yes, sir.
16 MR. J. F. HICKS: That is all I have.
17 CROSS EXAMINATION
18 BY MR. WORNOM:
19 Q Mr. Fraser, in your deed, you were conveyed
20 up to the center of the twenty foot --
21 A That is what the deed says.
22 Q And your right-of-way was ten feet on your
23 northerly property line?
24 A That is what the deed says, yes, sir.

1 Q And that also gave you the right in that
2 deed to use that not only where the road stopped but all the
3 the way down to the river?
4 A Yes, sir.
5 Q And that is what you have been using under
6 the claim in your deed?
7 A Sir, I have been using this property right
8 here, from the road to the river between the hedges and the
9 cedar trees that I described-- (Indicating.)
10 MR. C. F. HICKS: For the record, indicate
11 that he is pointing to Defendant's Exhibit No. 8.
12 Q Well, you were using that under the claim
13 of the right-of-way in your deed?
14 A I was using that as the understanding that
15 that is where the right-of-way was.
16 Q So what you were using was the right-of-way
17 that was given you in your deed?
18 A I was using that property right there, sir.
19 Q And that is what you thought the
20 right-of-way was?
21 A Yes.
22 Q That you got in your deed?
23 A That is what I thought the right-of-way
24 was.

1 Q And I understand you never talked to
2 anybody in the Sutton family about using it?
3 A No, sir.
4 Q And no body ever told you that you couldn't
5 use it?
6 A No, sir.
7 Q In fact everybody was using it openly--
8 A Our neighbors--
9 Q Your neighbors?
10 A Yes, sir.
11 Q No body lived next door, did they?
12 A No, sir, not while I lived there.
13 Q It has always been vacant land?
14 A The property to the right, which we call
15 the Sutton property had a cottage there. Their family used
16 it when I first moved there, but it fell into disrepair and
17 was later removed.
18 Q In fact the property really stayed vacant
19 until this young lady bought it and put up a house?
20 A Yes, sir.
21 Q Mr. Sutton rarely came down there, did he?
22 A That would be a fair statement, yes, sir.
23 Q I believe it was owned by Mr. Sutton's
24 mother.

1 A Yes, sir.

2 Q And she passed away in '84, '85--

3 A If you say so, sir, I don't--

4 Q Do you know when those trees were planted,

5 these cedar trees right here? (Indicating.)

6 A Sir, those cedar trees--

7 Q Was it within the last ten years?

8 A You know--

9 Q They weren't there when you first started

10 going down there--

11 A Absolutely not.

12 Q In fact it was some time later after you

13 started going down there, much, much later when they were

14 planted--

15 A I heard Ms. Erwin testify, and whatever

16 date she testified--

17 Q I am asking you--

18 A Whatever date she--

19 Q Go ahead--

20 A She testified and I can concur that that is

21 about when Mr. Erwin to my knowledge--I did not see him, it

22 is hearsay-- It was common knowledge that he planted those

23 trees.

24 Q And that was about ten years ago?

* * *

1 A To my knowledge it was only used--the
2 Sutton family would meet there I think the 4th of July and
3 had something like a picnic. But I don't recall more than
4 once or twice anyone staying overnight there.
5 Q But it was being used?
6 A Yes, sir.
7 Q And it could have been being used more than
8 what you recall?
9 A Well--
10 MR. WORNOM: Objection--
11 MR. J. F. HICKS: Withdraw the question.
12 Q During that time that the cottage was being
13 used, was it apparent--
14 MR. WORNOM: Objection. He said that
15 cottage was not being used but maybe once a year at 4th of
16 July picnic.
17 MR. CHENAULT: Sustained. Restate your
18 question.
19 Q On that 4th of July picnic that the Suttons
20 used the cottage for, was this area on Defendant's Exhibit
21 No. 8, between the bushes and the trees still being used as
22 access to the river?
23 A Yes.
24 Q And was it readily apparent to you that it

1 was being used at that time?

2 A Yes, sir.

3 Q I mean anybody could tell by looking at

4 that, that that was being used?

5 A Yes, sir.

6 MR. J. F. HICKS: No further questions.

7 MR. WORNOM: No further questions.

8 MR. CHENAULT: Is this witness free to go?

9 MR. J. F. HICKS: I would like to hold him,

10 might need him as rebuttal witness--

11 MR. CHENAULT: Mr. Fraser, I am sorry, but

12 you are not free to go.

13 MR. J. F. HICKS: I would now like to call

14 Mrs. Fraser.

15 (Witness sworn.)

16 MR. J. F. HICKS: Can we go off the record

17 for a minute?

18 (Brief discussion off of the record.)

19 MR. CHENAULT: Back on the record.

20

21 RUTH S. FRASER, a plaintiff, called as a

22 witness on her own behalf, and having been first duly sworn,

23 was examined and testified, as follows:

24 DIRECT EXAMINATION

1 BY MR. J. F. HICKS:

2 Q State your full name for the record,

3 please.

4 A Ruth Swisher Fraser.

5 Q Ms. Fraser, where do you live?

6 A We live in the ninth house on the left on

7 Route 687 and it is the second house back from the river.

8 Q Does your property border Ms. Erwin's

9 property?

10 A Yes it does.

11 Q Are you the wife of Mr. Fraser who just

12 testified?

13 A Yes, sir.

14 Q When did you acquire your property, when

15 did you move into your house?

16 A We moved in our house on July 1, 1967.

17 Q During that time have you used--this is a

18 photograph which is Defendant's Exhibit No. 8. Can you

19 explain to me, just briefly, if you have used any land on

20 this photograph as access to the York River?

21 A We have used between the bushes on the left

22 and the cedars on the right, extending straight from the

23 paved road to the river.

24 Q And you have used that continuously since

1967?

A Yes, sir.

Q Breifly if you would describe what use you have seen by your neighbors.

A Well my neighbors take walks down there, they walk their dogs. Since I was home for eight years with little children, from '67 to '75, I and neighbors would take our children together and they would play in the sand, they would swim. In the summer it was a daily basis. And that is the use that our neighbors made of it. My husband did have a boat there that he kept tied up down there.

Q Since 1967 up until the present day have any members of the general public used this area that you just described?

A Very seldom, as people have stated, once in a while a car might drive down there and then back out. But people did not go there to swim or sunbathe or anything like that, not that I know of.

Q You are saying they drove down there. Did they stop and park for a while, and use quotation marks when I say "parking"--

A To my knowledge probably just drive down there, look at the river, and then back out.

Q So from 1967 up until present all your

1 neighbors who lived in this neighborhood have used this area
2 between the bushes on the left and the--
3 A Yes, everyone used--
4 Q --and the cedars trees--
5 A Yes, neighbors--
6 Q Did they use it openly?
7 A Yes.
8 Q Did you ever get permission to use any of
9 this area over here by the cedar trees and the bushes; did
10 Mr. Sutton ever give you any permission?
11 A No, we never thought that it was necessary.
12 Q Mr. Sutton's mother?
13 A No.
14 MF. J. F. HICKS: No further questions.
15 CROSS EXAMINATION
16 BY MR. WORNOM:
17 Q Mrs. Fraser, do you know when those cedar
18 trees were planted, how many years ago?
19 A Well as we heard stated, since Mr. Erwin
20 planted them, and he was ill, I think it must be the 13
21 years. I would not have been able to think back myself and
22 calculate that.
23 Q And up until then it was just open through
24 there, just field--

1 area did you use and the neighbors use from the state road
2 going down to the York River?
3 A Well I have always used just generally
4 straight down from the road, and considered the width of the
5 road to be our right-of-way.
6 Q So although the cedar trees weren't there,
7 this was a boundary? (Indicating.)
8 A General area, yes.
9 Q Straight back from that big cedar tree to
10 the state road?
11 A Yes.
12 MR. J. F. HICKS: I don't have any further
13 questions.
14 Wait, just one more.
15 BY MR. J. F. HICKS: (Redirect Examination Cont'd.)
16 Q There wasn't any underbrush back here back
17 in 1967, was there? (Indicating.)
18 A No, there has never been anything in the
19 area where we walked, it has always been free--
20 Q It has been grass--
21 A Well it wasn't even really grassy, it was
22 more sandy.
23 Q More sandy?
24 A Yes.

* * *

1 A Yes.

2 MR. WORNOM: I would like to introduce that,

3 Mr. Commissioner.

4 MR. CHENAULT: Will make this Defendant's

5 Exhibit No. 9--

6 MR. WORNOM: What is your objection to

7 taking the label off--

8 MR. J. F. HICKS: My objection-- You can

9 get it introduced by her and she can identify it and it will

10 be identified on the record. That won't be identified on the

11 record, that is not her statement. And if you would like

12 your client to introduce it later, I am sure that they can.

13 I don't think that there is proper foundation set for that

14 statement--

15 MR. CHENAULT: Defendant's Exhibit No. 9 is

16 a large photograph taken from the river looking back towards

17 the state maintained road with a brick ranch house on the

18 right of the picture, with two pine trees and a row of what

19 appear to be cedars on the left hand side.

20 (DEFENDANT'S EXHIBIT NO. 9, marked for

21 identification and admitted into evidence.)

22 Q Of course you knew that in your deed you

23 had a ten foot right-of-way to the York River?

24 A We knew we had a right-of-way, yes.

1 Q And that is the reason you were talking to
2 the York River because you had a right-of-way to the York
3 River?
4 A Right, we understood from the pervious
5 owners that we had a right-of-way.
6 MR. WORNOM: Thank you, ma'am.
7 REDIRECT EXAMINATION
8 BY MR. J. F. HICKS:
9 Q Real quickly on Defendant's Exhibit No. 9,
10 to the right of this photograph when you are standing at the
11 York River and facing the state road, do you see these shrubs
12 here? (Indicating.)
13 A Yes.
14 Q Were they there back in 1967 when you moved
15 in?
16 A There were always shrubs there. The
17 Thrifts who lived there had a beautiful yard and had lots of
18 shrubbery. So whether they are the exact same ones, but most
19 of them are.
20 Q The same line, there was shrubberies in
21 that same line--
22 A Yes.
23 Q And this oak tree right there, was that
24 there--

* * *

1 and Jack Graham Gardner and Anne Hamilton Gardner as
2 Plaintiff's Exhibit No. 1B(1).
3 And Deed Book 51, page 402, deed dated 14th
4 day of September, 1960 between Robert E. Huneycutt and Helen
5 S. Huneycutt and Horance William George, Jr., as Plaintiffs'
6 Exhibit No. 1C.
7 (PLAINTIFFS' EXHIBIT NOS. 1B, 1B(1) and 1C,
8 marked for identification and admitted into evidence.)
9 MR. WORNOM: There was some question before
10 lunch as to whether or not the deed for the Erwins, that is
11 the next-door neighbor, had been introduced. And that was
12 introduced as Defendant Exhibit No. 3, which is where the
13 reservation of the ten foot easement was noted in her deed,
14 that the parties in the subdivision had a right to use that
15 ten feet.
16 MR. CHENAULT: All right.
17 (Witness sworn.)
18
19 G. T. WILSON, JR., called as a witness on
20 behalf of the defendant, and having been first duly sworn,
21 was examined and testified, as follows:
22 DIRECT EXAMINATION
23 BY MR. WORNOM:
24 Q Please state your name and occupation.

1 A G. T. Wilson, Jr., I am a land surveyor.

2 MR. WORNOM: Can we stipulate Mr. Wilson's

3 qualifications, counsel?

4 MR. C. F. HICKS: Yes, sir.

5 Q When did you first become acquainted --

6 You know the property in dispute?

7 A Yes, sir.

8 Q In fact you surveyed it when Mr. Sutton

9 sold it to this young lady?

10 A Yes.

11 Q And is this your survey, a copy of it?

12 (Review of document.)

13 A Yes.

14 Q Do you live in the vicinity of this

15 property?

16 A Yes, sir I do.

17 Q How long have you been familiar with the

18 property?

19 A I have known that particular piece of

20 property since I was a kid. I used to take swimming lessons

21 over there from the Red Cross.

22 Q On Mr. Sutton's property?

23 A Yes, sir.

24 Q When did you officially become acquainted

1 showing the turnaround at that point?

2 A Yes.

3 Q Now in connection with your engineering

4 work, did you ascertain any easement of record over this

5 young lady's property?

6 A No, sir.

7 Q And it is all shown on this plat?

8 A Yes.

9 Q Did you ascertain that there was an

10 easement of record for access to the York River for the

11 people that lived on the south side of the river?

12 A There was.

13 Q And where is that easement located?

14 A It is on the other side of this property

15 line. (Indicating.)

16 Q Can you designate that on this plat,

17 please, which is Defendant's Exhibit 5, if you would show

18 where the ten foot easement is on that plat?

19 A The ten foot easement is here.

20 (Indicating.)

21 MR. WORNOM: Let the record show that he

22 has identified the ten foot easement as being ten feet

23 adjacent to and parallel with the southerly property line of

24 the defendant.

1 Q Did each property owner in that subdivision
2 obtain a right of access to the York River over that ten
3 feet?
4 A To my knowledge, yes.
5 Q Since you have been up there, has anybody
6 actually lived on the property, live in the house on Mr.
7 Sutton's property?
8 A No.
9 Q Was it more or less grown up in weeds and
10 stuff like that?
11 A Yes, when I moved moved over there it was.
12 Q When Mr. Sutton conveyed lots in his
13 subdivision which is on down this way, did he give anybody a
14 right of access to the York River? (Indicating.)
15 A Not that I am aware of.
16 Q You didn't find any deeds containing such
17 information?
18 A No, sir.
19 Q Now, on Defendant's Exhibit No. 8, can you
20 tell me with reference to that exhibit where the property
21 line between the two parcels of land is?
22 A Down this line of bushes. (Indicating.)
23 Q Which line?
24 A The bushes that are closest to the house.

* * *

1 line went right along the edge of his shrubs?

2 A Yes.

3 Q So that ten foot was obstructed by those

4 shrubs back in 1984 when you did this first work?

5 A Yes, the shrubs were in the easement.

6 Q But still you had seen people going down to

7 the river, hadn't you?

8 A Yes.

9 Q And they weren't walking through the

10 shrubs, were they?

11 A They weren't walking through them, no.

12 Q So they had to be walking on the Sutton

13 side of that line, according to your survey, isn't that

14 right?

15 A Yes, that is true.

16 Q But you didn't show anything on your

17 preliminary plat in '84, or the plat that--it wasn't

18 preliminary, it was actualy plat but never recorded?

19 A That is correct.

20 Q And you didn't show anything in there about

21 where people had been walking to the river, did you?

22 A No.

23 Q Did you see any evidence of driving to the

24 river?

1 A No.

2 Q Do you know State Police Officer Cook?

3 A Yes.

4 Q If he testified that as early in the 1970's

5 and then later after he bought the property that he drove

6 down to the river, would you dispute his testimony?

7 A No I wouldn't dispute that people have

8 driven down there, because I have seen them drive down there.

9 Q You have seen them drive down there, and

10 they haven't driven through the Erwin's shrubs?

11 A No.

12 Q You didn't think it important at the time

13 that Mr. Erwin was there to--because of the fact that it

14 appeared that the shrubs were where the easement was supposed

15 to be, to get a boundary line agreement?

16 A Well the boundary lines were

17 self-explanatory, there wasn't any need for a boundary line

18 agreement.

19 Q The boundary lines were self-explanatory,

20 but at the same time the easement that was called for

21 couldn't be used because the shrubs were there?

22 A That was no concern to my client, in my

23 opinion.

24 Q It wasn't concern to your client that

1 people were using his property to regularly go the river--

2 A I imagine that the property owner knew that

3 people were walking down there.

4 Q Did you discuss it with the property owner?

5 A Yes, sir.

6 Q Did you discuss it with Mr. Sutton?

7 A Yes, Mr. Sutton was well aware of the

8 people walking down there--

9 Q Mr. Sutton was well aware that people were

10 walking down there?

11 A Sure.

12 Q And had been going down there ever since he

13 owned the property, hadn't they?

14 A Pardon--

15 Q They had been going down there virtually

16 ever since they had owned the property?

17 A I would assume so. I have no first hand

18 knowledge of that.

19 Q Now you said that no one told you that they

20 were using this as an access. But when that fence went up

21 you got a telephone call from one of the property owners,

22 didn't you?

23 A Yes, sir.

24 Q So someone did tell you when that fence

* * *

1 DAVID NELSON SUTTON, JR., called as a
2 witness, on behalf of the defendant, and having been first
3 duly sworn, was examined and testified, as follows:
4 DIRECT EXAMINATION
5 BY MR. WORNOM:
6 Q Mr. Sutton, for the record, state your name
7 and address, please.
8 A My name is David Nelson Sutton, Jr. I live
9 in West Point, Virginia.
10 Q What is your occupation, sir?
11 A I am a lawyer.
12 Q Are you familiar with the property that is
13 in dispute today, that is the Garnett subdivision and your
14 mother's subdivision?
15 A Yes I am.
16 Q When did your mother acquire lot 4?
17 A She acquired it in 1935.
18 Q After she acquired it, did she subdivide it
19 and sell a part to Mr. J. M. Garnett?
20 A In 1944 a strip of land was cut off and
21 conveyed to J. M. Garnett, yes.
22 Q Is that shown as on Defendant's Exhibit No.
23 1?
24 A Yes, it is that portion that is five acres

1 with the words J. M. Garnett on it.

2 Q Did Mr. Garnett subsequently subdivide that

3 particular piece of land?

4 A Yes he did.

5 Q Do you have a copy of his subdivision plat?

6 A Yes I do.

7 (Review of documents.)

8 MR. C. F. HICKS: --plat been put in the

9 record--

10 MR. WORNOM: I don't know. I don't think

11 so. I am going to put some more in--

12 MR. CHENAULT: Which plat are you referring

13 to now?

14 MR. WORNOM: I am asking if he has a copy

15 of the Garnett subdivision plat?

16 WITNESS: I do.

17 MR. WORNOM: That might already be in the

18 record--

19 MR. J. F. HICKS: I thought it was in the

20 record--

21 (Review of documents.)

22 MR. C. F. HICKS: He may have a better

23 one--

24 Q This is Defendant's Exhibit No. 6; is that

1 his subdivision plat?
2 A Yes, that is the subdivision plat.
3 Q Did you draw some of the deeds in that
4 subdivision for Mr. Garnett?
5 A I drew most of them, yes.
6 Q Have you checked the deeds in the Clerk's
7 Office?
8 A I have and I got certified copies of each
9 and every deed out of Mr. Garnett --
10 Q Now, when he resubdivided the property and
11 conveyed the lots along--when was then a 25 foot dirt road,
12 did he grant an easement to all of these lot owners?
13 A Yes, he did.
14 Q And was that a ten foot easement for access
15 to the river?
16 A It was a ten feet easement for access to
17 the river on the--I guess that would be the east and to the
18 road on the west--
19 Q And that was along the northerly property
20 line?
21 A Within the property along the northerly
22 property line--
23 MR. C. F. HICKS: I think it should be
24 river to the west and road to the east--

1 WITNESS: I guess that is--
2 MR. C. F. HICKS: He is on opposite of
3 river from you--
4 WITNESS: Okay, all right, whatever.
5 Q Now, did your mother subsequently subdivide
6 the land that she owned?
7 A Yes she did.
8 Q Do you have a copy of that subdivision
9 plat?
10 A Yes I do.
11 Q Could I see it, sir?
12 (Review of documents.)
13 A If the Commissioner will bear with me for a
14 moment, I have got a large file here.
15 (Review of documents.)
16 A This is a copy-- Pardon me, let me get one
17 that I haven't written all over it--
18 Q Take your time.
19 (Review of documents.)
20 MR. WORNOM: Well I may be able to--
21 Q The land that was subdivided, the land that
22 your mother sudivided-- I don't think we will need that, Mr.
23 Sutton--
24 A I am going to find it eventually. With the

* * *

1 road?

2 A That is correct, in configuration --

3 Q With that--

4 A Like this. (Indicating.)

5 Q When you sold those lots, did you give any

6 right-of-way to any of those lot owners to the York River?

7 A No, sir.

8 Q You gave no one any right-of-way over the

9 remaining part of your land?

10 A No.

11 Q Basically when is the last time that anyone

12 lived down there?

13 A On that which was sold?

14 Q Yes, the piece that was sold to Ms. Chaney.

15 A During World War II some folks lived in the

16 cottage that was on this property. Subsequent to that time,

17 so far as I know, nobody has lived there. There have been

18 times when members of the family and others have spent a

19 night or two here and there. But there were no sanitary

20 facilities or anything in that cottage--

21 Q Before your mother died in 1985--'84 or

22 '85--

23 A '84.

24 Q --how frequently did you go down there?

* * *

* * *

1 Q So they were planted after that?
2 A Yes, sir.
3 Q Did Mr. Erwin say anything to you at all
4 about planting the trees?
5 A No, sir, I don't recall any conversation
6 about them.
7 Q Did he ever say anything to you about
8 cutting the grass?
9 A No, not that I can recall.
10 Q You knew he was cutting the grass?
11 A Oh, yes.
12 Q You knew he was planting the trees?
13 A Oh, yes, they were evident, I could see
14 them.
15 Q Why didn't you say something to him about
16 it?
17 A Well--
18 Q Did you object to it? Let me ask you that
19 first.
20 A Oh, I don't know, not really. It wasn't
21 hurting anything particularly. And Mr. Erwin was quite ill
22 during the later part of his life and terminally ill. He was
23 a friend. And I certainly didn't want to bother him.
24 Q Now you were aware that people, not only

1 the lot owners but probably other people, were coming down
2 that piece of land to the water?
3 A Yes.
4 Q Did you object to it?
5 A On, no, no. All of the original purchases
6 of these lots from Mr. Garnett were in fact friends of mine
7 and my family, and most of the subsequent purchasers have
8 been, many of them have been. And our property, the Sutton
9 property was not currently being used on a day-in and day-out
10 basis, we were perfectly happy to have our friends use the
11 whole frontage there. And for a while there was a pier there
12 and they used to use the pier, and use a good portion of the
13 front, as friends.
14 Q Did anybody ask you specifically if they
15 could use it?
16 A I don't recall anything specific. There
17 may have been an occasion now and then when somebody wanted
18 to have a party or a cook-out or a get-together of some kind
19 involving a bunch of people that we might have been asked,
20 but--
21 Q Did anybody ever claim or state to you that
22 they had a right to use that piece of land?
23 A No, sir.
24 Q When is the first time you ascertained that

1 anybody was claiming a right to use that part of your land?
2 A When I was advised of this suit.
3 Q Your position, as I understand it, was that
4 you had no objection to your friends and neighbors using your
5 land?
6 A No, no, never have. Our family has always
7 been very receptive to people visiting us and using what we
8 have, and it was just an accepted kind of a thing.
9 Q There has been some discussion about a road
10 that went down there before the state took it over.
11 A Yes, sir.
12 Q Basically this dotted line, and this is
13 Exhibit No. 7--
14 A Yes, sir--
15 Q Basically before the state took it over,
16 this was the road--
17 A The dotted portion--
18 Q It made a little turn right there and came
19 back out?
20 A That is correct.
21 Q The road never went to the water?
22 A No, sir. As a matter of fact, the end of
23 this road here is recited in the instrument that precedes
24 that plat in the records--

* * *

1 A I certainly do.

2 Q And I believe that before the Erwin's owned

3 that house that some people named Thrift owned it?

4 A Probably Holland before Erwins and then

5 Thrift before Holland and then Garnett before.

6 Q How long, to your knowledge, had there been

7 shrubs along where those shrubs are?

8 A I can't give you a specific date, Mr.

9 Hicks, but has been a long time.

10 Q They were there even before the Erwin's

11 bought the house--

12 A I am sure.

13 Q So you would say that those shrubs have

14 been there--those or similar shrubs have been in that

15 location--

16 A Some kind of shrubs have been down that

17 line for a long time--

18 Q More than twenty years, right?

19 A I would say so.

20 Q And, Mr. Sutton, if these people who are

21 now present owners the--you know Mrs. Garnett, Mrs. Evelyn

22 Garnett--

23 A Yes.

24 Q And you know Officer Howard Cook?

1 A Very well.
2 Q And you know Mr. Michael Day?
3 A I know Mr. Michael Day, know who he is, I
4 don't know--
5 Q How about Mr. and Mrs. Robert Fraser?
6 A Oh, very well.
7 Q And of course you said that you knew the
8 Erwins and considered them friends.
9 A Yes.
10 Q How about Mr. and Mrs. Hilton?
11 A Yes, sir I know them well.
12 Q And Mr. Carlisle?
13 A I don't believe that I know Mr. Carlisle.
14 Q How about Mrs. Paula Pierce?
15 A Just a little bit.
16 Q But those people who you know well, if I
17 tell you that they have testified under oath at this hearing
18 this morning that they have, since they were there, and Mr.
19 Fraser has been there since 1967, used the area in between
20 that large cedar tree and those shrubs ever since they have
21 owned the property as what they deem to be their
22 right-of-way; would you dispute their testimony?
23 A I certainly would indicate that they were
24 wrong in their assumption--

1 Q In their assumption, but not in their
2 testimony as to their use?
3 A As friends and people in the neighborhood
4 there would no problem as far as I am concerned of them using
5 any part of our frontage at their convenience--
6 Q But did your or your mother or anyone on
7 behalf of your mother ever advise these people that you have
8 permission to use our property?
9 A Specifically in these words--
10 Q Specifically--
11 A --no, no, not that I can recall, unless
12 there may have been, through the years, some requests to use
13 the whole property for a function of some kind--
14 Q Whole property, staing over where the
15 cottage was --
16 A Sure, yes.
17 Q Now you said that after your mother died
18 that you cleaned up the whole property and removed the
19 cottage--
20 A That is correct.
21 Q How about this area over there next to the
22 Erwin's shrubs, wasn't that already pretty well cleaned up?
23 A The portion toward the river was all the
24 way across and up beside these shrubs was--well, it was

* * *

1 impossible to walk through them, there were spaces between
2 them and of course earlier on they were quite small.
3 Q Did you ever say anything to Mr. Erwin, you
4 know, you have got your shrubs blocking what is supposed to
5 be the right-of-way?
6 A No, no because it wan't my right-of-way, it
7 was other person's rights-of-way.
8 Q So when people were going to the river, for
9 the other people that had rights-of-way, they weren't, to
10 your knowledge, they weren't really using the right-of-way
11 that they had, were there, because the shrubs were there?
12 A Where they were going to the river, I don't
13 know. I really don't know.
14 MR. C. F. HICKS: No further questions.
15 REDIRECT EXAMINATION
16 BY MR. WORNOM:
17 Q Mr. Sutton, did anybody ever tell you that
18 they had a right to use that land to go to the river?
19 A No, not the land that was on our side of
20 the line.
21 Q Not your land?
22 A No, nobody told me that.
23 Q And you never objected to anybody using it?
24 A No.

1 Q And nobody ever claimed to you that they
2 were using it because they had a right to use it?
3 A No.
4 MR. WORNOM: Thank you, sir.
5 RECROSS EXAMINATION
6 BY MR. C. F. HICKS:
7 Q But you did know that people were going to
8 the river along there?
9 A My friends, my neighbors and persons that I
10 was very happy to use our property at any time.
11 MR. C. F. HICKS: No further questions.
12 MR. CHENAULT: Is this witness needed any
13 more?
14 MR. WORNOM: No, sir. Thank you, Mr.
15 Sutton.
16 MR. CHENAULT: Mr. Sutton, thank you. You
17 didn't pick up any of my exhibits when you--
18 WITNESS: I don't know--
19 MR. CHENAULT: Let me check before you
20 leave, please.
21 WITNESS: Mr. Commissioner, could we go off
22 of the record, for just a moment?
23 MR. CHENAULT: Sure.
24 (Brief discussion off of the record.)

* * *

* * *

1 Q And did that person tell you where the ten
2 foot right-of-way was supposed to be for the property owners
3 across the road from you?
4 A No they did not because that did not
5 pertain to this piece whatsoever.
6 Q Where was the property line as indicated to
7 you by your surveyor? How far from the shrubs on the Erwin's
8 property?
9 A It is basically the same plot that Mr.
10 Sutton had and Mr. Wilson did. He just gave me a plot plan--
11 Q Goes right along the line of the shrubbery
12 is that right?
13 A It is just basically the same plan.
14 Q And so if there was a ten foot right-of-way
15 there, the shrubbery was planted in it, wasn't it?
16 A Yes.
17 Q Did you see the property before Ms. Chaney
18 purchased it?
19 A Yes.
20 Q And was there a cleared area between the
21 cedar trees and the shrubbery; was that area cleared?
22 A It had been maintained just as you see it
23 in the picture.
24 Q And you don't know how long it had been

1 maintained--

2 A No.

3 Q Is that the area where you saw people, when

4 you were building the house, people going down to the water?

5 A Yes.

6 Q Between the cedar trees and the shrubbery?

7 A Yes.

8 Q So that is where you -- When did you put

9 the fence up in relationship to the construction of the

10 house; was it after the house was--

11 A The house was completed.

12 Q When you first started constructing the

13 house, did you have water and electricity to the property?

14 A I had electricty within 30 days but did not

15 have water.

16 Q Did you use any electricity or water from

17 any neighbors?

18 A Yes.

19 Q Who?

20 A Jo Erwin.

21 Q From Mrs. Erwin?

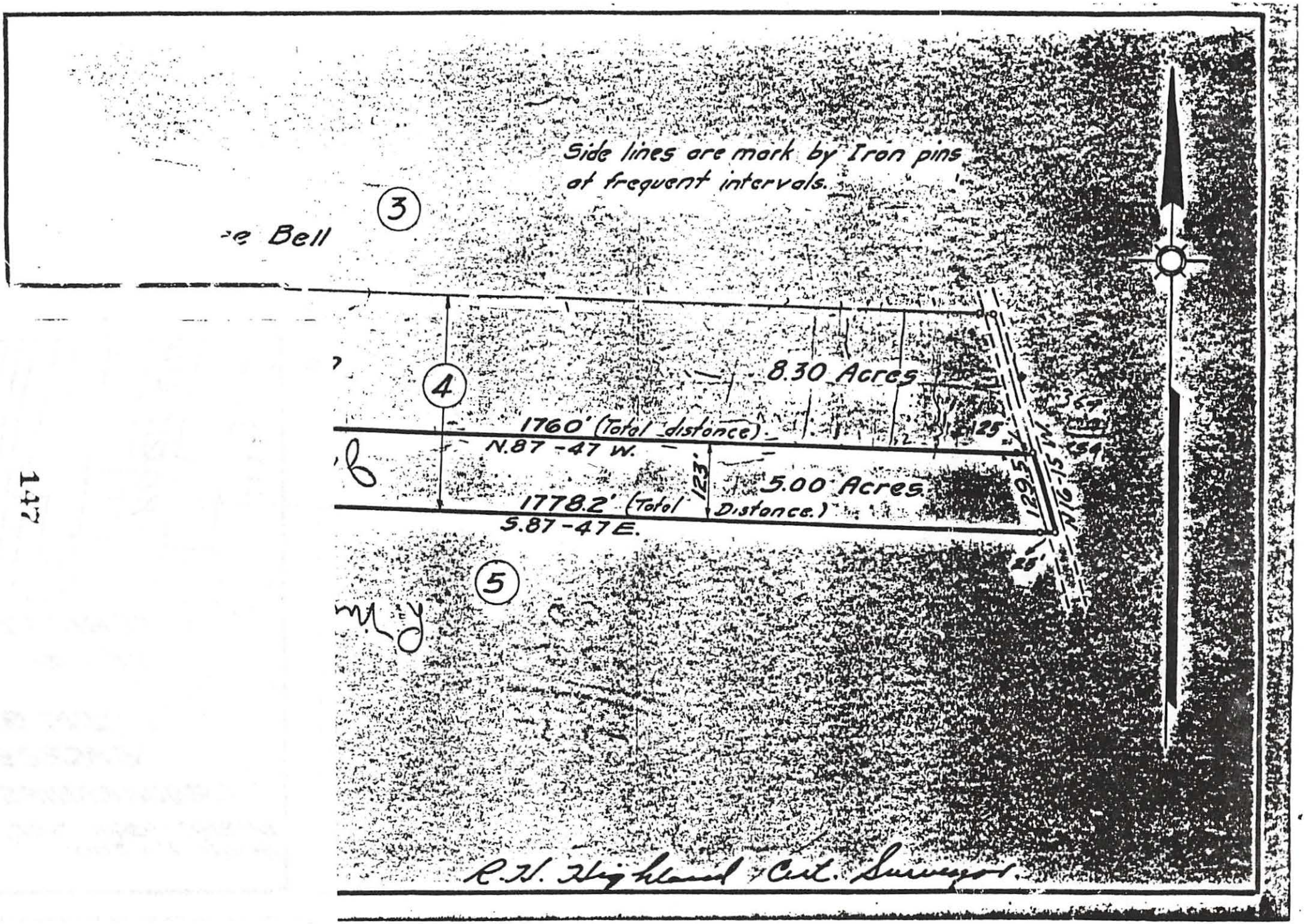
22 A Yes.

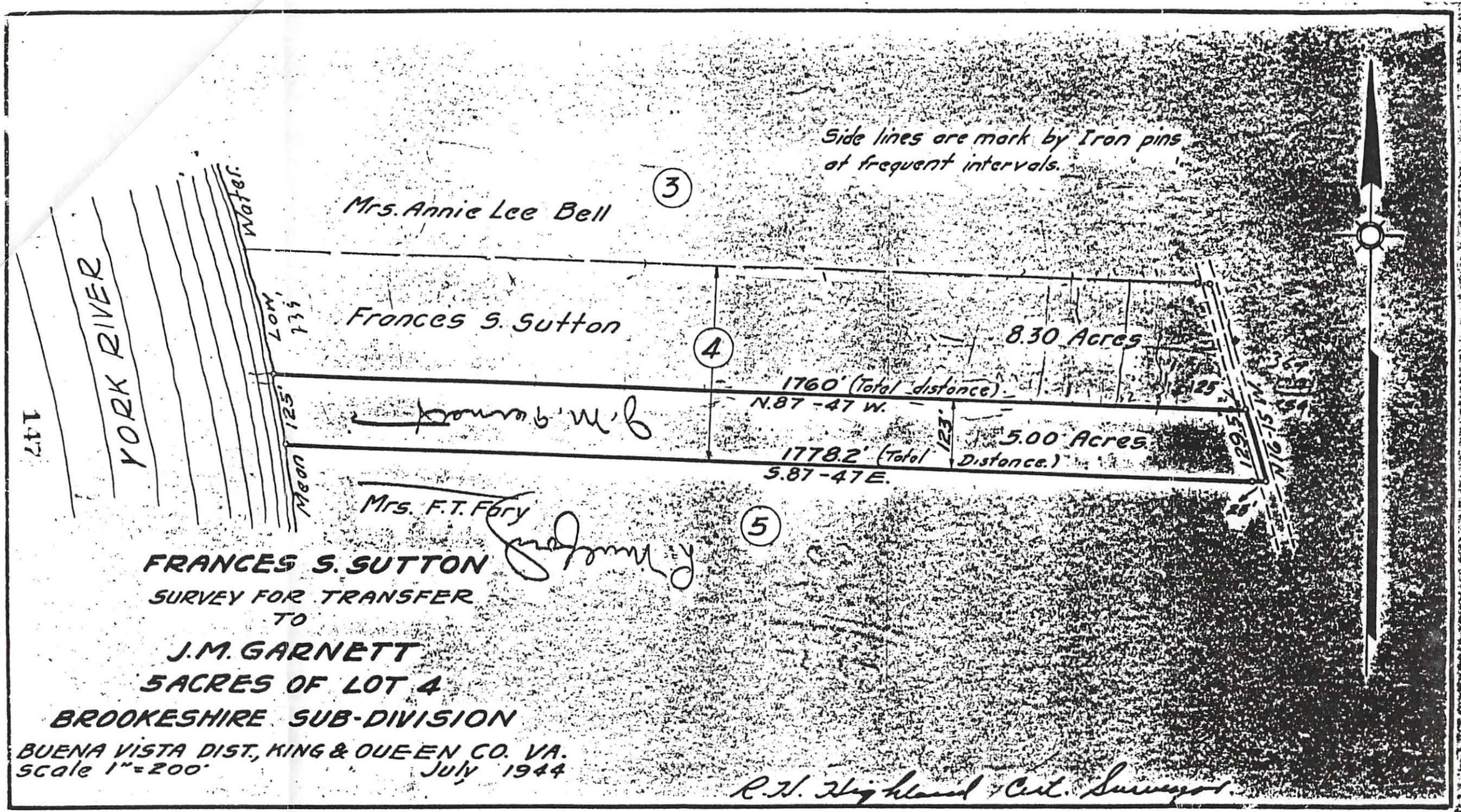
23 Q Was there any discussion concerning the

24 right-of-way at that time?

1 A Not that I recall.
2 Q Did you have a discussion with her about
3 the people that were going down beside her house to the
4 river?
5 A Not that I recall at that time.
6 Q But when you purchased the property you
7 could see that there was use between the cedar trees and the
8 bushes?
9 A Yes.
10 Q You could see that at the time that the
11 property was purchased that there was use there?
12 A Yes.
13 MR. C. F. HICKS: No further questions.
14 REDIRECT EXAMINATION
15 BY MR. WORNOM:
16 Q Is this the other plat that counsel is
17 referring to that you had made?
18 A Yes, this is the plat.
19 Q That was the development plan to locate
20 your septic tank and your house--
21 A That is what I needed to get the building
22 permit--
23 MR. WORNOM: We will introduce this, Mr.
24 Commissioner.

* * *


Side lines are mark by Iron pins
at frequent intervals.
3
-e Bell
4
8.30 Acres
1760' (Total distance)
N.87 -47 W.
123'
5.00 Acres.
1778.2' (Total Distance.)
S.87 -47E.
5
25
129.5'
N.15-19 W
25
R. H. Highland Cert. Surveyor.



D' exhibit # 1
Ore

THIS DEED, made this 10th day of June, 1974, between C. CLAY HOLLAND and JOYCE C. HOLLAND, his wife, parties of the first part; C. B. ERWIN and JOSEPHINE T. ERWIN, husband and wife, parties of the second part, and BLANTON B. THRIFT and BERTA T. THRIFT, his wife, parties of the third part.

W I T N E S S E T H:

That for and in consideration of the sum of TEN ($10.00) DOLLARS and other valuable consideration, the receipt whereof is hereby acknowledged, the said parties of the first part do grant, with GENERAL WARRANTY and ENGLISH COVENANTS OF TITLE, unto the said parties of the second part, as tenants by the entirety with the right of survivorship as at common law, the following property, to-wit:

> ALL that certain lot or parcel of land in Buena Vista Magisterial District, King and Queen County, Virginia, with improvements thereon and appurtenances thereto belonging, being the western portion of Lot 4-B of "Brookeshire", bounded on the North by the property of Frances S. Sutton; on the East by the property of Robert Frazier; on the South by the property of John R. Johnson and on the West by the low water mark of the York River and further described, as follows:
>
> BEGINNING at a point at the low water mark of the York River, corner with the property of Frances S. Sutton; thence down the low water mark of the York River in a Southerly direction, 125 feet, more or less, to a point on said low water mark, corner with the property of John R. Johnson; thence S. 87° 47' E. 355 feet, more or less, along the line of John R. Johnson to an iron pipe, corner with the property of Robert Frazier; thence N. 2° 13' E. along the line of Robert Frazier, 100 feet to an iron pin; thence along the same course 23 feet to a point in the center of a private road, corner with the property of Frances S. Sutton; thence N. 87° 47' W. along the line of Frances S. Sutton, 380 feet, more or less, to the low water mark of the York River, the point of beginning.
>
> BEING the same real estate conveyed to C. Clay Holland by deed from Blanton B. Thrift and Berta T. Thrift, his wife, dated May 17, 1973; recorded May 22, 1973, Clerk's Office, Circuit

Δ's exhibit #3
RMC

Court, King and Queen County, Virginia,
in Deed Book 69, page 73.

This conveyance is made expressly subject to any and all easements, conditions, restrictions and agreements of record insofar as they may lawfully be applicable to the property herein conveyed, and particular reference is made to an easement 10 feet wide over and along the northern boundary thereof for the benefit of all the lots in the J. M. Garnett Re-Subdivision of the East portion of Lot 4-B of "Brookeshire" for access to the York River.

PROVIDED, HOWEVER, that this conveyance is made subject to the terms and provisions of a certain deed of trust made by C. CLAY HOLLAND and RUTH A. HOLLAND, his wife, to DOUGLAS S. MITCHELL and GEORGE M. TRIBLE, III, Trustees, dated May 17, 1973 and recorded May 22, 1973, in the Clerk's Office of the Circuit Court of King and Queen County, Virginia, in Deed Book 69, page 76, conveying the real estate hereinabove described to secure the payment of the principal sum of THIRTY-THREE THOUSAND AND NO/100 ($33,000.00) DOLLARS and interest, the principal balance owed after the June 5, 1974 payment, being THIRTY-TWO THOUSAND FOUR HUNDRED NINETY-FIVE and NO/100 ($32,495.00) DOLLARS. The parties of the second part hereby assume the payment of the aforementioned unpaid portion of said debt as evidenced by their signatures hereto and they covenant with the parties of the first part that they will discharge the said debt so secured by said deed of trust and that they will save the parties of the first part forever harmless from the covenants and undertakings of said deed of trust.

The parties of the third part, noteholders under the above described need of trust, as evidenced by their execution hereof, consent to the assumption of the above described loan and transfer of the property herein conveyed to the parties of the second part, PROVIDED, HOWEVER, that the consent herein given shall in no way be construed as a novation and PROVIDED, FURTHER, that the provision

relating to the transfer of the property herein conveyed which requires the consent of the parties of the third part, as set forth in the aforesaid deed of trust, shall remain in full force and effect as to any subsequent transfer of the property herein conveyed, as if said provision were set forth fully herein.

WITNESS the following signatures and seals:

C. Clay Holland (SEAL)
C. CLAY HOLLAND

Joyce C. Holland (SEAL)
JOYCE C. HOLLAND

C B Erwin (SEAL)
C. B. ERWIN

Josephine T. Erwin (SEAL)
JOSEPHINE T. ERWIN

Blanton B. Thrift (SEAL)
BLANTON B. THRIFT

Berta T. Thrift (SEAL)
BERTA T. THRIFT

State of Virginia

County of King William, to-wit:

I, LORRAINE J NORMAN, a notary public, in and for the County aforesaid, in the State of Virginia, do certify that C. CLAY HOLLAND and JOYCE C. HOLLAND, whose names are signed to the foregoing writing, bearing date on the 10th day of June, 1974, have each acknowledged the same before me in my County and State aforesaid.

Given under my hand this 20th day of June, 1974.

Lorraine J. Norman
NOTARY PUBLIC

My commission expires:
October 8, 1974

State of Virginia

County of King William, to-wit:

I, Linda C. Newman, a notary public, in and for the County aforesaid, in the State of Virginia, do certify that C. B. ERWIN and JOSEPHINE T. ERWIN, whose names are signed to the foregoing writing, bearing date on the 10th day of June, 1974, have each acknowledged the same before me in my County and State aforesaid.

Given under my hand this 19th day of June, 1974.

Linda C. Newman
NOTARY PUBLIC

My commission expires:
January 4, 1977.

State of Virginia

City of Richmond, to-wit:

I, F. A. CARLETON JR., a notary public, in and for the City aforesaid, in the State of Virginia, do certify that BLANTON B. THRIFT and BERTA T. THRIFT, whose names are signed to the foregoing writing, bearing date on the 10th day of June, 1974, have each acknowledged the same before me in my City and State aforesaid.

Given under my hand this 18th day of June, 1974.

F. A. Carleton Jr.
NOTARY PUBLIC

My commission expires: My Commission Expires April 23, 1978

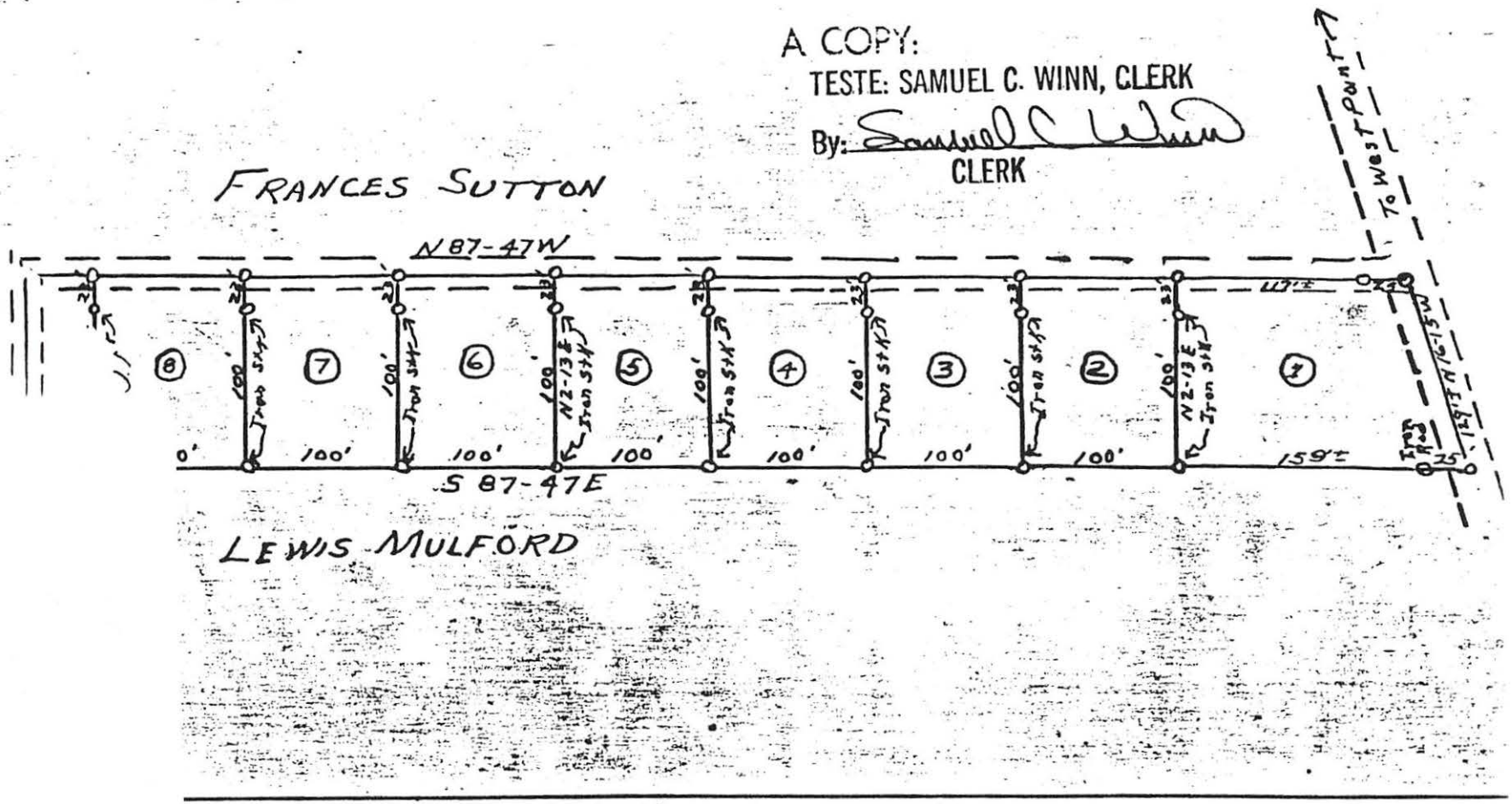
VIRGINIA: IN THE CLERK'S OFFICE OF THE CIRCUIT COURT OF KING AND QUEEN COUNTY, June 20, 1974

THIS DEED was presented and with the certificates annexed admitted to record at 4:30 o'clock P. M., the additional tax imposed by Sec. 58-54.1 of the Code of Virginia, in the amount of $60.00, having been paid.

TESTE: Carey C. Hall, Clerk.

By: Martha D. Owen
Deputy Clerk.

A COPY:
TESTE: SAMUEL C. WINN, CLERK
By: Samuel C. Winn
CLERK

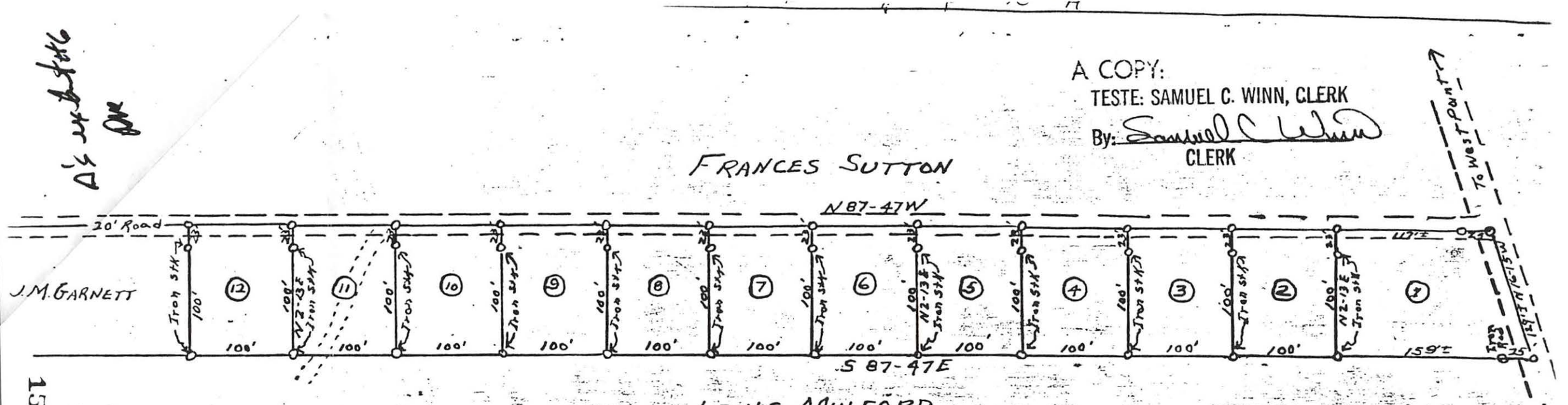


"A"

Surveyed Dec. 15, 1949
D.B. 40, page 77.
Teste: Carrie C. Hall, Deputy Clerk.

152

A COPY:
TESTE: SAMUEL C. WINN, CLERK
By: Samuel C. Winn
CLERK



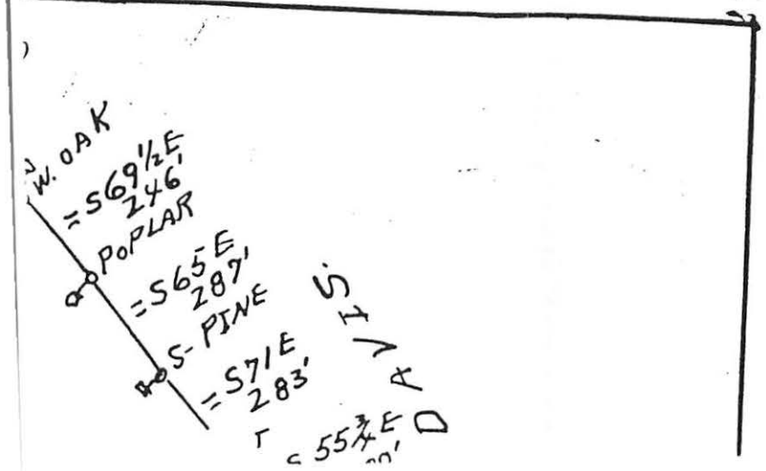
152

RESUBDIVISION
of
EAST PORTION OF LOT 4B, PROPERTY OF J.M. GARNETT, INTO LOTS AS SHOWN ABOVE.
BUENA VISTA DIST, KING & QUEEN Co., VA
SCALE 1" = 100' 16 MARCH, 1948.

R.H. Highland Certified Surveyor

"A"

Deed recorded Dec. 15, 1949
D.B. 40, page 77.
Teste: Carrie C. Hall, Deputy Clerk.



3. Fact of Main

D. B. 40, p. 7

THIS DEED, Made this 13th day of April, 1948, between J. M. GARNETT and MARGUERITE THOMAS GARNETT, his wife, parties of the first part; CHARLES LEONARD GARNETT, JR., SINGLE, party of the second part; W. G. WARING, TRUSTEE, party of the third part, and CITIZENS AND FARMERS BANK, a corporation chartered under the laws of the State of Virginia, party of the fourth part;

Tax 75
Fee 2.00
Tr 1.00
Rel 1.50
5.25
Paid
Del'd
C. L. Garnett Jr.
1/23/50
As exhibit #6 Eve

WITNESSETH: That the said parties of the first part for and in consideration of TEN DOLLARS, ($10.00), and other good and valuable consideration, the receipt whereof is hereby acknowledged, do grant with General Warranty unto the said party of the second part the following property, to-wit: All that certain lot or parcel of land in Buena Vista Magisterial District, King and Queen County, Virginia, shown and described as Lot No. Ten (10) on Re-Subdivision of east portion of Lot No. 4 of the property of J. M. Garnett made by R. H. Highland, Certified Surveyor, March 16, 1948, to be attached to and recorded with this deed; said lot fronting 100 feet on the 20-foot road forming the dividing line between the property of J. M. Garnett and Frances S. Sutton and running back between parallel lines 123 feet. The said property being a portion of the "Brookeshire" tract and a portion of the property conveyed to J. M. Garnett by deed from Frances S. Sutton and D. N. Sutton, her husband, dated August 1, 1944, recorded August 12, 1944, in the clerk's office of King and Queen County, Virginia, D. B. 34, p. 322.

The said party of the third part at the request of Citizens and Farmers Bank, the party of the fourth part, which said bank is the holder of the notes secured by the three deeds of trust hereinafter recited, doth unite in this deed for the purpose of releasing and doth hereby release the said property hereby conveyed from the lien of the three deeds of trust from J. M. Garnett and Marguerite Thomas Garnett, his wife, to W. G. Waring, Trustee, one dated July 30, 1946, recorded August 16, 1946, in the clerk's office of King & Queen County, Virginia, D. B. 36, p. 384, one dated February 15, 1947, recorded February 17, 1947, in the clerk's office of King and Queen County, Virginia, D. B. 37, p. 184, and the other dated February 21, 1948, recorded February 28, 1948, in the clerk's office of King and Queen County, Virginia, D. B. 38, p. 284.

And the said party of the third part doth release and convey with Special Warranty unto the said party of the second part any and all interest in and to said Lot No. 10 hereinabove more particularly described.

And the said party of the fourth part, the holder of the notes secured by the said three deeds of trust hereinabove recited, doth unite in this deed in evidence of its consent to the release of the three said deeds of trust as to the property hereby conveyed. This release on the part of the party of the third part and the party of the fourth part shall in no wise affect the lien of the three deeds of trust as to all of the rest and residue of the property therein conveyed.

The said parties of the first part covenant that they have the right to convey the said land unto the grantee; that they have done no act to encumber the said land, except as hereinabove recited; that the grantee shall have quiet possession of the said land free from all encumbrances except as hereinabove recited, and that they, the said parties of the first part, will execute such further assurance of the said land as may be requisite.

IN WITNESS WHEREOF, Citizens and Farmers Bank has caused this deed to be executed and delivered on its behalf by J. M. Lewis, its President, and its corporate seal to be hereunto affixed and attested by W. G. Waring, its Secretary; and,

WITNESS the following signatures and seals.

J. M. Garnett (SEAL).
Marguerite Thomas Garnett (SEAL).
W. G. Waring (SEAL).
TRUSTEE.
CITIZENS AND FARMERS BANK
By- J. M. Lewis, President.

##SEAL##

ATTEST:
Wm. G. Waring, Secretary.

STATE OF VIRGINIA,

COUNTY OF KING WILLIAM, to-wit:

I, Louise L. Medlin, a Notary Public in and for the County aforesaid, in the State of Virginia, do certify that J. M. Garnett and Marguerite Thomas Garnett, his wife, whose names are signed to the foregoing writing, bearing date on the 13th day of April, 1948, and W. G. Waring, whose name as Trustee is signed to the foregoing writing, bearing date on the 13th day of April, 1948, and J. M. Lewis and W. G. Waring, whose names as President and Secretary, respectively, of Citizens and Farmers Bank are signed to the foregoing writing, bearing date on the 13th day of April, 1948, have each acknowledged the same before me in my County and State aforesaid.

Given under my hand this 23 day of April, 1948.

Louise L. Medlin, Notary Public.

My commission expires Jan. 15, 1949.

VIRGINIA: IN THE CLERK'S OFFICE OF THE CIRCUIT COURT OF KING & QUEEN COUNTY,

December 15, 1949

This deed was presented and with the certificate and plat annexed admitted to record at 9 o'clock A. M.; it having thereon internal revenue stamps of the value of fifty-five cents duly cancelled.

TESTE:

H. C. Hall CLERK

BY M. S. Hall D. C.

(FOR PLAT, SEE PLAT BOOK NO. 3, PAGE 10"A")

A COPY:
TESTE: SAMUEL C. WINN, CLERK
By: Samuel C. Winn
CLERK

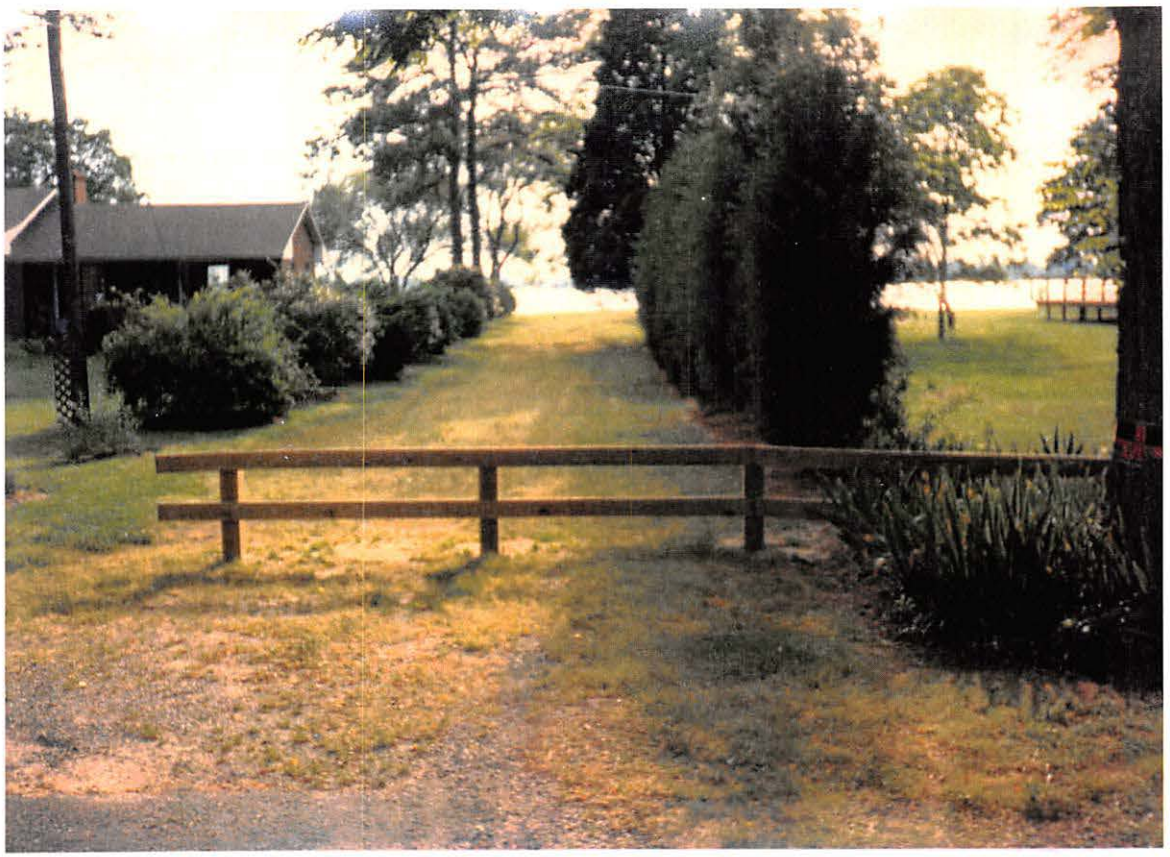
THIS DEED, Made this 6th day of December, 1949, between E. T. BRISTOW and RUBY L. BRISTOW, husband and wife, of King and Queen County, Virginia, parties of the first part, and D. N. SUTTON, TRUSTEE, of West Point, Virginia, party of the second part:

WITNESSETH: That the said parties of the first part do grant unto the said party of the second part the following property, to-wit: All those certain lots or parcels of land in Buena Vista Magisterial District, King and Queen County, Virginia, designated as Lots Nos. Five (5), Six (6) and Seven (7) on a certain plat or survey of R. H. Highland, Certified Surveyor, dated February 16, 1945, of "Subdivision of a portion of S. B. Milby's Land" which said plat is attached and made a part of a certain deed dated March 6, 1945, from Seth B. Milby and Rosa Lee Milby to Mollie Wilson and which said deed and plat are recorded in the clerk's office of the Circuit Court of King and Queen County, Virginia, in D. B. 35, p. 305, and plat book 2, page 17"C", respectively. The said lots are adjacent lots and each has a frontage on the highway of Fifty (50) feet and extends back in a north westerly direction between parallel lines one hundred fifty (150) feet to other lands of Seth B. Milby and Rosa Lee Milby. It being the same property conveyed to E. T. Bristow and Ruby L. Bristow, husband and wife, by deed from A. L. Burton and Mary Lelia Burton, husband and wife, dated February 21, 1947, recorded March 1, 1947, in the clerk's office of King and Queen County, Virginia, D. B. 37, p. 196.

The aforesaid property is conveyed subject to the restrictions contained in the deed from Seth B. Milby, et als, to A. L. Burton and Mary Lelia Burton which deed is

Defendant's Exhibit:

No. 8: Photograph



No. 9: Photograph

Plaintiff's Exhibit:

No. A: Photograph

No. B: Photograph

Plaintiff's Exhibit, continued:

No. C: Photograph

No. D: Photograph

H's exhibit 5D RC

Book 42, Page 206

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1.00
4.00
Paid
Mailed
Sutton
Clarke
& Pt.
Fa.
4/3/52

THIS DEED, Made this 18th day of March, 1952, between CHARLES LEONARD GARNETT, JR., and EVELYN J. GARNETT, his wife, of West Point, Virginia, and J. M. GARNETT and MARGUERITE THOMAS GARNETT, his wife, of King and Queen County, Virginia, parties of the first part, and WILLIAM DIXON JONES, of West Point, Virginia, party of the second part:

WITNESSETH: That the said parties of the first part for and in consideration of TEN DOLLARS, ($10.00), and other good and valuable consideration, the receipt whereof is hereby acknowledged, do grant with General Warranty unto the said party of the second part the following property, to-wit:All that certain lot or parcel of land in Buena Vista Magisterial District, King and Queen County, Virginia, shown and described as Lot No. Ten (10), on Re-Subdivision of east portion of Lot No. 4-B of the property of J. M. Garnett made by R. H. Highland, Certified Surveyor, March 16, 1948, attached to and recorded with the deed from J. M. Garnett et als to Charles Leonard Garnett, Jr., dated April 13, 1948, hereinafter recited; said lot fronting one hundred (100) feet on the 20-foot road forming the dividing line between the property of J. M. Garnett and Frances S. Sutton and running back between parallel lines one hundred twenty-three (123) feet. The said property being a portion of the "Brookeshire" tract and a portion of the property conveyed to J. M. Garnett by deed from Frances S. Sutton and D. N. Sutton, her husband, dated August 1, 1944, recorded August 12, 1944, in the clerk's office of King and Queen County, Virginia, D. B. 34, p. 322; and being the same lot conveyed to Charles Leonard Garnett, Jr., by deed from J. M. Garnett and wife dated April 13, 1948, recorded December 15, 1949, in the clerk's office of King and Queen County, Virginia, D. B. 40, p. 77. This property is conveyed subject to an easement 10-ft. wide over the northern portion thereof for a road for the benefit of this lot and all the other lots in this Re-Subdivision and the remaining property of J. M. Garnett. The grantee herein shall have 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-Subdiv

nett extending fr

on the west fo

right shall

part and

of a

STATE OF

COUNTY OF KI

It's exhibit 5D

Book 42, Page 206

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2.25
1.00
4.00
Paid
Mailed
Sutton
Clerk
King Wm.
Va.
4/3/52

THIS DEED, Made this 18th day of March, 1952, between CHARLES LEONARD GARNETT, JR., and EVELYN J. GARNETT, his wife, of West Point, Virginia, and J. M. GARNETT and MARGUERITE THOMAS GARNETT, his wife, of King and Queen County, Virginia, parties of the first part, and WILLIAM DIXON JONES, of West Point, Virginia, party of the second part:

WITNESSETH: That the said parties of the first part for and in consideration of TEN DOLLARS, ($10.00), and other good and valuable consideration, the receipt whereof is hereby acknowledged, do grant with General Warranty unto the said party of the second part the following property, to-wit:All that certain lot or parcel of land in Buena Vista Magisterial District, King and Queen County, Virginia, shown and described as Lot No. Ten (10), on Re-Subdivision of east portion of Lot No. 4-B of the property of J. M. Garnett made by R. H. Highland, Certified Surveyor, March 16, 1948, attached to and recorded with the deed from J. M. Garnett et als to Charles Leonard Garnett, Jr., dated April 13, 1948, hereinafter recited; said lot fronting one hundred (100) feet on the 20-foot road forming the dividing line between the property of J. M. Garnett and Frances S. Sutton and running back between parallel lines one hundred twenty-three (123) feet. The said property being a portion of the "Brookeshire" tract and a portion of the property conveyed to J. M. Garnett by deed from Frances S. Sutton and D. N. Sutton, her husband, dated August 1, 1944, recorded August 12, 1944, in the clerk's office of King and Queen County, Virginia, D. B. 34, p. 322; and being the same lot conveyed to Charles Leonard Garnett, Jr., by deed from J. M. Garnett and wife dated April 13, 1948, recorded December 15, 1949, in the clerk's office of King and Queen County, Virginia, D. B. 40, p. 77. This property is conveyed subject to an easement 10-ft. wide over the northern portion thereof for a road for the benefit of this lot and all the other lots in this Re-Subdivision and the remaining property of J. M. Garnett. The grantee herein shall have 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 parties of the first part 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.

It is covenanted and agreed that the property herein conveyed shall not be sold or leased to colored people.

The said parties of the first part covenant that they have the right to convey the said land unto the grantee; that they have done no act to encumber the said land, except as hereinabove recited; that the grantee shall have quiet possession of the said land, free from all encumbrances, except as hereinabove recited, and that they, the said parties of the first part, will execute such further assurance of the said land as may be requisite.

WITNESS the following signatures and seals.

Charles Leonard Garnett, Jr. (SEAL)
Evelyn J. Garnett (SEAL)
J. M. Garnett (SEAL)
Marguerite Thomas Garnett (SEAL)

STATE OF VIRGINIA,

COUNTY OF KING WILLIAM, to-wit:

State of Virginia, do certify that Charles Leonard Garnett, Jr., and Evelyn J. Garnett, his wife, and J. M. Garnett and Marguerite Thomas Garnett, his wife, whose names are signed to the foregoing writing, bearing date on the 18th day of March, 1952, have each acknowledged the same before me in my County and State aforesaid.

Given under my hand this 21 day of March, 1952.

Louise L. Medlin Notary Public.

My commission expires Jan. 14, 1953.

VIRGINIA: IN THE CLERK'S OFFICE OF THE CIRCUIT COURT OF KING & QUEEN COUNTY,

March 22, 1952

This deed was presented and with the certificate annexed admitted to record at 1 o'clock P. M.; it having thereon internal revenue stamps of the value of fifty-five cents duly cancelled.

TESTE:

Carey C. Hall CLERK

BY M. S. Hall D. C.

A COPY:
TESTE: SAMUEL C. WINN, CLERK
By Lurmen S. Forget
Dep. CLERK

See 58-6

THIS DEED, made this 14th day of November, 1951, between R. I. Jeffries, W. C. Marston and E. P. Drudge, Trustees of Poroporone Baptist Church of King and Queen County, Virginia, parties of the first part, and Douglas S. Mitchell, Trustee, party of the second part:

WITNESSETH: That the said parties of the first part do grant, with Special Warranty, unto the said party of the second part, the following described tracts or parcels of land together with buildings thereon situated near Shacklefords in Buena Vista Magisterial District, King and Queen County, Virginia, to-wit:

FIRST: A lot or

acre, more or less,

to King and Queen

is the same pr

Church by

Clerk's

25,

State of Virginia, do certify that Charles Leonard Garnett, Jr., and Evelyn J. Garnett, his wife, and J. M. Garnett and Marquerite Thomas Garnett, his wife, whose names are signed to the foregoing writing, bearing date on the 18th day of March, 1952, have each acknowledged the same before me in my County and State aforesaid.

Given under my hand this 21 day of March, 1952.

Louise L. Medlin Notary Public.

My commission expires Jan. 14, 1953.

VIRGINIA: IN THE CLERK'S OFFICE OF THE CIRCUIT COURT OF KING & QUEEN COUNTY,

March 22, 1952

This deed was presented and with the certificate annexed admitted to record at 1 o'clock P. M.; it having thereon internal revenue stamps of the value of fifty-five cents duly cancelled.

TESTE:

Carey C. Hall CLERK

BY M. S. Hall D. C.

A COPY:

TESTE: SAMUEL C. WINN, CLERK

By Lurman S. Longest

per. CLERK

See 1 58-6

THIS DEED, made this 14th day of November, 1951, between R. I. Jeffries, W. C. Marston and E. P. Drudge, Trustees of Poroporone Baptist Church of King and Queen County, Virginia, parties of the first part, and Douglas S. Mitchell, Trustee, party of the second part:

WITNESSETH: That the said parties of the first part do grant, with Special Warranty, unto the said party of the second part, the following described tracts or parcels of land together with buildings thereon situated near Shacklefords in Buena Vista Magisterial District, King and Queen County, Virginia, to-wit:

FIRST: A lot or parc el of land with buildings thereon containing one (1) acre, more or less, lying immediately on the public road leading from Shacklefords to King and Queen Courthouse adjoining other lands of Poroporone Baptist Church and is the same property conveyed R. I. Jeffries et als, Trustees for Poroporone Baptist Church by deed dated March 24, 1947, from Macie Cooke Bristow recorded in the Clerk's Office of the Circuit Court of King and Queen County, Virginia, on March 25, 1947, in Deed Book 37, page 225.

SECOND: A tract of land containing two (2) acres, more or less, lying immediately on the left hand side of Route #14, leading from King and Queen Courthouse to Shacklefords and bounded by said highway and also by Route #33, the lands of Oscar Boyer et als. It being the same property conveyed W. C. Marston et als, Trustees of Poroporone Baptist Church by deed dated May 24, 1947, from J. H. Coulbourn and wife, recorded in the Clerk's Office of the Circuit Court of King and Queen County, Virginia, on June 11, 1947, in Deed Book 37, page 420.

THIRD: A tract of land containing one (1) acres and being 70 yards square bounded by the old public road leading from Shacklefords to King and Queen Courthouse. It being the same property conveyed to George H. Crittenden et als, Trustees for Poroporone Baptist Church by deed dated December 15, 1879, from John B. Flannagan and wife, recorded in the Clerk's Office of the Circuit Court of King and Queen County, Virginia, on May 12, 1881, in Deed Book 6, page 487.

EXCEPTING from the tracts Nos. "SECOND" and "THIRD" above described the such portion

Book 59, Page 202

IN THE EVENT of the resignation, death, incapacity, disability, removal or absence from the State of both Trustees herein named, or should both refuse to act or fail to execute this trust when requested, then the holder of the note herein described is hereby authorized and empowered to appoint another Trustee in the place or stead of the ones herein named as provided by Section 59 of Title 26 of the Code of Virginia of 1950, which said Trustee when so appointed shall have all the rights, powers and authority and be charged with all the duties that are charged upon the Trustees herein named.

THIS DEED is made pursuant to the provisions of Sections 59 to 66, inclusive of Title 55 of the Code of Virginia of 1950 and shall be construed to impose and confer upon the parties hereto and the beneficiary hereunder all the rights, duties and obligations prescribed in said sections and in short form the said sections provide: Identification by Trustee's Signature; Renewal or Extension Permitted; Right of Anticipation Reserved; All Subject to Call Upon Default in Any Installment; Insurance Required $3,000.00.

WITNESS the following signatures and seals:

George W. Watkins (Seal)

Lucy C. Watkins (Seal)

STATE OF VIRGINIA

COUNTY OF ESSEX, to-wit:

I, John R. Ferry, a Notary Public in and for the County aforesaid in the State of Virginia, do hereby certify that GEORGE W. WATKINS and LUCY C. WATKINS, husband and wife, whose names are signed to the foregoing deed of trust, bearing date the 27th day of May, 1967, have this day personally appeared before me in my County aforesaid and acknowledged the same.

Given under my hand this 27th day of May, 1967.

My Commission Expires: January 24, 1971.

John R. Ferry Notary Public

VIRGINIA: IN THE CLERK'S OFFICE OF THE CIRCUIT COURT OF KING AND QUEEN COUNTY,

May 31, 1967

THIS DEED OF TRUST was presented and with the certificate annexed admitted to record at 12:00 o'clock M.

TESTE: Cary E. Hall, CLERK.

Gertrude Bank Trustee Deed

e 7.00
x 17.25
. 1.00
25.25

iled:
tton&Causey
Pt.,Va.
6/7/67

THIS DEED, Made this 23rd day of May, 1967, between ROBERT J. WALSH and ROBERTA H. WALSH, husband and wife, parties of the first part, and ROBERT L. FRASER, III and RUTH S. FRASER, husband and wife, as tenants by the entirety with right of survivorship as at common law, parties of the second part.

WITNESSETH: That the said parties of the first part, for and in consideration of Ten Dollars ($10.00), and other good and valuable consideration, cash in hand paid, the receipt whereof in full of the purchase price is hereby acknowledged, do grant with General Warranty of title unto the said parties of the second part, as tenants by the entirety with right of survivorship as at common law, the following

FIRST: All that certain lot or parcel of land in Buena Vista Magisterial District, King and Queen County, Virginia, being a part of the Re-Subdivision of east portion of Lot 4-B, property of J. M. Garnett, and further being the lot upon which the said Robert J. Walsh et al now resides, as shown and described upon plat of R.H. Highland, Certified Survryor, dated November 19, 1956, of "Survey of Lot and Building Location for J. M. Garnett as per Resubdivision of East Portion of Lot 4B" attached to the deed next hereinafter referred to, and more particularly described as follows: Beginning at a point in the center of a twenty (20) foot road corner with the property of Frances S. Sutton and Lot No. 12 of said J. M. Garnett Re-Subdivision; thence S. 2° 13' W. 23 feet to an iron pin; thence along the same course 100 feet along the line of Lot No. 12 to an iron pin corner with said Lot No. 12 and the property of John R. Johnson; thence N. 87° 47' W. along the line of the property of John R. Johnson 138 feet to an iron pin; thence N. 2° 13' E. along the line of the remaining property of J. M. Garnett 100 feet to an iron pin; thence along the same course 23 feet to a point in the center of said twenty (20) foot road; thence up said road S. 87° 47' E. 138 feet to the point of beginning. The said lot is bounded on the North by the property of Frances S. Sutton; on the East by Lot No. 12 of said Re-Subdivision owned by Raymond R. Kyger and Mary G. Kyger; on the South by the property of John R. Johnson; and on the West by the property of J. M. Garnett.

The property hereby conveyed is the same property conveyed to Robert J. Walsh and Roberta H. Walsh, husband and wife, by deed of J. M. Garnett and Marguerite Thomas Garnett dated December 6, 1956 and recorded in the Clerk's Office of the Circuit Court of King and Queen County, Virginia in Deed Book 47, page 264.

This property is conveyed subject to an easement 10 feet wide over the northern portion thereof for a road for the benefit of this lot and all the other lots in this Re-Subdivision and the remaining property of J. M. Garnett. The grantees herein shall have the right to use the strip of land ten feet wide over and along the northern boundary of this lot and over and along the northern boundary of all other lots in this 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 parties of the first part and the owners of all the land now owned by J. M. Garnett and the owners of all the lots in the Re-Subdivision herein recited.

SECOND: The parties of the first part convey unto the parties of the second part all their one-half undivided interest in and to an existing well, pump and all pipes, motors, electric wiring, pump house and all other attachments, fixtures, facilities and equipment used in connection therewith presently located generally in the southeastern corner of the property of J. M. Garnett in Buena Vista Magisterial Disdrict, King and Queen County, Virginia, being the western most lot of the Re-Subdivision of the East portion of Lot 4-B of "Brookeshire", which well and appurtenances are adjacent to the property of John R. Johnson. The said parties of the first part further grant unto the parties of the second part a perpetual easement which shall hereafter run with the land for a sufficient amount of land to maintain a pump-house and also for the purpose of transmitting water by means of underground pipes from the well and for such electric wires, conduits or poles as may be necessary for the transmission of electric current to the pump. The parties of the second part, their [illegible] and assigns shall have the right to enter upon such of the

pump, well and other appurtenances as set out herein.

It is the intention of the parties of the first part that they convey unto the parties of the second part their one-half undivided interest in and to the well and appurtenances and being the same interest that was conveyed to the parties of the first part by agreement dated July 10, 1958 and recorded in the Clerk's Office of the Circuit Court of King and Queen County, Virginia, in Deed Book 49, page 177.

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

WITNESS the following signatures and seals.

Robert J. Walsh (SEAL)
Robert J. Walsh

Roberta H. Walsh (SEAL)
Roberta H. Walsh

STATE OF VIRGINIA,

COUNTY OF KING WILLIAM, to-wit:

I, George H. Guy,Jr., a Notary Public, in and for the County aforesaid, in the State of Virginia, do certify that ROBERT J. WALSH and ROBERTA H. WALSH, husband and wife, whose names are signed to the foregoing writing, bearing date the 23rd day of May, 1967, have each acknowledged the same before me in my County aforesaid.

Given under my hand this 30th day of May, 1967.

My commission expires: April 5, 1969.

George H. Guy, Jr. Notary Public

VIRGINIA: IN THE CLERK'S OFFICE OF THE CIRCUIT COURT OF KING AND QUEEN COUNTY,

June 1, 1967

THIS DEED was presented and with the certificate annexed admitted to record at 12:00 o'clock M., it having thereon internal revenue stamps of the value of $12.65 duly cancelled.

TESTE: Corey C. Hall, CLERK.

A COPY:
TESTE: SAMUEL C. WINN, CLERK
By: Lucille S. Longest
Dep CLERK

e 7.00
x 10.50
17.50
paid
iled:
tton&Causey
Pt.,Va.
6/2/67

THIS DEED, Made this 31st day of May, 1967, between ROBERT L. FRASER, III, and RUTH S. FRASER, husband and wife, parties of the first part, and JOHN PAUL CAUSEY, TRUSTEE, of West Point, Virginia, party of the second part:

WITNESSETH: That the said parties of the first part do grant unto the said party of the second part the following property, to-wit:

FIRST: All that certain lot or parcel of land in Buena Vista Magisterial District, King and Queen County, Virginia, being a part of the Re-Subdivision of east portion of Lot 4-B, property of J. M. Garnett, and further being the lot purchased by the parties of the first part from Robert J. Walsh, et al, as shown and described upon plat of R. H. Highland, Certified Surveyor, dated November 19, 1956, of "Survey of Lot and Building Location for J. M. Garnett as per Resubdivision of East Portion

VIRGINIA:

IN THE CIRCUIT COURT OF KING AND QUEEN COUNTY

CASPER B. HAYNES, JR. and WANDA F. HAYNES
HOWARD J. COOK, JR. and CHARLENE R. COOK
CHARLES L. GARNETT, JR. and EVELYN J. GARNETT
MICHAEL Y. DAY and DORIS B. DAY
ROBERT L. FRASER, III and RUTH S. FRASER
JOSEPHINE ERWIN
JOHN S. HILTON and PATRICIA L. HILTON
JAMES M. CARLISLE and KATHRYN CARLISLE
GARLAND M. PIERCE and PAULA K. PIERCE
MICHAEL S. DUVALL

Plaintiffs,

v. Chancery No: 92-26

RAECHAL P. CHANEY

Defendant.

REPORT OF COMMISSIONER IN CHANCERY

Pursuant to a decree of reference made and entered in this Court on the 9th day of November, 1992, by John M. Folkes, Circuit Court Judge, whereby the said cause was referred to the undersigned Commissioner in Chancery who gave notice to the parties that on the 28th and 29th days of April, 1993, at 9:00 A.M., at the Law Offices of L. McCauley Chenault, Route 360 East, Aylett, Virginia, he would proceed to execute the said order.

WHEREFORE, plaintiffs, James M. Carlisle and Kathryn Carlisle, John S. Hilton and Patricia Hilton, Garland M. Pierce and Paula Pierce, Michael Y. Day and Doris B. Day, Michael S. DuVall, Charles L. Garnett, Jr. and Evelyn J. Garnett, Howard J. Cook, Jr. and Charlene R. Cook, Josephine Erwin, Robert L. Fraser, III and Ruth

S. Fraser, appeared both in person and by their counsel J. Flippo Hicks and C. Flippo Hicks. Casper B. Haynes, Jr. and Wanda F. Haynes appeared by their counsel. Defendant, Raechal P. Chaney, appeared both in person and by her counsel, I. Leake Wornom, Jr.

WHEREUPON, your Commissioner in Chancery duly examined the witnesses produced before him, taking and reducing their testimony to writing in the form of depositions, which are herewith returned and made a part of this report. Documentary proofs were also produced before your Commissioner in Chancery, which are herewith returned. Also provided your Commissioner in Chancery was Plaintiff's Memorandum of Argument, Brief of Defendant and Plaintiff's Reply Brief, all of which are herewith returned.

UPON due consideration of all of which, your Commissioner in Chancery respectfully submits the following report.

1. The following allegations contained in the petition for declaratory judgment are found to be true:

a. There is an actual controversy existing between the Plaintiffs and Defendant regarding the rights of the parties hereto to the use of a certain tract of land. This tract of land is bounded on the south by shrubs to the right of Josephine Erwin's home, on the north by cedar trees to the left of Raechal Chaney's property, on the east by State Route 667, and on the west by the low water mark of the York River.

b. Plaintiffs are the owners of parcels of land in the Re-Subdivision as follows:

i. Casper B. Haynes, Jr., and Wanda F. Haynes are owners of a 1/3 acre known as lot 1, recorded in Deed Book 93, page 31, in the Clerk's Office of the Circuit Court of King and Queen County, Virginia.

ii. Howard J. Cook, Jr. and Charlene R. Cook are owners of a 1/4 acre known as lot 12, recorded in Deed Book 77, page 33, in the Clerk's Office of the Circuit Court of King and Queen County, Virginia.

iii. Charles L. Garnett, Jr. and Evelyn J. Garnett are owners of a 1/4 acre known as lot 11, recorded in Deed Book 50, page 145, in the Clerk's Office of the Circuit Court of King and Queen County, Virginia.

iv. Michael Y. Day and Doris B. Day are owners of a 1/4 acre known as lot 9, recorded in Deed Book 100, page 416, in the Circuit Court Clerk's Office of King and Queen County, Virginia.

v. Robert L. Fraser, III, and Ruth S. Fraser are owners of 1 acre, which is in the eastern part of the property formerly owned by J. M. Garnett, recorded in Deed Book 59, page 202, in the Clerk's Office of the Circuit Court of King and Queen County, Virginia.

vi. Josephine T. Erwin is the owner of 3/4 acre in the western part of the property formerly owned by J. M. Garnett, recorded in Deed Book 71, page 607 in the Clerk's Office of the Circuit Court of King and Queen County, Virginia.

vii. John S. Hilton and Patricia L. Hilton are owners of a 1/4 acre known as lot 2 and 1/4 acre known as lot 3, recorded in Deed Book 73, page 141, in the Clerk's Office of the Circuit Court of King and Queen County, Virginia.

viii. James M. Carlisle and Kathryn Carlisle are owners of 1/2 of lot 5 and 1/2 acre known as lot 6, 1/2 acre known as lots 7 and 8, recorded in Deed Book 124, page 346, in the Clerk's Office of the Circuit Court of King and Queen County, Virginia.

ix. Garland M. Pierce and Paula K. Pierce are owners of lot 4 and 1/2 of lot 5, recorded in Deed Book 92, page 419, in the Clerk's Office of the Circuit Court of King and Queen County, Virginia.

x. Michael DuVall is the owner of lot 10, recorded in Deed Book 113, page 534, in the Clerk's Office of the Circuit Court of King and Queen County, Virginia.

c. Defendant, Raechal Chaney, is the owner of a certain lot or parcel in King and Queen County, Virginia, known as lot 11 in the Sutter subdivision and more particularly described in a deed of sale dated May 20, 1991, between David N. Sutton, Jr., Frances S. Oliver, and Raymond E. Oliver, and the Defendant, Raechal Chaney, of record in the Clerk's Office of the Circuit Court of King and Queen County, Virginia, in Deed Book 122, page 705.

d. Plaintiffs were unaware of any controversy regarding the alleged easement until on or about April 15, 1991, when the Defendant constructed, or caused to be constructed, a fence

restricting Plaintiffs' access to the tract of land that is the subject of this dispute.

e. Said easement being the right to use a strip of land 10 feet wide extending from the public highway on the East to the low water mark of the York River on the west for purposes of access to the York River and to the public highway, all of which is more definitely set forth in a certain deed dated March 18, 1952 from J. M. Garnett and wife to Charles L. Garnett, Jr., recorded in the Clerk's Office of the Circuit Court of King and Queen County, Virginia, on March 22, 1952, in Deed Book 42, page 204.

2. The deed by and between Charles Leonard Garnett, Jr. and Evelyn J. Garnett to J.M. Garnett and Marguerite Thomas Garnett States:

> The grantees herein shall have 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 the low water mark of the York River on the west for purposes of access to the York River and to public highway.

a. The following plaintiffs have the above clause in their deeds.

i. Casper B. Haynes, Jr. and Wanda F. Haynes

ii. Howard J. Cook, Jr. and Charlene R. Cook

iii. Charles L. Garnett, Jr. and Evelyn J. Garnett

iv. Michael Y. Day and Doris B. Day

v. Robert L. Fraser, III and Ruth S. Fraser

vi. James M. Carlisle and Kathryn Carlisle

vii. Garland M. Pierce and Paula K. Pierce

b. The following plaintiffs predecessors' deeds contain the above clause:

i. Josephine T. Erwin

ii. John S. Hilton and Patricia L. Hilton

iii. Michael DuVall

3. There is an actual controversy existing between the Plaintiffs and Defendant regarding the right of the parties hereto to the use of a certain tract of land. This tract of land is bounded on the south by shrubs to the right of Josephine Erwin's home, on the north by cedar trees to the left of Raechal Chaney's property, on the east by State Route 667, and on the west by the low water mark of the York River. The plaintiffs claim an easement over said tract by prescription.

In Virginia, the law does not lightly presume the existence of a prescriptive easement and the burden is on a party claiming one to prove its elements clearly. To establish a private right of way over lands of others by prescription, the claimant must prove that his/her 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 it passes, and that the use has continued for a period of at least twenty (20) years. Williams v. Green, 111 Va. 205, 206, 68 S.E. 253, 254 (1910). Accord Burks Brothers of Virginia, Inc. v. Jones, 232 Va. 238, 245-46, 349 S.E.2d 134, 139 (1986). Where there has been an open, visible, continuous and unmolested use of a road across the land of another for at least twenty years, the use will

be presumed to be under claim of right, and places upon the owner of the servient estate the burden of rebutting this presumption by showing that the use was permissive, and not under claim of right. Rives v. Gooch, 157 Va. 661, 663, 162 S.E. 184, 184 (1932). Accord Martin v. Proctor, 227 Va. 61, 65, 313 S.E.2d 659, 662 (1984).

a. The following Plaintiffs have testified that their use of the disputed tract has been open, visible, continuous, and unmolested:

i. Jimmy M. Carlisle testified to so using the disputed tract since 1981 when he began renting the tract of land he now owns from Jack and Elizabeth Gardner, the previous owners.

ii. Patricia L. Hilton testified to so using the disputed tract of land since January 1963, when her parents James T. Lynn and Mildred W. Lynn acquired the piece of property Patricia and her husband now own.

iii. Paula K. Pierce testified to so using the disputed tract of land since May 1982, when she acquired the property from Alex and Louise Lowery.

iv. Michael Y. Day testified to so using the disputed tract since May 1985, when he acquired the property from Marion E. Kyger.

v. Michael S. DuVall testified to so using the disputed tract since January 1989, when he acquired the property form American Development Corporation.

vi. Evelyn J. Garnett testified to so using the disputed tract since February 1959.

vii. Howard J. Cook, Jr. testified to so using the disputed tract since April 1976.

viii. Josephine T. Erwin testified to so using the disputed tract since 1974.

ix. Robert L. Fraser, III and Ruth S. Fraser testified to so using the disputed tract since May 1967.

b. That the twenty (20) years of open, visible, continuous and unmolested use required by Virginia law for the granting of a prescriptive easement was satisfied, was verified by Robert L. Fraser, III and Ruth S. Fraser as follows:

i. That the predecessors in interest of the property now owned by Jimmy and Kathryn Carlisle, Bill and Pat George, who acquired their former property prior to 1967, and Jack and Ann Gardner, who acquired their former property in 1972, both so used the disputed property.

ii. That the predecessor in interest of the property now owned by Garland M. Pierce and Paula K. Pierce, Alex Lowery, who acquired his former property prior to 1967, so used the disputed property.

iii. That the predecessor in interest of the property now owned by Michael Y. Day and Doris B. Day, Marion Kyger, who acquired her former property prior to 1967, so used the disputed property.

iv. That the predecessors in interest of the property now owned by Michael S. DuVall; American Development Corporation, which acquired their former property in 1988; Jessie

D. and T. B. Alfriend, who acquired the property in 1981; and AvaLou and Dixon Jones, who acquired their property in 1952, so used the disputed property.

v. That the predecessors in interest of the property now owned by Howard J. Cook, Jr. and Charlene R. Cook; Norman and Carolyn Dinwiddie, who acquired their former property in 1972; Esther G. and James E. Jarrell, who acquired their former property in 1972, and Lillian B. and Raymond R. Kyger, who acquired their former property in 1969, all so used the disputed property.

vi. That the predecessors in interest of the property now owned by Josephine T. Erwin, C. Clay and Joyce C. Holland, who acquired their former property prior to 1974, and Blanton B. and Bertha T. Thrift, who acquired their former property in 1973, both so used the disputed property.

c. Robert L. Fraser, III and Ruth S. Fraser testified that the use of the disputed tract by each of the above mentioned predecessors in interest was open, visible, continuous, and unmolested for a period of at least twenty (20) years.

4. Each of the Plaintiffs in this case testified that at no time did any of them request or receive permission to use the disputed tract. Further, all the Plaintiffs testified that at no time did the Defendant or one of her predecessors in interest give instructions to cease their activity on the alleged easement.

a. Robert L. Fraser, III and Ruth S. Fraser testified that all predecessors in interest to the current property owners never requested or received permission to so use the disputed land.

b. G. T. Wilson, Jr. (a certified land surveyor), defendant's first witness, testified that the ten-foot right-of-way called for in the Plaintiffs' deeds was actually obstructed by the shrubs adjacent to the Erwin house in 1984 when he first made a survey. Mr. Wilson further testified that he had seen people both walk and drive down to the river using the disputed tract, that he had informed Mr. Sutton of said use and that Mr. Sutton was aware of said use.

c. Nelson Sutton, Jr., defendant's witness, prior owner of the property Raechal Chaney now owns, testified that neither he nor his mother had ever given any of the Plaintiffs or their predecessors permission to use the disputed tract. Mr. Sutton further testified that he was aware that the plaintiffs were using the disputed tract to reach the river and that he never objected to their use of said tract of land.

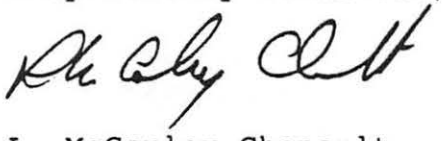
d. Gregg Nance, defendant's witness, who assisted Raechal Chaney in purchasing the property, testified that he had observed the disputed tract prior to Raechel Chaney's purchase of property, that while building Ms. Chaney's house he had observed people using the disputed tract to gain access to the York River, and that at the time Ms. Chaney purchased her property it was obvious the disputed tract was being used for travel.

5. The Plaintiffs have acquired a prescriptive easement in the tract of land bounded on the south by a row of shrubs, on the north by a row of cedar trees, bounded on the east by State Route 667, and bound on the west by the low water mark of the York River.

For a better description of said easement see Plaintiff's Exhibit B and Defendant's Exhibit 8 both of which were entered into evidence at the Commissioner's Hearing on April 28, 1993.

6. The Defendant, Raechal P. Chaney, has wrongfully constructed the fence which currently blocks access to the above-noted prescriptive easement as the Defendant has no right to block or partially obstruct Plaintiff's access.

Respectfully submitted,



L. McCauley Chenault
Commissioner in Chancery

VIRGINIA:

IN THE CIRCUIT COURT OF KING AND QUEEN COUNTY

CASPER B. HAYNES, JR. and	)	
WANDA F. HAYNES,	)	
HOWARD J. COOK and	)	
CHARLENE R. COOK,	)	
CHARLES L. GARNETT, JR. and	)	
EVELYN J. GARNETT,	)	
MICHAEL Y. DAY and	)	
DORIS B. DAY,	)	
ROBERT L. FRASER, III and	)	Chancery Number: 92-26
RUTH S. FRASER,	)	
JOSEPHINE ERWIN,	)	
JOHN S. HILTON and	)	
PATRICIA L. HILTON,	)	
JAMES CARLISLE and	)	
CATHERINE CARLISLE,	)	
GARLAND M. PIERCE and	)	
PAULA K. PIERCE,	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
RACHEL P. CHANEY,	)	
Defendant.	)	

PLAINTIFF'S MEMORANDUM OF ARGUMENT

The sole issue in this case is whether the Plaintiffs have acquired an easement by prescription over that strip of land running from State Route 687 in a westerly direction to the low water mark of the York River between the shrubs on the south alongside the home

of Erwin and the cedar trees on the north which are along the property of the Defendant. The Supreme Court of Virginia has been consistent in its holdings as to what is necessary for a person or persons to establish a prescriptive easement. As the Court said in Pettus v. Keeling, 352 S. E. 2d 321 (Va. 1987), "there is no dispute among the parties upon the basic law of prescriptive easements applicable to this case. In order to establish a private right-of-way over lands of others by prescription, the claimant must prove 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 it passes, and that the use has continued for a period of twenty years." It is interesting that the appellant in this case, Reginald H. Pettus, was a lawyer and practiced law in Charlotte County. The Court said that it is an issue of exclusiveness, "however, when each landowner asserts his own right, independent of all others, to use the way, and no rights are dependent 'upon the common enjoyment of similar rights by others,' prescriptive rights may arise. This is because when each user independently asserts his right to enjoy the way for himself, 'such use is exclusive even though others assert similar rights for themselves.' " The Court continued to state in the Pettus case, "relying on the belief that he had a right to use the road, Keeling continued to use it exclusively until Pettus blocked the way in 1977". The Court continued "furthermore, the evidence shows that use of the roadway was with the knowledge and acquiescence of the defendants." On the issue of the width of right-of-way, the Court held in the Pettus case that "We likewise reject defendants' contention that the trial court erred in holding that the easement was 14 feet wide, extending seven feet on

either side of the center line of the dirt road. Where, as here, the right-of-way depends on user, the width of the way and the extent of the servitude is measured by the character of the use."

In a more recent Supreme Court case, McNeil v. Kingrey, 377 S. E.2d 430 (Va. 1989), the Court held that the Kingreys' "evidence showed that, beginning at least in 1930 and up until 1972, they regularly and continuously used and maintained the dirt road with the knowledge but without the permission of its owner, Callie Campbell, under the belief that they had a right to do so....Vera York MacMackin, Gertrude York's daughter, who lived in York's house near the state highway, testified that the Yorks made use of the dirt road under the belief that they had a right to do so, with Campbell's knowledge and without objection or permission."

Evidence as set forth in the transcript of the Commissioner's Hearing held on April 28, 1993 clearly contains the following undisputed, unrebutted testimony.

Jimmy Monroe Carlisle testified that he had deeded access all the way to the low water mark of the river and he used this area quite frequently, the whole area between the bushes and the trees, at a minimum, a couple of times a month, that he though he had a claim of right, that he never hid his use if it, and that he never got permission from anybody except what was in the deed. (Transcript, pages 23-24.)

Patricia L. Hilton testified that since 1974, when she bought the property, until the fence was put up by the Defendant, she went down to the river using the piece of property straight from the road to the river and used it continuously since 1974, that she moved into

the home she now lives in with her parents when she was nine years old in January of 1963, that she used the area from the road to the river several times a week in the summer and once a month during the winter, that the property which was used was bordered on the north by the cedar trees, on the south by the brush, from the state road to the river, and that their use and the use of people renting their home was uninterrupted from 1963. (Transcript, pages 32-37.)

Paula Kyle Pierce testified that she purchased her home on May 26, 1982 from Alex and Louise Lowery, that Mr. Lowery took Mrs. Pierce and her husband down to the end of the road and showed them the area between the trees, that she never asked anybody who owned the land on the other side of the road for permission to use it, that nobody objected to her using it, and that she used the whole area from the cedar trees and the walnut tree on the north over to the bushes on the south. (Transcript, pages 44, 51, and 53.)

Michael Y. Day testified that he had used the grassy strip extending from the paved road to the York River that lies with the shrubs on the left and the cedar trees located on the right-hand side since 1985 when he purchased his property, that he never obtained permission to do so from anybody, either in writing or verbally. (Transcript, pages 58 and 60.)

Michael S. Duvall stated that he had used the area between the bushes and the trees since he purchased his property in 1989. (Transcript, pages 67-68.)

Plaintiff Evelyn J. Garnett testified that when she purchased her property in 1959, there was a dirt road which went all the way from State Route 661 to the river and that

from 1959 until the present, she had used the area which is now bordered by shrubs on the left and cedars on the right. She stated that she used the road as the right-of-way to the river, that she used the road because she had been told the road was the right-of-way, that the road has been in the same location all these years, that she had used the road uninterrupted since 1959, and that the public does not use the road. She further testified that neither Nelson Sutton nor his mother ever told her that she could not use the road, nor did she ever ask permission because she thought the road was a right-of-way. (Transcript, pages 75-79.)

Howard J. Cooke, Jr., Special Agent of the State Police, testified that he bought his property in 1976 and that since that time, he has used the area between the shrubs on the left-hand side and a row of cedars on the right-hand side, that he was there at least once or twice when D. Nelson Sutton, Jr. was present and that he had walked over and talked to Mr. Sutton, that Mr. Sutton had never given him permission to use the area as a right-of-way, that he did not think he needed permission, and that Mr. Sutton never told him not to use that area. (Transcript, pages 86-90.) Mr. Cooke, upon further questioning from the Commissioner, stated that he had been using the area between the cedar trees on the right and the shrubs on the left even though it was more than ten feet wide. Mr. Cooke said that it was his understanding that his property was 120 feet and that 20 feet had been given to the State for highway maintenance and that, based on this, he had ten feet from the center line to use as well as the ten feet on the other side of the center line because the person who owned the property on the other was using his ten feet as well, that they were both

using each other's ten feet as mutual usage, and that he was using the entire twenty feet under a right of claim. (Transcript, pages 93-94 and 99.)

Plaintiff Josephine Erwin, who has lived in the last house on Route 687 for eighteen years, stated that it was her understanding that the right-of-way was from the large cedar tree over to the bushes for all the people up the street to use to go to the water, that next to the large cedar tree, the little cedar trees were situated in a perfect line, that she did not plant the shrubberies next to her house as they were there when she bought the house eighteen years before. (Transcript, pages 102-105.) In response to questioning by the Commissioner, Ms. Erwin siad that it was her understanding that the right-of-way down to the river was between the bushes on the left and the big cedar tree on the right. (Transcript, pages 113-114.)

Robert L. Fraser, III testified that he moved into his home on July 1, 1967, that with the cedar trees on the right and the bushes on the left, he had consistently used roughly the middle of that area to the river and had probably used the whole area one time or another, that he used it on a regular basis once or twice a week to walk down to the river, that in the years past he sometimes kept a small boat at the end of the area in question, that his use of the area has been uninterrupted, that he has never asked anybody for permission to use it, and that he had been open about his use of the area. (Transcript, pages 116-118.) Mr. Fraser also testified as to the use of the area by prior owners of the properties of other Plaintiffs as a right-of-way to the river since he moved there in 1967. (Transcript, pages 119-130.) Upon cross-examination Mr. Fraser reiterated that he had been using the property

from the road to the river between the hedges and the cedar trees with the understanding that that was where the right-of-way was based upon what his deed stated. (Transcript, pages 130-131.) Mr. Fraser said that there was a cottage on the adjacent property, formerly owned by the Sutton family, which is now owned by the Defendants and that there was usually a Fourth of July picnic at which time the Suttons used the cottage and that it was readily apparent, when the cottage was in use, that the area between the bushes and the trees was used as access to the river by him and the other owners of properties adjacent to him. (Transcript, pages 135-136.)

The evidence of the Plaintiff established that there was an open, visible, continuous, and uninterrupted use of the easement across the land of another for at least twenty (20) years. In Causey v. Lanigan, 159 S.E.2d 655 (Va. 1968), the Court says that when such evidence has been established, "the use will be presumed to be under claim of right and places upon the owner of the servient estate the burden of rebutting this presumption by showing that the use was permissive, not under a claim of right." The Defendant's evidence did not rebut the claim of right and, in fact, the Defendant's evidence reaffirmed the Plaintiffs' claim.

The Defendant's first witness, G. T. Wilson, Jr., a certified land surveyor who lived in the area, testified that the ten-foot right-of-way called for in the Plaintiffs' deeds was actually obstructed by the shrubs adjacent to the Erwin house in 1984 when he first made a survey. He said he had seen people going down to the river and that as they were not walking through the shrubs, they had to be walking on the Sutton side of the line according

to his survey. (Transcript, page 162.) Mr. Wilson further stated that he would not dispute that people drive down there as he had seen them do it and that they did not drive through the Erwin's shrubs. He said that the boundary lines were self-explanatory and he did not see any need for a boundary line agreement between the Suttons and the Erwins even though the easement called for could not be used because of the shrubs. He said that, in his opinion, there was no concern on the part of Mr. Sutton, that he imagined that Mr. Sutton knew that people were walking down to the river, that he had discussed it with him, and that Mr. Sutton was well aware that people were walking down there. (Transcript, pages 162-164.)

Now being used by people a access

D. Nelson Sutton, Jr. owned the property before its sale to the Defendant and his mother owned it prior to that. He stated that a large cedar tree, shown in the photographs introduced into evidence, had been on the property for many years and that the shrubs alongside the Erwin house had been there many years, even before the Erwins owned it, more than twenty years. When asked if he or his mother or anyone on behalf of his mother ever advised the friends and neighbors that they had permission to use their property, Mr. Sutton stated "No, no, not that I can recall, unless there may have been, through the years, some requests to use the whole property [over where the cottage was] for a function of some kind." He further admitted that he knew that people were going to the river along this easement, that he was very happy for his friends, his neighbors, and people he knew to use their property anytime, and that he never objected to anyone using it. (Transcript, pages 181-184, 187-188.)

The Defendant did not testify, but Gregg Nance, who assisted her in acquiring her property and building a home on it, testified that he had a survey which was basically the same plot that Mr. D. Nelson Sutton had which G. T. Wilson had made. He stated that if there was a ten-foot right-of-way there, the shrubbery was planted in it, that he had seen the property before Mrs. Chaney purchased it and there was a cleared area between the cedar trees and the shrubbery, that the area was maintained just it appeared in the pictures, that, when he was building the house, he saw people going down to the river through that area, that he got electricity from Plaintiff Josephine Erwin and there was no discussion concering right-of-way at that time, and that when the Defendant purchased the property, one could see that there was use between the cedar trees and the bushes. (Transcript, pages 196-198)

Defendant's Exhibit 7, which was used for "dedication of 1,359.82' of road 40.00' wide being 20.00' each side of the center line of Merry Point Lane running westerly from Route 661 in Buena Vista District of King & Queen County, Virginia", shows the existing road at the time the plat was made in June of 1964 by Frank L. Minor. This plat, introduced by the Defendant, clearly shows why the Plaintiffs and their predecessors used the road as a right-of-way and claimed to use it as a matter of right and, further, verifies how the road would have gone if it had continued on down to the river. It shows that the existing road was almost entirely across the boundary line on the Sutton property and the Plaintiffs testified that they simply continued on it down the road to the river. The plat also shows a turnaround, virtually all on the Sutton's, now Defendant's, property, which was necessary for the highway department to have for its maintenance vehicles.

In Causey v. Lanigan (id.), the owner of the servient estate, Miss Lanigan, argued that "...the evidence in the case showed that the common driveway was 'permitted by neighborly sufferance or acquiescence, not by any adverse claim of right or hostile act.' " The Court, reversing the lower court and ruling against Miss Lanigan, said that "...the record shows that use of the driveway by complainant and her predecessors in title was exclusive, continuous, uninterrupted, and with knowledge and acquiesence of the defendant and her predecessors in title for more than twenty years. Under these circumstances,...a rebuttable presumption arose that the use was under a claim of right. The defendant, owner of the servient estate, offered no evidence to rebut this presumption by showing that the use was permissive and not under a claim of right. Hence, complainant acquired an easement by prescription as a matter of law."

We have the same evidence in this case. The Defendant's predecessor in title, D. Nelson Sutton, Jr. and before that, his mother, never gave permission to use the road but did so by "neighborly sufferance or acquiesence". The Court has held that the law in Virginia says that this is not permissive use and therefore the users have acquired the use of the right-of-way by claim of right. The burden was on the Defendant to show that permission had been given to the Plaintiffs or an agreement existed permitting the Plaintiffs to use the right-of-way between the cedar trees on the north and the bushes on the south of the westerly end of the State Route 687 down to the low water mark of the York River. Not only did the Defendant not assume this burden, absolutely no evidence was produced showing any such permission or agreement.

We respectfully contend that the Plaintiffs have shown by clear and convincing evidence that they and their predecessors in title for more than twenty years have used the entire area between the cedar trees on the north and the bushes on the right from State Route 687 down to the low water mark of the York River. We further contend that such use was adverse under claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiesence of the owner of the land over which the use occurred and that this use has been continuous for a period of at least twenty years. Pettus v. Keeling, (id.)

Respectfully submitted,
HAYNES, et al.

By _____
Of Counsel

C. Flippo Hicks (VSB #9002)
J. Flippo Hicks (VSB #31021)
Ayers & Stolte, P. C.
710 North Hamilton Street
Richmond, Virginia 23221
804-358-4731

CERTIFICATE

This is to certify that a true copy of the foregoing Plaintiffs' Memorandum of Argument was mailed, postage prepaid, to I. Leake Wornom, Jr., Esquire, Patten, Wornom & Watkins, L. C., 12350 Jefferson Avenue, Suite 360, Newport News, Virginia 23602 this 27th day of August, 1993.

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VIRGINIA; IN THE CIRCUIT COURT OF KING AND QUEEN COUNTY

CASPER B. HAYNES, JR., et al

Plaintiffs

v. CHANCERY NO. 92-26

RACHEL P. CHANEY,

Defendant

BRIEF OF DEFENDANT

Basically there is no dispute over the facts. The land over which the easement is claimed was originally owned by Nelson Sutton's parents They conveyed the southerly 1/2 of the entire rectangular shaped parcel of land to J. M. Garnett. (Exhibit D-1) J. M. Garnett then proceeded to subdivide the parcel of land conveyed to him into building lots. (Exhibit D-6).

At the time the subdivision plat was recorded there was a 20 ft. dirt road leading from the state road, (as shown on Exhibit D-7, that exhibit being the plat showing the dedication of a 40 ft. parcel of land to the state when the state took it over). The center line of the road being the dividing line between the property of Sutton and Garnett. The road stopped at the defendant's land (see Exhibits D-7, D-10, D-18 and D-5).

G. T. Wilson, Jr., Engineer, identified and pointed out on his survey (Exhibit D-5) the location of the pin that is the same pin shown on the dedication plat (Exhibit D-7) showing that the road ended adjacent to defendant's land.

All the original deeds conveying the lots in the Garnett Subdivision granted a right of way for access over a 10 ft. strip of land, being the 10 ft. immediately

adjacent to the northerly property line of Garnett, for access to the York River and contained the following language:

> "The grantee herein shall have the right to use the strip of land 10-feet 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 from 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 owners of all the lots in the Re-Subdivision herein recited, and the owners of all the land formerly owned by J. M. Garnett."

The original deed to what is now the property of Mrs. Erwin (Exhibit D-3) contained language in the legal description which imposes the right of way for access as an encumbrance on her lot. The legal description being as follows:

> BEGINNING at a point at the low water mark of the York River, <u>corner with the property of Frances S. Sutton</u>; thence down the low water mark of the York River in a Southerly direction, 125 feet, more or less, to a point on said low water mark, corner with the property of John R. Johnson; thence S. 87° 47' E. 355 feet, more or less, along the line of John R. Johnson to an iron pipe, corner with the property of Robert Frazier; thence N. 2° 13' E. along the line of Robert Frazier, 100 feet to an iron pin; thence along the same course 23 feet to a point in the center of a private road, <u>corner with the property of Frances S. Sutton</u>; thence N. 87° 47' W. <u>along the line of Frances S. Sutton</u>, 380 feet, more or less, to the low water mark of the York River, the point of beginning.

Thus it is clear that the <u>northerly</u> boundary line abuts the property of Frances S. Sutton. The conveyance was expressly subject to the following easement as set forth in the legal description:

> "...and particular reference is made to an easement 10 feet wide over and along the northern boundary thereof for the benefit of all the lots in the J. M. Garnett Re-Subdivision for access to the York River."

When Mr. Sutton subdivided his land (Exhibit D-14) he granted no access to the York River.

When the state acquired 20 ft. on either side of the division line for a public road 40 ft. wide, the access easement given to the lot owners was thus moot because it was in the road after the state acquired the property. The continuance of the easement over the land of Mrs. Erwin is the access all the plaintiffs have to the river. Thus the plaintiffs already have an easement for access to the York River 10 ft. in width. Apparently in this litigation they are attempting to acquire an additional easement by prescription over the defendant's land. The Motion for Declaratory Judgment asked for a 10 ft. easement by prescription, but apparently they are now asking for an easement by prescription of unknown width over the parcel between the cedar trees and Mrs. Erwin's lot. (The record shows the cedar trees were planted within the last 10 to 12 years).

The law in Virginia is clear on the proof required to establish an easement by prescription, that is, "a claimant must show by clear and convincing evidence, that use of the way was adverse, under a claim of right, exclusive, continuous, 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 twenty years." Umbarger v. Phillips 240 Va. 120 (1990). Counsel submits the evidence completely fails to meet this burden of proof. Considering the evidence, there is no question the plaintiffs walked over the land in question as access to the York River. On plaintiffs' testimony this use was made under

the claim of easement and right of way for access granted them in their deed. The mere fact that they walked over the wrong land instead of the easement they possess is certainly insufficient to create a prescriptive easement. At no time was the use adverse to Mr. Sutton, or his family, predecessors in title to the defendant. Conversely it was permissive. In Martin v. Proctor 227 Va. 61., the Court stated that if use is permissive in its inception it will never ripen into a hostile right.

The plaintiffs have attempted to show that the use was exclusive to the neighborhood, however, the plaintiffs' own evidence indicates otherwise. Mr. Nance basically put up the fence due to people driving over his land and using his yard to turn around in to go back out.

Counsel for the plaintiffs refer to the parcel of land in question as a "road". The evidence shows it was never a road. The photographs introduced do not show how the land looked 20 years ago, all parties agreeing it was grown up in weeds. The cedar trees were not there until approximately 12 years ago. It is submitted that the three cases cited by counsel for the plaintiffs are not pertinent to the facts in this case. In Pettus, that involved a road that was in existence and used as access for logging. Causey involved a driveway constructed on two residential lots abutting each other. In McNeil there was an existing road. In the case at bar there never was any existing road or right of way to the York River over the defendant's land.

The other items mentioned in the Motion for Declaratory Judgment as actual controversies have apparently been abandoned by the plaintiffs as no evidence was introduced to support same.

I call the Commissioner's attention to paragraphs 5 and 6 of the Motion for Declaratory Judgment. Counsel submits that the plaintiffs, or their predecessors in title, cannot arbitrarily move an existing easement onto the land of the defendant which is apparently what they are attempting to do. If Mrs. Erwin has blocked access to the York River over the 10 ft. easement, the appropriate remedy is an action against her to remove any obstructions in the easement that prohibit the 10 ft. access rights that all plaintiffs have.

Counsel further submits that even if these plaintiffs did not have an existing right of way for access to the York River, the evidence still falls far short of establishing an easement by prescriptive use failing to meet the required criteria. All parties testified that they were aware that they had access to the river over a 10 ft. strip of land and were walking across Mr. Sutton's land based on the right of way they had. The mere fact that they walked over the wrong land cannot relocate an easement.

RESPECTFULLY SUBMITTED,

RAECHAL P. CHANEY

By:_____
Of Counsel

I. Leake Wornom, Jr., p.d.
PATTEN, WORNOM & WATKINS, L.C.
12350 Jefferson Avenue, Suite 360
Newport News, VA 23602

CERTIFICATE

I hereby certify that on the 29 day of September, 1993, I mailed the original of the foregoing Brief of Defendant to L. McCauley Chenault, Commissioner in Chancery, P. O. Box 40, Aylett, VA 23009 and a copy to J. Flippo Hicks, Esq., Counsel for Plaintiffs, Seven South Adams Street, Richmond, VA 23220.

VIRGINIA:

IN THE CIRCUIT COURT OF KING AND QUEEN COUNTY

CASPER B. HAYNES, JR. and	)	
WANDA F. HAYNES,	)	
HOWARD J. COOK and	)	
CHARLENE R. COOK,	)	
CHARLES L. GARNETT, JR. and	)	
EVELYN J. GARNETT,	)	
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ROBERT L. FRASER, III and	)	Chancery Number: 92-26
RUTH S. FRASER,	)	
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PAULA K. PIERCE,	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
RACHEL P. CHANEY,	)	
Defendant.	)	

PLAINTIFFS' REPLY BRIEF

The Plaintiffs will not re-state or re-argue the facts in this case as the depositions speak for themselves. The Plaintiffs do make the following rebuttal argument relative to the two cases cited by the Defendant in her Brief in support of her position.

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IOND, VIRGINIA
04) 358-4731

The first case, Umbarger v. Phillips, 240 Va. 120 (1990), actually supports the Plaintiffs' claim to prescriptive easement. In that case, the Supreme Court said "here the Phelpses' use of the driveway was shown to have been open, notorious, visible, and uninterrupted for almost forty years. These facts establish the presumption and imply the requisite level of knowledge on the part of Umbarger". Id. 126. The facts in the Plaintiffs' case show undisputedly that the right-of-way to the water over the property now owned by the Defendant has been used for approximately forty (40) years, that the use was open, notorious, visible, and uninterrupted. Two of the Defendant's witnesses, the surveyor, Wilson, and the prior owner, Sutton, testified that they saw the Plaintiffs and their predecessors in title using the right-of-way to the river. Several Plaintiffs testified as to motor vehicles using the right-of-way to the river.

There is one major difference in the facts in Martin v. Proctor, 227 Va. 61 from the facts in the present case, i.e. permission. The original owner divided his property into lots and conveyed some of the lots to his children, including his daughter, Marian Proctor, and her husband who were the Plaintiffs-Complainants in the suit to establish prescriptive easement. The Supreme Court reaffirmed its prior holding that "when the use originates by permission, it is presumed to continue with permission unless the conduct of the user is sufficient to apprise the owner of the servient tenement that the user is exerting a claim adverse and hostile to his rights". Id. 65. The Court continued that "the alley was opened by the owner of lot 2 for the benefit of his children and 'for his own use and convenience'". Wall v. Landman, *supra*. "The alley was used by the family 'in common with its use by

LAW OFFICES
AYERS & STOLTE, P.C.
HAMILTON PROFESSIONAL BUILDING
710 N. HAMILTON STREET
RICHMOND, VIRGINIA
(804) 358-4731

others'." Witt v. Creasey, *supra*. "Wornom was Mrs. Proctor's father, and use by a child of land owned by its parent is regarded as permissive, absent 'some "clear, definite, or unequivocal notice" of the child's intention to assert exclusive ownership'." Id. 66. D. Nelson Sutton testified that, to his knowledge, his mother never gave the Plaintiffs permission to use the right of way across her land as an access to the river and while he knew the Plaintiffs were using the right-of-way when he owned the property and before that time, when he was looking after the property for his mother, he, being a good friend and neighbor, did not object, but he never gave them permission. It is clear from the case law in Virginia that failure to object when you know that someone is using the right-of-way across your property is not the same as giving permission and, in fact, the testimony of D. Nelson Sutton, the Defendant's witness and predecessor in title, sustains the Plaintiffs' case. Sutton's testimony did nothing to overcome the evidence of the Plaintiffs that the use was open, notorious, visible, and uninterrupted, and thus, hostile and adverse to the Suttons.

Respectfully submitted,
HAYNES, et al.

By _____
Of Counsel

C. Flippo Hicks (VSB #9002)
J. Flippo Hicks (VSB #31021)
Ayers & Stolte, P. C.
710 North Hamilton Street
Richmond, Virginia 23221
804-358-4731

CERTIFICATE

This is to certify that a true copy of the foregoing Plaintiffs' Reply Brief was mailed, postage prepaid, to I. Leake Wornom, Jr., Esquire, Patten, Wornom & Watkins, L. C., 12350 Jefferson Avenue, Suite 360, Newport News, Virginia 23602 this 7th day of October, 1993.

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LAW OFFICES
AYERS & STOLTE, P.C.
HAMILTON PROFESSIONAL
BUILDING
710 N. HAMILTON STREET
RICHMOND, VIRGINIA
(804) 358-4731

VIRGINIA; IN THE CIRCUIT COURT OF KING & QUEEN COUNTY

CASPER B. HAYNES, JR., et al,

Plaintiffs

v. Chancery No: 92-26

RAECHAL P. CHANEY,

Defendant

DEFENDANT'S EXCEPTIONS TO REPORT OF COMMISSIONER IN CHANCERY

COMES NOW the Defendant, Raechal P. Chaney, and files the following exceptions to the Report of the Commissioner in Chancery:

1) The Commissioner erroneously concluded that the Plaintiffs established and are entitled to an easement by prescription over Defendant's land.

2) The evidence fails to prove that the use was sufficient to establish an easement by prescription under the laws in the Commonwealth of Virginia.

(3) The Commissioner incorrectly interpreted the law in Virginia, the use being permissive, non-exclusive and under no claim of right.

(4) The Commissioner erroneously concluded that the land in question was a road when in fact the evidence established there never was a road, merely a part of Defendant's land.

(5) The Commissioner erroneously concluded under the facts and law in this case that an easement by prescription had been established by the Plaintiffs.

WHEREFORE, the Defendant says that the Court should over rule the report of the Commissioner and enter judgment for the Defendant and dismiss the motion filed by the Plaintiffs for prescriptive easement.

RAECHAL P. CHANEY

By: _____
Of Counsel

_____
I. Leake Wornom, Jr., p.d.
PATTEN, WORNOM & WATKINS, L.C.
12350 Jefferson Avenue, Suite 360
Newport News, VA 23602

CERTIFICATE OF SERVICE

I hereby certify that on the 10 day of November, 1993 I mailed a true copy of the foregoing pleading to counsel for the Plaintiffs, J. Flippo Hicks, Esq., Ayers & Stolte, 710 North Hamilton Street, Richmond, VA 23221.

_____

FILED
1:00 P.M.
NOV 12 1993
Hiram F. Ingram
Dep. Clerk

PATTEN, WORNOM & WATKINS, L.C.
ATTORNEYS AND COUNSELORS AT LAW
PATRICK HENRY CORPORATE CENTER
SUITE 360
12350 JEFFERSON AVENUE
NEWPORT NEWS, VIRGINIA 23602
(804) 249-1881
FACSIMILE (804) 249-3242

NEAL J. PATTEN
I. LEAKE WORNOM, JR.
THOMAS R. WATKINS
DONALD N. PATTEN
ROBERT R. HATTEN
JOSEPH H. LATCHUM, JR.
BENJAMIN A. WILLIAMS, III
E. THOMAS COX

WILLIAM M. MARTIN, III
AVERY T. WATERMAN, JR.
JOSEPH M. DURANT
JONATHAN A. SMITH-GEORGE

JAMES F. THORNTON, JR.
GARY R. WEST
SOUTH T. PATTERSON
JAMES H. SHOEMAKER, JR.

December 21, 1993

The Honorable Samuel Taylor Powell, III
New Kent Circuit Court
P.O. Box 98
New Kent, VA 23124

Re: Haynes, et. al., v. Chaney, Chancery No. 92-26

Dear Judge Powell,

On behalf of the defendant, Rachael Chaney, I respectfully request that you reconsider the decision you rendered in this matter on December 13, 1993 granting the plaintiffs a prescriptive easement over the property of the defendant.

Throughout these proceedings, the defendant has contended that the plaintiffs have not proved by clear and convincing evidence that they are entitled to a prescriptive easement over her property. Specifically, the defendant has argued that "[t]he mere fact that [the Plaintiffs] walked over the wrong land instead of the easement they possess is certainly insufficient to create a prescriptive easement. At no time was the use adverse to Mr. Sutton, or his family, predecessors in title to the defendant." Brief of Defendant, p. 4.

As you are undoubtedly aware, the intention to hold or use someone else's property adversely is an indispensable element of a prescriptive easement. The plaintiffs in this action uniformly testified that their use of the disputed parcel was premised on their belief that it was

the parcel was in fact their deeded right-of-way. See Transcript of Commissioner's Hearing, Testimony of Jimmy Monroe Carlisle at p. 24; Testimony of Patricia Lynn Hilton at pp. 35-36, 39; Testimony of Paula Kyle Pierce at pp. 44-45, 51; Testimony of Michael Y. Day at pp. 59, 61-62; Testimony of Michael S. DuVall at pp. 69, 71; Testimony of Evelyn J. Garnett at pp. 76, 80; Testimony of Howard June Cook at pp. 93-93, 97; Testimony of Josephine Erwin at pp. 113-114; and Testimony of Robert L. Fraser, III at pp. 117, 131. In fact, many of the plaintiffs testified that they shown the disputed parcel by the previous owner of their property or their realtor and told that this was the easement contained in their deed. See Transcript of Commissioner's Hearing, pp. 28, 44-45, 59, and 76. The first time that any of the plaintiffs realized that the land they were using to gain access to the river was not the easement granted in their deeds was when the instant lawsuit was filed.

The plaintiffs mistaken belief that they were using the deeded right-of-way cannot form the basis of a prescriptive easement because they lack the intention to possess and use the land adversely. See Clatterbuck v. Clore, 130 Va. 113, 122 (1921); Christian v. Bulbeck, 120 Va. 74, 102-114 (1916); Schaubuch v. Dillemuth, 108 Va. 86 (1908); see also Umbarger v. Phillips, 240 Va. 120, 125 (1990)(copies are attached to facilitate your review). As the Court in Schaubuch, 108 Va. at 89, succinctly stated:

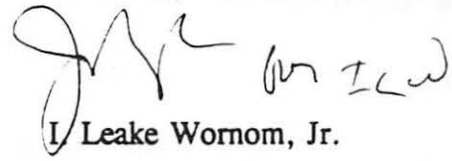
> . . . where a person occupies and possesses the land of another, through a misapprehension or mistake as to the boundaries of his land, with no intention to claim as his own that which does not belong to him, but only intends to claim to the true line, wherever it may be, he does not hold adversely.

Here, the record is devoid of any evidence, explicit or implicit, that the plaintiffs intentionally

claimed an easement over Mr. Sutton's land, the predecessor in title to the defendant. Although raised and argued before the Commissioner, this issue was not addressed in his report and therefore, I would ask that you reconsider your decision in light of the foregoing precedent and deny the plaintiffs' a prescriptive easement.

Very truly yours,

PATTEN, WORNOM & WATKINS, L.C.



I. Leake Wornom, Jr.

ILW/eh

cc: J. Flippo Hicks, Esq. (with enclosures)

LAW OFFICES
AYERS & STOLTE
A PROFESSIONAL CORPORATION
HAMILTON PROFESSIONAL BUILDING
710 N. HAMILTON BUILDING
RICHMOND, VIRGINIA 23221-2035
(804) 358-4731
FAX (804) 358-6206

CHARLES E. AYERS, JR.
SCOTT DAVID STOLTE
CYNTHIA A. MUNCIE
J. FLIPPO HICKS

OF COUNSEL
J. P. BOYLE*
C. FLIPPO HICKS

*ADMITTED IN GEORGIA

FILE NO. LX93-0444

December 27, 1993

The Honorable Samuel Taylor Powell, III
New Kent Circuit Court
P.O. Box 98
New Kent, Virginia 23124

Re: Haynes, et al. v. Chaney, Chancery No. 92-26

Dear Judge Powell,

On behalf or the Plaintiffs I request that you not reconsider the decision rendered in the above referenced matter, and allow them to keep the prescriptive easement you granted them on December 13, 1993.

In response to opposing counsel's letter dated December 21,1993, I concur that the plaintiffs' would not have a right to a prescriptive easement if they where operating on a mistaken belief that they were using a deeded right-of-way, because there would then be no intention to posses and use the land adversely, but the evidence taken at the Commissioner's Hearing does not fit into that scenario. Mr. Cook in his testimony at the Commissioner's Hearing stated that he knew he had a ten foot deeded easement but that he used the entire area between the bushes on the left and the cedar trees on the right, and that he knew that area was larger than ten feet (See Transcript of the Commissioner's Hearing, pp. 86-88). Therefore he and the rest of the plaintiffs had the intention of adversely possessing the land not contained within that ten foot deeded right-of-way.

In closing I would renew my request that you not reconsider your previous decision.

With warmest regards,

J. Flippo Hicks

cc: I. Leake Worman, Jr.

JUDGES

G. DUANE HOLLOWAY
P.O. BOX 371
YORKTOWN, VIRGINIA 23690
804-898-0073

WILLIAM L. PERSON, JR.
P.O. BOX 385
WILLIAMSBURG, VIRGINIA 23187
804-229-4711

JOHN M. FOLKES
P.O. BOX 282
GLOUCESTER, VIRGINIA 23061
804-693-1358

SAMUEL T. POWELL, III
P.O. BOX 98
NEW KENT, VIRGINIA 23124
804-966-9525

Commonwealth of Virginia

NINTH JUDICIAL CIRCUIT

COURTS

CHARLES CITY COUNTY
GLOUCESTER COUNTY
JAMES CITY COUNTY
KING AND QUEEN COUNTY
KING WILLIAM COUNTY
MATHEWS COUNTY
MIDDLESEX COUNTY
NEW KENT COUNTY
YORK COUNTY
CITY OF POQUOSON
CITY OF WILLIAMSBURG

January 19, 1994

Mr. L. McCauley Chenault
P. O. Box 40
Aylett, VA 23009

RE: Haynes v Chaney
Circuit Court: King & Queen County
Chancery Number 92-26
Report of Commissioner In Chancery

Dear Mr. Chenault:

I have received your Commissioner's report and conducted a hearing upon exceptions filed to the report. I would appreciate if you would respond to two additional questions in a supplemental report to the Court.

The questions are as follows:

1) Did the persons claiming a prescriptive easement assert their claim through a misapprehension or mistake as to the location of their easement, with no intention to claim as their own that which does not belong to them, but only intending to claim the true easement.

2) If the persons claiming the prescriptive easement did enter and use the claimed easement by mistake did the claimants subsequently form the requisite intent either expressly or by implication from conduct that is unequivocal and inconsistent with any other inference, to claim the easement adversely.

You may supplement your report based solely on evidence presented at your previous hearing or you may allow additional evidence to be presented on this issue at your discretion.

I enclose a copy of letters to the Court from counsel dated December 21, 1994, and December 27, 1994, for your information. In addition, you may wish to review the exceptions to the Commissioner's report and briefs filed therein.

Upon notice to the parties, you may allow additional Memorandum of law to be filed with the Commissioner before you complete and file your report.

Very truly yours,

Samuel T. Powell, III
Judge

STPIII/dac

Enclosures

xc: J. Flippo Hicks (without enclosures)
A. Leake Worman, Jr. (without enclosures)

VIRGINIA:

IN THE CIRCUIT COURT OF KING & QUEEN COUNTY

CASPER B. HAYNES, JR. and WANDA F. HAYNES
HOWARD J. COOK, JR. and CHARLENE R. COOK
CHARLES L. GARNETT, JR. and EVELYN J. GARNETT
MICHAEL Y. DAY and DORIS B. DAY
ROBERT L. FRASER, III and RUTH S. FRASER
JOSEPHINE ERWIN
JOHN S. HILTON and KATHRYN CARLISLE
GARLAND M. PIERCE and PAULA K. PIERCE
MICHAEL S. DUVALL,

Plaintiffs,

v. Chancery No. 92-26

RAECHAL P. CHANEY,

Defendant.

SUPPLEMENTAL REPORT

Your Commissioner respectfully submits this supplemental report to the Report of Commissioner in Chancery filed with the Court on the 5th day of November, 1993, in the Clerk's Office of the Circuit Court of King and Queen County, Virginia.

The answer to the two questions propounded to the Commissioner by the Court, dated January 19, 1994, are as follows:

1. The persons claiming a prescriptive easement did not assert their claim through a misapprehension or mistake as to the location of their easement, with no intention to claim as their own that which did not belong to them, but only intending to claim the true easement.

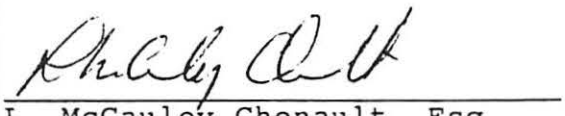
2. The persons claiming the prescriptive easement did enter and use the claimed easement forming the requisite intent expressly and by implication from conduct that is unequivocal and inconsistent with any other inference, to claim the easement adversely.

At this time, the Commissioner does not feel that it is necessary to hold another hearing on this matter. All evidence presented at the April, 1993 hearing indicated that the plaintiffs had acquired an easement by prescription. Each petitioner, testified that he/she knew he/she was deeded a ten foot easement but that he/she had used the entire area located between the row of shrubs and the row of cedar trees and that said area was well over ten feet in width. In using the entire area between the shrubs and cedars, plaintiffs formed the requisite intent to claim the easement adversely.

Should your Honor feel that additional evidence is necessary, your Commissioner will conduct additional hearings or request additional memorandum of law to be filed.

L. McCAULEY CHENAULT

COMMISSIONER IN CHANCERY



L. McCauley Chenault, Esq.
Chenault Law Offices
Post Office Box 40
Aylett, Virginia 23009
(804) 769-3003

mac\report.pwl

VIRGINIA: IN THE CIRCUIT COURT OF KING & QUEEN COUNTY

CASPER B. HAYNES, JR., et al,

Plaintiffs

v. Chancery No: 92-26

RAECHAL P. CHANEY,

Defendant

DEFENDANT'S EXCEPTIONS TO
SUPPLEMENTAL REPORT OF COMMISSIONER IN CHANCERY

COMES NOW the Defendant, Raechal P. Chaney, who, without waiving her previously filed exceptions to the Report of the Commissioner, files the following exceptions to the Supplemental Report of the Commissioner in Chancery:

1) The Commissioner erroneously concluded that the plaintiffs, in claiming a prescriptive easement over the defendant's land, did not assert their claim through a misapprehension or mistake as to the location of their easement, with no intention to claim as their own that which did not belong to them. The evidence clearly shows that each of the Plaintiffs testified that their use of the disputed parcel was premised on their belief that the parcel was in fact their deeded right of way. See Transcript of Commissioner's Hearing, Testimony of Jimmy Monroe Carlisle at p. 24; Testimony of Patricia Lynn Hilton at pp. 35-36, 39; Testimony of Paula Kyle Pierce at pp. 44-45, 51; Testimony of Michael Y. Day at pp. 59, 61-62; Testimony of Michael S. DuVall at pp. 69, 71; Testimony of Evelyn J. Garnett at pp. 76, 80; Testimony of Howard June Cook at pp. 93-94, 97; Testimony of Josephine Erwin at pp. 113-114; and Testimony of Robert L. Fraser, III at pp. 117-131. The first time that any of the plaintiffs realized that the land they were using to gain access to the river was not the easement granted in their deeds was when the instant lawsuit was filed.

2) The Commissioner incorrectly concluded that each of the plaintiffs testified that they used the entire area between the shrubs and cedar trees with the intent to possess as their own. This conclusion is not supported by the record and is contrary to the testimony of the witnesses. See exerpts of testimony cited above.

3) Accordingly, the Commissioner erroneoulsy concluded that the plaintiffs established and are entitled to an easement by prescription over defendant's land

WHEREFORE, the Defendant respectfully requests that the Court over rule the supplemental report of the Commissioner and enter judgment for the Defendant and dismiss the motion filed by the Plaintiffs for prescriptive easement.

RAECHAL P. CHANEY

By: _____ for IW
Of Counsel

_____ for IW

I. Leake Wornom, Jr., p.d.
PATTEN, WORNOM & WATKINS, L.C.
12350 Jefferson Avenue, Suite 360
Newport News, VA 23602

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of February, 1994 I mailed a true copy of the foregoing pleading to counsel for the Plaintiffs, J. Flippo Hicks, Esq., Ayers & Stolte, 710 North Hamilton Street, Richmond, VA 23221.

_____ for IW

LAW OFFICES
AYERS & STOLTE
A PROFESSIONAL CORPORATION
HAMILTON PROFESSIONAL BUILDING
710 N. HAMILTON BUILDING
RICHMOND, VIRGINIA 23221-2035
(804) 358-4731
FAX (804) 358-6206

CHARLES E. AYERS, JR.
SCOTT DAVID STOLTE
CYNTHIA A. MUNCIE
J. FLIPPO HICKS

OF COUNSEL
J. P. BOYLE*
C. FLIPPO HICKS

*ADMITTED IN GEORGIA

March 17, 1994

FILE NO. LX93-0444

The Honorable Samuel Taylor Powell, III
New Kent Circuit Court
P.O. Box 98
New Kent, Virginia 23124

RE: Haynes, et al. v. Chaney
Chancery No. 92-26

Dear Judge Powell:

By this letter, I submit to you that the Supplemental Report of the Commissioner is factually and legally correct. Each of the plaintiffs testified that they were deeded a ten foot wide right-of-way. The plaintiffs further testified that the area they actually used was an area bounded by bushes on the left and cedar trees on the right. See Testimony of Patricia Lynn Hilton at pp. 38-9; Testimony of Paula Kyle Pierce at p. 50; Testimony of Michael Y. Day at p. 61; Testimony of Michael S. Duvall at pp. 70-1; Testimony of Evelyn J. Garnett at p. 79; Testimony of Howard June Carter at p. 93; Testimony of Josephine Erwin at p. 110; Testimony of Robert L. Fraser, III at p. 130. This area bounded by the bushes and cedar trees is wider than ten feet.

The defendant's exception claims that the plaintiff's failed to show that they used the strip land in question adversely. Quite to the contrary, when use of the way has been open, continuous and uninterrupted for the prescribed period, the prima facie presumption is that the use is adverse and under a claim of right. Umbarger v. Phillips, 240 Va. 120, 124 (1990); Causey v. Lanigan, 208 Va. 587, 159 S.E.2d 655 (1968); Rives v. Gooch, 157 Va. 661, 162 S.E. 184 (1932)

The Honorable Samuel Taylor Powell, III
March 17, 1994
Page 2

I respectfully request that this Honorable Court enter an Order accepting the Commissioner's Report and finally ending this controversy.

With warmest regards,

J. Flippo Hicks

cc: I. Leake Wornom, Esquire

VIRGINIA: At a Circuit Court of the County of King and Queen, at the Courthouse of such Court, in such County, on Monday, the 13th day of June, in the year 1994.

PRESENT: The Honorable Samuel Taylor Powell, Judge.

VIRGINIA:

IN THE CIRCUIT COURT OF KING AND QUEEN COUNTY

CASPER B. HAYNES, JR. and	)	
WANDA F. HAYNES,	)	
HOWARD J. COOK and	)	
CHARLENE R. COOK,	)	
CHARLES L. GARNETT, JR. and	)	
EVELYN J. GARNETT,	)	
MICHAEL Y. DAY and	)	
DORIS B. DAY,	)	
ROBERT L. FRASER, III and	)	Chancery Number: 92-26
RUTH S. FRASER,	)	
JOSEPHINE ERWIN,	)	
JOHN S. HILTON and	)	
PATRICIA L. HILTON,	)	
JAMES CARLISLE and	)	
CATHERINE CARLISLE,	)	
GARLAND M. PIERCE and	)	
PAULA K. PIERCE,	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
RACHEL P. CHANEY,	)	
Defendant.	)	

ORDER

This cause came on May 27, 1994 to be again heard upon the papers formerly read and order entered herein, whereby the Plaintiff's Petition for Declaratory Judgment, the Commissioner's report, and Defendant's objections thereto were argued by counsel and considered upon its merits;

LAW OFFICES
AYERS & STOLTE, P.C.
HAMILTON PROFESSIONAL BUILDING
710 N. HAMILTON STREET
RICHMOND, VIRGINIA
(804) 358-4731

UPON CONSIDERATION WHEREOF, it appearing to the court that the Commissioner's report shows that the Plaintiffs have acquired a prescriptive easement, it is hereby

ADJUDGED, ORDERED, and DECREED:

1. That the Plaintiffs have an easement as described in the Commmissioner's report;

2. That the cost for the Commissioner's report be split equally between the parties;

3. That the temporary injunction entered be quashed thereby enabling the Plaintiffs to use the land within the easement;

4. That the fence erected by the Defendant be removed by the Defendant within thirty (30) days of entry of this Order; and

5. That this Order be recorded at the Plaintiff's expense in the Circuit Court Clerk's Office and indexed in the grantor's index under the Defendant's name and in the grantee's index under the Plaintiff's name.

Let the Clerk send certified copies of this Order to all counsel.

ENTER: 6 / 13 / 94

Judge

LAW OFFICES
AYERS & STOLTE, P.C.
HAMILTON PROFESSIONAL BUILDING
710 N. HAMILTON STREET
RICHMOND, VIRGINIA
(804) 358-4731

I ASK FOR THIS:

_____ p.q.

C. Flippo Hicks (VSB #9002)
J. Flippo Hicks (VSB #31021)
Ayers & Stolte, P. C.
710 North Hamilton Street
Richmond, Virginia 23221

SEEN: and objected to: Exceptions to be Forwarded to Clint by June 13

_____ p.d.

I. Leake Wornom, Jr.
Patten, Wornom & Watkins, L. C.
12350 Jefferson Avenue, Suite 360
Newport News, Virginia 23602

g:\private\ann\docs\pleadng\haynes.ord

LAW OFFICES
AYERS & STOLTE, P.C.
HAMILTON PROFESSIONAL BUILDING
710 N. HAMILTON STREET
RICHMOND, VIRGINIA
(804) 358-4731

Haynes v. Chaney, Chancery No. 92-26

EXCEPTIONS TO JUDGE POWELL'S ORDER
dated May 27, 1994

The defendant objects to entry of this Order granting the plaintiffs a prescriptive easement over the defendant's land because the plaintiffs failed to meet their burden of proving that their use of the disputed parcel was adverse to the plaintiff. Both Judge Powell and the Commissioner erroneously concluded that the plaintiffs did not assert their claim of a prescriptive easement over the defendant's property through a misapprehension or mistake as to the location of their easement but instead used the defendant's land with an intent to possess as their own. The evidence clearly shows that each of the plaintiffs' use of the disputed parcel was premised on their belief that the parcel was in fact their deeded right of way. See Transcript of Commissioner's Hearing, pp. 24, 35-36, 39, 44-45, 51, 59, 61-62, 69, 71, 76, 80, 93-94, 97, 113-114, 117-131. In fact, many of the plaintiffs testified that they were shown the disputed parcel by the previous owner of their property or their realtor and told that this was the easement contained in their deed. See Transcript of Commissioner's Hearing, pp. 28, 44-45, 59, and 76. The first time that any of the plaintiffs realized that the land they were using to gain access to the river was not the easement granted in their deeds was when the defendant erected a fence blocking access to the disputed parcel. Since each of plaintiffs' use of the disputed parcel was premised on a misapprehension as to the location of the true easement, none of the plaintiffs evinced any intention to adversely possess the defendant's land, a prerequisite to the finding of a prescriptive easement.

The defendant also objects to the entry of this Order because the plaintiffs' only alleged prescriptive easement ten (10) foot in width in their pleadings. This Order and the report of the Commissioner adopted by Judge Powell erroneously grants the plaintiffs a prescriptive easement of approximately fifty (50) feet in width.

6/13/94

IN THE SUPREME COURT OF VIRGINIA

RACHEL P. CHANEY,

Appellant,

v. Record No. 941562

CASPER B. HAYNES, JR. and WANDA F. HAYNES,
HOWARD J. COOK and CHARLENE R. COOK,
CHARLES L. GARNETT, JR. and EVELYN J. GARNETT,
MICHAEL Y. DAY and DORIS B. DAY,
ROBERT L. FRASER, III and RUTH S. FRASER,
JOSEPHINE ERWIN,
JOHN S. HILTON and PATRICIA L. HILTON,
JAMES CARLISLE and CATHERINE CARLISLE,
GARLAND M. PIERCE and PAULA K. PIERCE,

Appellees.

ASSIGNMENTS OF ERROR

1. The Circuit Court erred in granting the Plaintiffs a prescriptive easement over the property of the Appellee, Rachel P. Chaney, because the Plaintiffs uniformly testified that they used Chaney's property under the mistaken belief that her land was their deeded right-of-way and, therefore, they failed to prove with clear and convincing evidence that their use of Chaney's property was adverse.

2. Since the Plaintiffs only requested a ten foot wide prescriptive easement in their pleadings, the Circuit Court erroneously granted them a prescriptive easement of fifty feet in width.