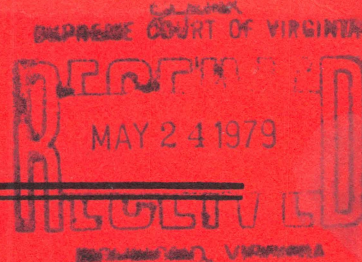


221VA797



IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 790035

ROBERT MIDDLETON AND FRED COOK,

.....Appellants

v.

BRICE JOHNSTON JR., AND
M. TERESA S. JOHNSTON,

.....Appellees

JOINT APPENDIX

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33 Third Street
Pulaski, Virginia 24301

Counsel for Appellants

William R. L. Craft, Jr.
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Christiansburg, Virginia
24073

Counsel for Appellees

TABLE OF CONTENTS

APPENDIX
PAGES

1. BILL OF COMPLAINT	1-6
2. ANSWER	7-8
3. DECREE OF REFERENCE	9-10
4. TESTIMONY OF DORA VIVIAN SIMPKINS HEARD ON JANUARY 31, 1974	11-45
5. TESTIMONY OF BRICE JOHNSTON, JR., HEARD ON JULY 14, 1975	46-64
6. TESTIMONY OF BRICE JOHNSTON, JR., HEARD ON APRIL 8, 1976	65-69
7. TESTIMONY OF THORNTON ALLISON HEARD ON APRIL 8, 1976	70-87
8. TESTIMONY OF BUSTER QUESENBERRY HEARD ON APRIL 8, 1976	88-95
9. TESTIMONY OF GLEN L. SIMPKINS HEARD ON APRIL 8, 1976	95-118
10. TESTIMONY OF BOBBY M. MIDDLETON HEARD ON APRIL 8, 1976	119-131
11. TESTIMONY OF BRICE JOHNSTON, JR., HEARD ON APRIL 18, 1978	132-143
12. TESTIMONY OF DORA SIMPKINS HEARD ON APRIL 18, 1978 .	143-149
13. TESTIMONY OF JOE MACK BAKER HEARD ON APRIL 18, 1978	149-153
14. DISCUSSION BETWEEN SPECIAL COMMISSIONER AND COUNSEL.	153-154
15. REPORT OF COMMISSIONER IN CHANCERY DATED JUNE 24, 1977	155-158
16. EXCEPTIONS TAKEN TO REPORT OF COMMISSIONER IN CHANCERY	159
17. EXCEPTIONS TAKEN TO REPORT OF COMMISSIONER IN CHANCERY DATED JULY 8, 1977	160-161
18. ADDITIONAL REPORT OF COMMISSIONER IN CHANCERY DATED APRIL 27, 1978	162-163
19. EXCEPTIONS TAKEN TO ADDITIONAL REPORT OF COMMISSIONER IN CHANCERY	164-168
20. MEMORANDUM OPINION DATED JULY 12, 1978	169-174

21. DECREE	175-177
22. ASSIGNMENTS OF ERROR	178-179
23. NOTICE OF APPEAL	180
24. LIST OF EXHIBITS	181-182
25. APPELLANT'S EXHIBIT NUMBER 6	183-185
26. APPELLANT'S EXHIBIT NUMBER 7	186-192
27. APPELLANT'S EXHIBIT NUMBER 10	193-197
28. APPELLANT'S EXHIBIT NUMBER 12	198-203
29. APPELLANT'S EXHIBIT NUMBER 13	204-208
30. APPELLANT'S EXHIBIT NUMBER 14	209-211
31. APPELLANT'S EXHIBIT NUMBER 15	211-A
32. APPELLEE'S EXHIBIT NUMBER A	212-215
33. APPELLEE'S EXHIBIT NUMBER 3-A	216-218
34. APPELLEE'S EXHIBIT NUMBER 5-A	219
35. APPELLEE'S EXHIBIT NUMBER 5-B	220

VIRGINIA, IN THE CIRCUIT COURT OF PULASKI COUNTY:

BRICE JOHNSTON, JR., et als,)	
)	
)	
)	
v.	)	BILL OF COMPLAINT
)	
)	
ROBERT MIDDLETON, et als,)	

TO THE HONORABLE WM. R. ARTHUR, JUDGE OF SAID COURT:

Your complainants would respectfully show unto
this honorable Court as follows, to-wit:

I

Your complainants are the owners of real estate
consisting of six (6) tracts of land, which real estate
is as follows:

(a) A certain parcel or tract of land containing
ninety-eight (98) acres, more or less, situated in
Pulaski County, Virginia,, one (1) mile south of Max
Creek in Pulaski County, Virginia, known as the
"Irish Cabin Land", which was conveyed to Brice C.
Johnson, Jr. and M. Teresa Stafford Johnston by
Noah J. Simpkins and Dora V. Hylton Simpkins by
General Warranty deed dated August 22, 1964, which
deed is recorded in the Clerk's Office of the
Circuit Court of Pulaski County, Virginia, in Deed
Book 219, Page 582.

(b) A certain group of tracts or parcels of land containing in the aggregate some one hundred forty (140) acres, more or less, situated north and south of State Route 692 in Pulaski County, Virginia, which was conveyed to Brice C. Johnston, Jr. and M. Teresa Stafford Johnston by Myrtle T. White by General Warranty deed dated December 1, 1967, which deed is recorded in said Clerk's Office in Deed Book 243, Page 335.

(c) A certain tract or parcel of land containing eight (8) acres, more or less, situated south of State Route 692 in Pulaski County, Virginia, which was conveyed to the said Brice C. Johnston, Jr. and M. Teresa Stafford Johnston by Harless Thurman Lawson and Helen Henley Lawson by General Warranty deed dated April 18, 1969, which deed is recorded in said Clerk's Office in Deed Book 252, Page 586.

All of which real estate is located in the Hiwassee Magisterial District of Pulaski County, Virginia, and copies of the aforementioned deeds are attached hereto as Complainants' Exhibits A, B and C, to which exhibits reference is hereby made for a more particular description of the lands therein conveyed.

II.

Your complainants would further show unto the Court that the respondents, Robert Middleton and Fred Cook, in December, 1972, were the owners of a tract of land adjacent to the aforesaid lands of your complainants; and,

III

Your complainants would show unto the Court that on or about the latter part of December, 1972, your complainants were informed that respondents Robert Middleton and Fred Cook had allegedly employed respondents Harry Strickler and Horace Strickler, T/A Strickler Brothers, to construct a road in, over and through the aforesaid lands of your complainants for the purpose of establishing a road or way of egress and egress over the lands of your complainants to the lands of said respondents, Robert Middleton and Fred Cook; whereupon your complainants placed all the said respondents an notice that the said respondents had no right, title, easement, right of way or any interest in said lands to cause to be done such trespassory construction and placed said

respondents on notice that irreparable harm was being inflicted upon your complainants' lands by such trespassory construction; and,

IV.

That notwithstanding your complainants placing "Posted" signs and having placed respondents, Robert Middleton, Fred Cook and Horace Strickler and Harry Strickler, T/A Strickler Brothers, on notice of their wrongs and injury to your complainants' property and your complainants having performed other acts inconsistent with and in complete denial of respondents' rights to so trespass, the respondents did, nevertheless, without right, title, easement, right of way or interest therein, continue to and repeatedly trespass, damage and irreparably harm your complainants free-hold interest in their said lands; and, in spite of having been notified to cease and desist their trespassory activities, your respondents repeatedly and continuously trespassed in, over and through your complainants' lands in complete derogation of your complainants' rights as freeholders; and,

V

Your complainants would show that respondents Robert Middleton and Fred Cook informed your complainants that the said Robert Middleton and Fred Cook were possessed of a right of way across your complainants land and that they, the said respondents, would show proof of this right of way to your complainants. However, as of the date of the institution of this suit, the said respondents have failed to produce any evidence of their alleged right of way; and,

VI.

That as a direct result, your complainants have suffered and continue to suffer repeated trespass by the respondents and/or their agents, invitees, servants and licensees, as well as loss of plant life, trees and disruption of the aesthetic value of their lands in that the excavation by respondents, Horace Strickler and Harry Strickler, T/A Strickler Brothers, has scarred the said lands of your complainants, and that the respondents have refused to desist from their trespassory acts, damages and wrongful conversion and use of your complainants' real estate.

WHEREFORE, your complainants pray that an injunction be issued against the respondents from further trespassory acts and use of your complainants' property; that all the proper orders and decrees be entered that will enjoin them from further damage and injury to your complainants freehold interest in said real estate; and that an issue out of chancery be ordered and decreed to fix and determine the damages and injuries which your complainants have sustained as herein alleged, and that said issue out of chancery fix and ascertain a sum of money as punitive and exemplary damages not to exceed the sum of Fifty Thousand (\$50,000.00) Dollars for the willful and wanton disregard of your complainants' rights as freeholders; said issue to fix and determine a sum of money not to exceed Fifty Thousand (\$50,000.00) Dollars as damages and to return said lands of your complainants to its pristine condition.

And in duty bound, your complainants will ever pray, etc.....

BRICE C. JOHNSTON, JR.
M. TERESA STAFFORD JOHNSTON

By s/ William R. L. Craft, Jr.

s/ William R. L. Craft, Jr.

Craft & McGhee, p.q.
Attorneys at Law
Christiansburg, Virginia

VIRGINIA: IN THE CIRCUIT COURT OF PULASKI COUNTY:

BRICE JOHNSTON, JR., et als,)	
)	
)	
)	
v.	)	A N S W E R
)	
)	
)	
ROBERT MIDDLETON, et als)	

TO: THE HONORABLE R. WILLIAM ARTHUR, JUDGE OF SAID COURT

Comes now, Robert Middleton and Fred Cook, by Counsel, and for Answer to a Bill of Complaint filed against them, answers and says:

I.

That they neither admit or deny the allegations contained in Paragraph I and calls for strict proof of the same.

II.

That they deny the allegations contained in Paragraphs III, IV, V, VI, and deny that they have in any manner damaged the property of the Complainants.

III.

Your respondents allege that they have, either by deed or by usage, a right of way and easement over the lands of the complainants to reach the lands owned by the respondents.

WHEREFORE, your respondents pray that the relief sought by the Complainants be denied, or, that this Court will appoint a Commissioner to determine the respective rights of the parties hereto.

Respectfully submitted,

ROBERT MIDDLETON
and
FRED COOK

By s/ A. Dow Owens
Of Counsel

s/ A. Dow Owens
A. Dow Owens
Attorney at Law
33-3rd Street
Pulaski, Virginia
Counsel for Robert Middleton
and Fred Cook

I, A. Dow Owens, do hereby certify that on this the _____ day of June, 1973, I mailed a true copy of the foregoing Answer to Mr. William R. L. Craft, Jr.; Craft & McGhee, Attorneys at Law, Christiansburg, Virginia.

s/ A. Dow Owens
A. Dow Owens

VIRGINIA, IN THE CIRCUIT COURT OF PULASKI COUNTY:

BRICE JOHNSTON, JR., ET AL)

V.)

DECREE

ROBERT MIDDLETON, ET ALS)

This cause came again this day to be heard on the bill of complaint; the answer and responsive pleadings; and the orders and decrees heretofore entered herein; and was argued by counsel.

Upon consideration of all of which, it is ADJUDGED, ORDERED and DECREED that this cause be, and it hereby is, referred to EUGENE L. NUCKOLS, a Commissioner in Chancery, who is hereby appointed for the purpose, who is hereby directed to make, state and report to this Court an account showing as follows:

1. The interest in real estate owned by the complainants and respondents as alleged in said bill of complaint and responsive pleadings.

2. What easements and rights of way exist in favor of the respondents in, over and across the lands of the complainants; and the source thereof.

3. What, if any, trespass or road construction was made in, over and across the said lands of the complainants by the respondents.

4. Any other matters decreed pertinent to this cause.

And said commissioner is directed to report to this Court his action taken pursuant to this decree.

We ask for this Decree.

s/ W. R. L. Craft, Jr.
Counsel for Complainants

s/ A. Dow Owens
Counsel for Respondents

Enter this Decree on this
the 11th day of December,
1973.

s/ R. William Arthur
Judge

VIRGINIA: IN THE CIRCUIT COURT OF PULASKI COUNTY:

BRICE JOHNSTON, JR.

AND

M. TERESA S. JOHNSTON, his wife

v.

COMMISSIONER'S

HEARING

ROBERT MIDDLETON

King, North Carolina

AND

FRED COOK

King, North Carolina

AND

HORACE STRICKLER

HARRY STRICKLER

T/A STRICKLER BROTHERS

Fancy Gap, Virginia

In execution of a decree of reference entered in the above styled matter on the 11th day of December, 1973, the following deposition was taken before Eugene L. Nuckols, Special Commissioner, at the law offices of Crowell, Nuckols & Koch, West Court Square, Pulaski, Virginia, commencing at 10:00 o'clock A.M. on the 31st day of January, 1974.

PRESENT:

EUGENE L. NUCKOLS, Special Commissioner

BRICE JOHNSTON, JR., in person and by his attorney,

HENRY A. WHITEHURST

**A. DOW OWENS, counsel for
Robert Middleton, Fred Cook & Horace
Strickler and Harry Strickler, T/A Strickler
Brothers**

DORA VIVIAN SIMPKINS, witness

DORA VIVIAN SIMPKINS, a witness of lawful age, after first being duly sworn, deposes as follows:

BY MR. WHITEHURST:

Q. What is your full name, ma'am?

A. Dora Vivian Simpkins.

Q. Where do you reside?

A. Hiwassee.

Q. That is in Pulaski County, Virginia?

A. It certainly is.

Q. Are you married?

A. A widow.

Q. What was your husband's name?

A. Noah Simpkins. He usually signed his initials "N.J." or "Noah J."

Q. When did he pass away, Mrs. Simpkins?

A. Nine years ago in August.

Q. Did you and your husband own the property where you now live?

A. Well, we sold it - the deed was made on Saturday before he died on Monday.

Q. To whom did you sell your property?

A. Mr. Johnston.

Q. Are you still living on the property?

A. I am living on the property.

Q. Do you know Glenn Simpkins?

A. I guess I do. I have heard of him.

Q. How long have you known him?

A. Well, about sixty-two years.

Q. Did you and your husband ever sell land to Mr. Simpkins directly?

A. To Glenn Simpkins?

A. Yes, ma'am.

2

(Tr. 3)

A. No, not to him.

Q. Did you and your husband ever sell land to a Mr. C. C. Abell?

A. We sold sixty-two acres to C. C. Abell.

Q. Do you know of your own knowledge whether Mr. Abell ever sold any land to Glenn Simpkins?

A. Yes, I think he did. To the best of my knowledge he did.

Q. Would that be the sixty-two acres you sold to Mr. Abell?

A. The sixty-two acres, yes.

Q. How long ago did you sell that land to Mr. Abell?

A. Well, I just can't remember the exact date but I imagine about fourteen years ago.

MR. OWENS: You can refer to the deed dates.

MR. WHITEHURST: I don't have the deeds up here.

MR. NUCKOLS: 1952.

MR. OWENS: Here are copies of the deeds if you want them.

BY MR. WHITEHURST:

Q. In this land that you sold to Mr. Abell, Mrs. Simpkins, did you and your husband give him a right to cross your property?

A. Yes, over an old road—

Q. Where was the location of that route that you allowed him to use?

A. Well, from where I live, it was below the house; I guess you would say starting on the north side and running west to his property.

MR. OWENS: Below where you are now living?

A. Yeah, running west to his property.

BY MR. WHITEHURST:

Q. What was the nature of that right to cross your property that you all gave him?

A. The best I remember, of course, I am not—I think he was just to have the use of the road, is all I can remember.

3

(Tr. 4) Q. Did you give him permission to change or alter the route in any way?

A. No, I don't think so. I am by that like I was by dates I am not positive. Just to the best of my remembrance.

Q. With reference to your dwelling—it was behind or in front of your dwelling?

A. Well, it's—

Q. Generally speaking—

A. Start in at front and go in behind.

Q. I am going to hand you a photograph, Mrs. Simpkins. I will ask you to identify it for Mr. Nuckols and tell him when it was made and who was there when it was made?

A. This was made this morning. That is the road down—it's so

dark in that hollow. Me and Mr. Johnston was down there, it's foggy in that hollow.

Q. What is that a picture of for the commissioner?

A. That is the old bridge place. The bridge has fell in, the road that Glenn was supposed to travel, that we give Abell. The bridge has fell in.

Q. I would like to enter that as complainants' Exhibit 1, if I might. I am going to hand you some other photographs. Would you identify them please, ma'am, for the commissioner, Mr. Nuckols?

A. These are all the bridge place, there in the hollow.

Q. I am sorry the photographs are dark, that was the best we could do this morning.

MR. NUCKOLS: Do you want to mark them number 1 and so forth—

MR. WHITEHURST: We can all mark them as number 1 if you want to.

4

(Tr. 5)

MRS. SIMPKINS: Now these strips, looks like strips right here, that is bushes standing on the bank where the old bridge—

MR. WHITEHURST: I would like to enter all those as complainants' exhibit number 1.

BY MR. WHITEHURST:

Q. Now, you say these are the photos of the old trail Mr. Abell used?

A. Yes, that was his old road.

Q. Do you know Mr. Middleton and Mr. Cook?

A. I met them.

Q. Have you ever talked with either of them?

A. I have talked to Mr. Middleton several times.

Q. Are you familiar with the area they have graded out?

A. I sure am.

Q. Did you talk to them with regard to the area they graded?

A. Well, I talked to them before they graded it.

Q. What was the nature of that conversation?

A. Well, when he went in there to buy, I told him that there was no right of way there. I was going to tell him before he bought the land if he was planning on buying the land there was no road through there, never had been no legal right of way, people just walked over it but there's no legal right of way. He said he wasn't worried about roads or right of ways; if he got the land he would get a road. He would get out some way.

Q. Now, Mrs. Simpkins, you have testified that the old road Mr. Abell used generally went to the north and west or behind your residence, is that correct?

A. Yes.

Q. In what direction and what general line did the grading that he did, where was it?

5

A. Well, it started-I guess you would call it out front and went southeast and went on south, that would be --

Q. Would you say almost opposite of the old route?

A. Almost opposite of the other road .

Q. When you mentioned this fact that there was no right of way what was their response to you again?

A. He said he didn't worry about roads and right of ways. If he got the land he would get a road and he would get out.

Q. Before they began grading, Mrs. Simpkins, did an old road exist through there?

A. An old logging road existed there and people used it to walk over and go hunting and Allisons had used it to get in and out but never any rights.

Q. Was there ever an agreement in writing between you, your husband and Mr. Allison regarding that old logging road?

A. No, there wasn't.

Q. Now, was there a verbal agreement between your husband and Mr. Allison?

A. Well the way they did it. Mr. Allison had a piece of road we wanted to use. Well, we let Mr. Allison use our road for us to use his road. And it was just, you use my road, I will use yours. That's the way they—

Q. It was never in writing?

A. Never any money or anything in it.

Q. Did your husband allow Mr. Allison to make any changes in this old logging road?

A. No.

Q. How long ago was that old road used, the logging road?

A. How long since who quit using it, you mean the Allison's?

Q. Yes, ma'am.

A. Well, I just don't know. They got the timber out and quit—probably fifteen or sixteen years. My dates — I am like I was a while ago, I just couldn't say.

Q. Now, back to the route used by Mr. Abell. How long since it was last used?

A. Well, I guess about twelve or thirteen years.

Q. Has Glenn Simpkins ever attempted to use it?

A. No, to my knowledge he has never been over it.

Q. Is it possible to drive over the old route by car?

MR. OWENS: Which old route?

MR. WHITEHURST: The old route that Mr. Abell used.

MRS. SIMPKINS: No, you can't drive over it with a car; there is a hole where the bridge fell in; a tank couldn't get over it.

BY MR. WHITEHURST:

Q. Did Mr. Cook or Mr. Middleton or anyone acting for them ever purchase a right of way from you before you sold your land to Mr. Johnston?

A. No, I never saw them, didn't know they existed.

Q. How long have you been ^{living} on this property, off and on?

A. Well, I have been on and off this property for sixty-two years, there most of the time.

Q. Did you ever allow Mr. Abell to alter or change the route he used?

A. No, he never did even suggest such a thing.

Q. Has the grading that has occurred, has it damaged you in any way?

A. Well, it damaged my water.

7

(Tr. 8)

MR. OWENS: Your water?

A. Water. I have this good spring but it's way up in the mountain and I only get drinking water from there. I have water to use for every thing else right there below the house but it run mud to my water. It was thick with mud from the grading.

BY MR. WHITEHURST:

Q. To the best of your knowledge are there any other rights of way of any kind to your property other than this old logging road and the one that you all gave Mr. Abell?

A. To my knowledge there is no road only the one we gave Abell.

Q. Thank you. Answer any questions Mr. Owens might have or the commissioner, Mr. Nickols, might have.

BY MR. OWENS:

Q. Mrs. Simpkins, you say you do know Glenn Simpkins?

A. You do, too, if you think back; you tangled with him ten years ago.

Q. I don't remember tangling with him. I guess I have so many people tangling with me, why it just sort of rolls off. Did he not live over in this area, or his dad, many years ago?

A. He was raised right there where I live.

Q. In the same house?

A. At the same place. He was raised there. By his grandfather.

Q. And he moved away, lived away from here for a long time?

A. Since he was about thirteen I think when he left up there.

Q. Was he related in any way to your husband?

A. He was his nephew.

Q. He was N.J.'s nephew?

A. Nephew.

8

(Tr. 9) Q. Let me show you an aerial photograph here. If you can, fine, if you can't why tell me because I know sometimes it's difficult to follow. Just—

A. Let me get my glasses. I can't see real good any how.

Q. Let me ask you, first of all, all this land in question was formerly part of what's called the old Tasker Tract, isn't it?

A. No, not all of it.

Q. Well, let me ask, the land that you sold to Mr. Johnston, is it part of it?

A. No, the Glenn land is.

Q. The Glenn Simpkins?

A. Yes. It's of a different tract.

Q. Well, did Tasker at one time own the property that you are now living on?

A. No.

Q. Who owned it to begin with? Do you know?

A. Well, as far back as I have any record of, it was owned by Bill Cole.

Q. Yes, ma'am, but before Mr. Cole?

A. That's so many years back, I don't know.

Q. Do you know whether or not Tasker conveyed the property to W.R. Cole, I believe his name is?

A. He might have but it would be so far back I have no record.

Q. Are you familiar with the Tasker map that's of record in the plat books over here?

A. No, I am not, I know he had an awful lot of land in there but I don't know where it's at.

Q. Well, there is a plat of everything he owned of record in the clerk's office.

A. I know he owned the land—

g

(Tr.10) Q. Well, that will be for us lawyers to look up. Let me call your attention to this Route 692. Now, you live right off that, don't you?

A. Right off it, yeah.

Q. Would you mind marking on here about where you live? You don't have to be exact. This is the river. Here is the old paint mine. Here is the railroad track that crosses the bridge.

A. I am up on this—

Q. Yes, ma'am, un-hunh, not too far from the end—

A. Let's see, I'm right at the end of state maintenance. I'm right at the end. Just right out from the end is the house.

Q. Now, if you don't object I am going to make a little X mark, is that about where you live?

A. It's just out a little bit from the end of the road.

Q. I am not attempting to put this to scale but this is about where you live?

A. Yeah.

Q. And let me ask you this. Is north this direction? From your house you would look back across the road?

A. Yes, looking back that way would be north—

Q. That would be north and the river would be west of you?

A. West of me.

Q. Okay. Now, could you point out, draw here as best you can, the tract of land that you sold to Mr. Johnston. I realize this is not to scale.

A. Well, it borders this here—

Q. On 692?

A. Yes.

Q. Is it just generally in this area?

A. The line went to the road. The road was the line of the land we sold him.

10

(Tr. 11) Q. Now, where is Mr. Glenn Simpkins property in regard to this?

A. It's on the west side of it.

Q. Below it or to the west side and to the south—

A. West side in behind it.

Q. West side directly between this property and the river?

A. And the river, yes—

Q. Does it extend south of it?

A. No, that's the Middleton property south of it.

Q. You say, it's like this?

A. Yes—

Q. But now it doesn't come back to the road, does it?

A. No, there is a big mountain there.

Q. Right. Somewhat like that. Now, where is the Middleton property?

A. Well, it's on the south side.

Q. Of the Glenn Simpkins property?

A. No, it's on the south of the Johnston property.

Q. All right. Right in this general area, would you say?

A. This would be north. Yes, it would be in that area.

Q. All right. Now, let me ask you this. Does the Glenn Simpkins property touch the westerly line of the Middleton or the old Allison property?

A. For a small distance, just a very short ways in there. It comes up to a corner stone.

Q. Now, let me call your attention to this map. If this is not correct, why you tell me. This is Route 692, the public road, and your home is in here. This is the property you sold to Mr. Brice Johnston?

A. Brice Johnston.

Q. Right. This is the old Allison property, the property now owned by Middleton and Cook. And is this the property ^{now} owned by Glenn Simpkins

which puts it - and north being this way -

A. Yeah, I guess. There would be the Dickerson boundary.

11

(Tr. 12)

A. Un-hunh, that's W. W. Dickerson, isn't it?

A. Yes, W. W. Dickerson. Well, his heirs now.

Q. Right.

A. Yes, it would run, there is supposed to be a corner stake right there. Yes, that would be it.

Q. Okay. Now, calling your attention to this road that is shown on here. Is that generally the road that is there now and that Mr. Abell used to get to this land?

MR. JOHNSON: Could you rephrase that question? Perhaps, identify which road you are speaking about now.

MR. OWENS: Well, I will let you rephrase it but let me say in regard to this map we have identified, is this generally the road that Mr. Abell used to get back to this property you all sold him, or was it a different location. I am not trying to, you know, misdraw it or misdirect you at all.

A. Well, it starts in not far from the state road out there between the state road and my house—

Q. Yes, ma'am—

A. It goes down west—

Q. Okay.

A. From there it crosses a hill over to his property.

Q. Well, let me ask you this. If you don't think this is the correct location of it—now, this is north, you know, looking back across the road.

Here is the river. Here is the state road.

MR. NUCKOLS: This is the west side here.

MR. OWENS: Un-hunh, this would be west; this would be south; this would be east; this would be north. Would you in any way care to draw on here the way you feel that it did go?

A. Let's see. Let's turn it around here.

Q. Okay.

12

(Tr.13)

A. I never was no good at directions and maps.

Q. Here is the paint plant down here—

A. The paint plant down here—

Q. Yes, ma'am. Here is the Dickerson property and the railroad goes across—

A. Let's see. This is the state road—

Q. Yes, ma'am—

A. That is the road—

Q. Un-hunh, going into your home—

A. Out to my home.

MR. NUCKOLS: Is this 692 or is this 692?

MR. OWENS: No, this is 692.

WITNESS: This is 692.

MR. OWENS: Un-hunh, state road.

MR. NUCKOLS: And her house—

WITNESS: Is out that road there—

MR. OWENS: Let's show your house being right here.

WITNESS: Right there.

MR. OWENS: Yes, ma'am.

WITNESS: Well, it turns out somewhere between there and goes—
well, now that is not drawed running the right direction—

MR. OWENS: Okay, you put it the way you feel it is—

WITNESS: It's not the right direction—

MR. OWENS: Okay, right, all right.

WITNESS: Now, wait. Let's see. It would start out over here
somewhere as it goes down—Let's see, still yet it don't look right.

MR. OWENS: You just ignore that and draw it the way you think
it ought to be.

13

DISCUSSION OFF RECORD.

MR. NUCKOLS: Then the road comes here—

WITNESS: Yeah, something like that —

MR. NUCKOLS: All the way over to the property you sold to Abell?

WITNESS: Yeah, something like that now. That road don't go the
right direction.

MR. OWENS: All right. That's suitable with me. If you think that
is as close as you can get to it.

WITNESS: Well, that's about—

MR. OWENS: Just generally like that. Gene, you want to mark that
a little plainer.

MR. NUCKOLS: Yeah.

WITNESS: It wouldn't go that way, that would go through the Allison

property.

MR. OWENS: Okay-

WITNESS: Which it don't do-

MR. NUCKOLS: All right, I am going to put circles on the road that you drew.

WITNESS: Something like that. It goes down and then it turn right- sort of turns west, goes up over a hill.

MR. NUCKOLS: Let me draw your line a little bit deeper, okay? I'm just going to trace right over your line.

WITNESS: Right down there is where that broke down bridge is and then you turn up and go up a hill.

MR. OWENS: Does it come back near this corner marker that you spoke of?

WITNESS: No, it goes to his property down in a deep hollow; it goes up over the hill, down in a deep hollow, and there is corner marks on top of a mountain.

14

(Tr. 15)

MR. OWENS: May I mark this as Simpkins Road? We will call it-

MR. NUCKOLS: Abell-

WITNESS: It was called the Mack Jarrells road, was what every body referred to it because he dug it out.

MR. NUCKOLS: But it's the road that Mr. Abell had and used?

WITNESS: Yeah, it's the Abell Road.

MR. OWENS: Called the what road?

WITNESS: I believe it's called the Mack Jarrells road in the deed,

isn't it?

MR. OWENS: I don't know.

WITNESS: I think it is.

BY MR. OWENS: Now, let me call your attention to this road that you refer to that I already had on here that you referred to as the Allison Road. Is this generally the way that Allison got in to their property?

A. That's not exactly it.

Q. Well, change it as you would—

A. That don't look right either—

Q. Okay, well, just change it as you will.

A. Now, let's see; these out here, these roads lead right together—

Q. All right—

A. One goes off on one side and one on the other—

Q. The Abell road goes off on one side and the Allison on the other?

A. The Abell road goes off on one side and the Allison on the other. They go on up around up to Mr. Johnston's place and goes on to the—

Q. Well, it doesn't make that much difference what happens to it after it gets on their property—

A. Well, it goes right on up—that goes pretty good—but goes on then. But this up here, now, that don't run that way.

15

(Tr. 16)

Q. O.K. Well, it doesn't make any difference how it runs when it gets on their property but would you identify this as substantially the way it runs?

A. That's substantially the way it runs from there.

Q. May I mark that as the Allison road?

A. Yeah, I guess you can—

Q. If the commissioner—

MR. NUCKOLS: Okay.

MR. WHITEHURST: Merely for identification, I suppose?

MR. OWENS: Oh, yeah. Right. Sure.

MR. NUCKOLS: Yeah, because these things are not to scale.

MR. OWENS: (Back to witness)

Q. Now, you made the statement that Mr. Allison had a part of the road that you all wanted to use and you had a part of the road that he wanted to use. Could you show where his part of the road—

A. Now, that would be something around up—after you went on the property here —we had planned before we sold that to Glenn, you see—

Q. Yes, ma'am.

A. We went around there—

Q. Before you sold to Abell?

A. Abell, I mean.

Q. Right, un-hunh—

A. And we went around this bend up in there, and then went out to the land out there, and we used the land that was back on this side, too, you see, that road give us access to the timber and stuff—

Q. I see—

A. And we just used each others' roads.

(Tr. 17)

Q. To get to the property that Glenn Simpkins now owns and that C. C. Abell did own, you went over the Allison property?

A. We went over the Allison--Well, we went both ways.

Q. Yes, you could go both ways.

A. Could go both ways but the Allison road was the best.

Q. But in consideration of your letting Allison use this road to get to his, he let you use--

A. Let us use theirs--

Q. To get to yours--

A. Yeah--

Q. To the rest of yours. Okay.

A. There never was anything, only, just you use my road and I'll use yours between us.

Q. Now, let me ask, are you familiar with a road called the Miller Baby road?

A. That is now the state road.

Q. 692?

A. Yes.

Q. Is that what it was? Okay.

A. Before it became a state road it was called the Miller Baby road.

Q. That was what was known as the Miller Baby road. Now, I call your attention to a deed of sixty-one and one-half acres from Stephen P.M. Tasker to N.J. Simpkins. That was your husband?

A. Yes.

Q. This was in 1915; and is this sixty-one and one-half acres the same tract that you sold to Abell and that he sold to Glenn?

A. The same tract he sold to Glenn.

17

(Tr. 18) Q. This reference to the Miller Baby road is the reference to what is now Route 692?

A. Route 692. That's right.

Q. Okay. Now, one other question. If we could look back at this state map or this aerial view one more time. And here is Route 692 coming up here. And here is your home, you know, just roughly. Do you know where Breeden's Branch is?

A. Yes, Breeden's - Let's see. Breeden's Branch—

Q. Now, here is the railroad trestle—

A. That's the branch between my house and Myrtle's, ain't it?

MR. JOHNSTON: That is what is called Spencer's Branch.

A. Yeah, that is Spencer's Branch.

BY MR. OWENS:

Q. Well, again—

A. No, I just don't—

Q. Breeden's Branch is shown on the old Tasker maps—

A. I don't recall where the Breeden's Branch is. That's the Spencer's Branch that runs I think between my house and—

A. Well—

A. I just don't recall—

Q. Could you show us on here where you think the Spencer—what you call the Spencer Branch is? It may be that it has changed names.

A. Well, it runs right along with the road—below the road.

Q. Let's refer back to this yellow sheet that has the roads shown on it that we have identified. Can you show me on this what you refer to as Spencer Branch runs?

A. Let's see—

Q. Again, here is your home—

18

A. Yeah, I know and the road—

Q. Yes, ma'am—

A. That's the road that goes out to my house. This is the main road.

Q. This is the main road. Here is the old Painter place.

A. Well, the branch is right along there, almost to the road. It—

Q. Which way does it run, parallel with the road, or comes out of the mountains?

A. Comes out of the mountains.

Q. This thin, wiggly line will be referred to as the Spencer Branch.

A. Branch. Yeah, that used to be the Bogle line. We had to go to Allisonia. Everybody else went other direction.

Q. Now, Mr. Allison, it wasn't W.D., Thornton's dad, what was his name?

A. Well, I never did know his name. He was always called "H.B.".

Q. Okay—

A. But I don't know what his name was.

Q. After they logged the timber out of there, you say they did not use it any more?

A. Well, they farmed up in there. After the timber was cut off they cleared up quite a bit of the land and they farmed it.

Q. And did they keep using the same road—

A. The same road, yeah—

Q. This old log road we called it.

A. The old log road; they used it to take their stuff out.

Q. And you all continued using the road to get into—

A. Using their road—

Q. And you say you never did have a written agreement about it?

19

(Tr. 20) A. It was nothing to my knowledge anything about it, only, just you use my road, I will use yours.

Q. They never gave you—or blocked off was it?

A. No.

Q. Always been open for their use?

A. Their use.

Q. Mr. Commissioner, I would like to file these as respondents' or defendants' Exhibits A and B if I may.

MR. NUCKOLS: I am marking them D1 and D2.

MR. OWENS: Okay.

WITNESS: Now, see, we wasn't the one that first let them open the road. It had been done by them before we bought it.

MR. OWENS: Was that Mr. Cole?

WITNESS: No, that was Lee S. Simpkins.

Q. Oh, right. Right.

WITNESS: My husband's father. He was the first to let them chop the road out. He had—

MR. WHITEHURST: Mr. L.S. Simpkins--

WITNESS: L.S. Simpkins—

MR. OWENS: He let them cut it out and you bought it it was already—

WITNESS: Already there, already chopped out and there was nothing said about any road reserved or nothing. It was just—well, my husband

at that time owned all the land but just his daddy's part in it.

(DISCUSSION OFF RECORD)

BY MR. WHITEHURST:

Q. Mrs. Simpkins, here is State Route 692 as it comes on up the mountain there. Does this appear to be your turn in to your house right there where state maintenance ends?

20

(Tr. 21)

MR. OWENS: Well, now, I don't know where state maintenance ends.

MR. WHITEHURST: It's right there to the entrance to this little road.

WITNESS: Well, I guess it is. That's the only turn off there is off it.

BY MR. WHITEHURST:

Q. You turn right and you come down about how far to your house?

A. Not very far. If the woods wasn't there you could see the house.

Q. Now, I gather this is one of these branches we have been talking about drawn on here. Is this Spencer's Branch right here?

A. That runs right along the road--

Q. Okay.

A. I don't know where it crosses the road there. Oh, yes. That's the other fork road. This is the one that comes - must be -

Q. Is that what you called Spencer's Branch a moment ago?

A. Must be.

Q. In relation to Spencer's Branch--

A. But it should be closer to the road seems like than that.

Q. This is a pretty big scale. This is scaled I guess four hundred feet to an inch or something. All right. Would you take this pen. I have drawn something here, just approximate where your house is; again, this is not to scale, would you take the pencil and show how the road that you allowed Mr. Abell to use, how it generally follows away from the house in relation to this branch you were speaking of a moment ago?

A. Well, let's see. Now this branch -- let me look here a minute--

Q. In relation to this branch, would you try to show the Commissioner and Mr. Owens how you remember the Abell road to run?

A. Well, it starts out here--

Q. We are using this as your house--

MR. NUCKOLS: You might show her where the Abell land is.

Q. The Abell land would be off here to the north.

A. The house is too close to the branch there—

Q. You can move it on back if you want to some—

A. It would turn off, out something like that, and go on I would think—

Q. In other words, your house would be out here further?

A. Yeah, the house would be a little further—

Q. Does the Abell road generally follow the Spencer Branch for a distance?

A. No.

Q. Does the bridge—

A. It goes down a little — starts out not too far from the branch but then it goes on and crosses the branch going down to my house, down to where that bridge has fell in. There is another branch comes in it, there is a lot of branches, forks and prongs to that—

Q. So, generally it goes in this direction, to your left?

A. Yes, it goes down that way and then goes on up the hill.

Q. Generally speaking from your house and this Abell road which direction generally did the old logging trail go?

A. Which, the Allison road or the —

Q. That's correct, the one you allowed Mr. Allison to use.

A. It turns off right even with that one and goes, I guess, it would be southeast at first and then running on south.

Q. Generally to your right then as opposed to the Abell road going to your left?

A. Yeah. They all go off almost in the same direction, only one goes one way and one the other, they take off—

MR. OWENS: Are you filing this as an exhibit?

MR. WHITEHURST: I think I will for his benefit; it will help him in making his findings because this is a complicated subject. I will enter that if it is all right with the commissioner as complainants' exhibit number 2. Mrs. Simpkins in the years that Mr. Allison and those people were bringing logs out of there was it your intent or your husband's intent to give Mr. Allison—

MR. OWENS: If the court, please, I will object to any question of intent. She has testified that by usage it was there by her husband's father's consent and as to what his intent was I will object to her expressing it.

MRS. SIMPKINS: Well, I heard the whole deal. I was present when it all happened.

MR. NUCKOLS: Let me hear what it is—

MR. OWENS: Sure, oh, yeah, right—

MR. NUCKOLS: I will have to decide whether—what they verbally said and what they did has any effect—

MR. OWENS: I just wanted it in for the record.

BY MR. WHITEHURST:

Q. Go ahead and tell Mr. Nuckols what you were getting ready to say—

A. Which—

Q. What went on, what you heard, what you'll's intent was to this road that Mr. Allison was using.

A. What my father-in-law's agreement was with him?

Q. Yes.

MR. OWENS: That's L.S.

A. L.S. Well, they come there, Mr. Allison and Mr. Calfee. I was then, I guess, about thirteen years old, working there, come there

23

(Tr. 24) and they stood there in the kitchen door and talked it over, and then he come in the house and talked it over to the old lady and asked her about what to do about it. They wanted to buy a road through it. He said he wouldn't sell a road to anybody through him but he did need a road around there and he would agree for them to just chop out a road.

BY MR. WHITEHURST:

Q. When you say "chop out", what do you mean?

A. Just chop the brush out, not do any digging, any grading, that was the—they wasn't to do anything—they said they would cut the fibers and roots and cause it to wash but if they could haul by just chopping off the brush they could haul some of the timber out from up there. They didn't own the land then. They just bought the timber.

MR. OWENS: The Allisons.

A. The Allisons had bought the timber. The land belonged to Forney Mining Company and it was agreed they was to chop the road out and haul, which they did. Hauled with mules.

MR. WHITEHURST: Was that the common means of transportation back in those days?

A. Back in those days, mules and horses, a very few trucks. Well, I never did see the money but Mr. Simpkins said they paid him some for going over it.

BY MR. OWENS:

Q. Referring to the plaintiffs' exhibit number 2, I believe it is, Mrs. Simpkins, looking at Route 692 and your house having been placed in here, in approximate location, could you designate what this road is that runs east of your house and in a southerly direction? Is that not the road that runs back to the Allison property?

A. I don't know. Let's see. I guess it must be. If my house is there it runs, it's southeast to my house and running on south above my

24

(Tr. 25) house.

Q. And you all had continued to use this road that went over the Allison property to get to your other land. Do you remember when you last used it?

A. Well, I guess the last was shortly before my husband died, probably ten years ago.

Q. 1952? 52 was when you sold it to Mr. Abell.

A. Well, you see, our land joined it way back over there and we still hauled out from the back side of our place before we sold to Mr. Johnston.

Q. So you still used it?

A. Used it till we sold to Mr. Johnston or shortly before. He got completely disabled almost but up till he was disabled he hauled wood and various things out around that way.

BY MR. NUCKOLS:

Q. Mrs. Simpkins, if I understand correctly, there were two

roads, one that went to the property that you sold to Mr. Abell, and on the opposite side one that went up to Allison property. Now, is there a third road which has now been built by Mr. Middleton?

A. He built the road over the old logging road. He followed it pretty closely.

Q. He followed pretty closely over the road that went to the Allison property?

A. Allison property. He graded out over the old logging road.

Q. So there is still just two roads there, one that goes up to what is now the Glenn Simpkins property which he bought from C. C. Abell and the old road which went to the Allison property, the old logging road?

A. The Allison property. It has been re-graded and the road out to my house goes right out through the middle of it, straight out to the house.

25

(Tr. 26) If they take off each way, one on one side of the road and one on the other.

Q. Now, you talked to Mr. Middleton before he graded this road or had this road graded?

A. I talked to him before he bought the land.

Q. Before he bought the land?

A. I took him up there to show him where the line crossed. They didn't seem to know where the line crossed the road and asked me if it would bother me too much to go show them. I went on up there and showed them and that is when I talked to them.

Q. Was there any other way to get to the property that the Middletons now own that the Allisons did own?

A. Well, I am not positive but Mr. Allison always said he had a deeded right of way across through the mountains, coming out towards Allisonia, but it would cost so much to make a road up there he never tried to make it. I don't know, that's what he always said.

Q. Did anybody ever live up there on what is now the Middleton-Cook property?

A. Yes, they lived up there.

Q. The Allisons?

A. Not the Allisons. They had people farming, working up there in an old house, they had two old houses up there.

Q. How did they ^{to and} get from that house?

A. Well, they just came down -- when they walked they came through the yard most of the time. If they come out with any kind of a vehicle, they went in and out, they went around this road.

Q. This old logging road?

A. Yeah. School children used a path right down through our yard to get out.

26

(Tr. 27)

Q. And how long has it been since anybody lived up there?

A. Oh, it has been quite awhile. I would say eleven years or may be longer. Houses are all gone now I would think.

Q. But as long as anybody lived up there they either walked down or came down on some vehicle over this old logging road?

A. Yeah.

Q. Now, you and your husband would use that old logging road to get to the one portion, upper portion of your land, is that right?

A. That is right.

Q. Did you haul timber out along that road too?

A. He hauled timber out over, around that old logging road. Yes, go out over Mr. Allison, come on down over where it crossed us.

Q. Then you and your husband owned property on both sides of 692 that Mr. Johnston now owns?

A. Mr. Johnston --we did at one time but we had sold what was across the road before Mr. Johnston bought it to a Mr. Quesenberry and then it was sold, it has changed hands two or three times. Anyway, it was owned by widow White that Mr. Johnston bought from.

Q. But he owns now on both sides of Route 692?

A. Yes.

BY MR. OWENS:

Q. You mean on the north side as well as the south side of 692?

A. Down a ways. Way down the mountain. I think his line borders the Harris property.

BY MR. NUCKOLS:

Q. So, the old logging road as it takes off of 692, it goes through Mr. Johnston's property now? Starts right off into his property, is that right?

27

(Tr. 28)

A. No. The road that comes out to my house leaves the state road and then these roads branches off from it, out just a little ways from the state road, between my house and the state road.

Q. Then you leave 692 and come off on a road towards your house?

A. My house is just a few steps out where these roads turn off.

Q. I see. Well, now Glenn Simpkins, does he use the road which we call the Abell road to get to his property now?

A. I don't think he ever goes there. He lives in Michigan.

Q. These pictures were taken along that road, weren't they?

A. Yeah, they were taken there at that road. Taken there where the bridge fell in.

Q. But is that the only way that they had, that Mr. C. C. Abell and then Mr. Glenn Simpkins, is that the only way they had to get to that property, along this road here?

A. Along that road there. When they bought the property that was a very good road but it just fell apart. That is where Mr. Abell wanted the right of way was over that road, it was an old saw mill road.

Q. And this is the one that was used by any body that went to the C. C. Abell and then the Glenn Simpkins property?

A. Well, see, we owned it all for awhile. Then we sold to Abell and then he to Glenn and I don't reckon either one of them was^{even} out there after they bought the land.

Q. But Mr. C. C. Abell when he bought this land he wanted this particular right of way to get to the property that you sold to him?

A. He did. That was not where the original route was to that land but he didn't want over the original land. He wanted it over this one. So we give it over this one.

Q. But you and your husband could get to this property that you

sold to Mr. Abell by going over the old logging road?

28

(Tr. 29)

A. Going over the Allison property and out. That was our best road.

Q. But this is not the one that you gave to Mr. Abell, sold to Mr. Abell?

A. No, that is not the road. That is not the Abell road.

Q. And was Mr. Abell ever told by you or your husband that he could use this old logging road to get to his property?

A. Through Allison?

Q. Yes.

A. No, I suppose not, I never did. I don't guess he did because he wouldn't have had any rights over it. We just used it in exchange. Of course, he wouldn't have used it or tried to use it.

Q. So as far as you and your husband were concerned you didn't think you had the right to give Mr. Abell, you didn't think you could give him the right to cross the Allison property?

A. Oh, no. We didn't have any rights there. Mr. Allison could have said stop any day and we would have had to stop. We couldn't give somebody else—

BY MR. OWENS:

Q. You say, Mrs. Simpkins, that the road that Mr. Abell picked out to want to get to his property is not the original road that went in there?

A. Well, now that property is way out on the mountain, next to Hiwassee. And the road that we got with the deed, or he got, he owned the property before we was married, the road he got come out down a rough,

rocky hollow, down—

Q. You mean in a different direction?

A. Different direction. Come out down by Hiwassee, down through that rough, rocky hollow and Mr. Abell didn't want it that way, come down over Weldon Dickerson's property there. Well, it was the Tasker property at that time but he later sold it to Weldon. Mr. Abell didn't want it there and said it was too rough.

29

BY MR. NUCKOLS:

Q. Do you authorize the secretary to sign your name to your deposition when it is typed?

A. Yes.

DORA VIVIAN SIMPKINS,

By _____
Notary Public

COMMONWEALTH OF VIRGINIA

COUNTY OF PULASKI, to-wit:

I, Jewell W. Martin, a Notary Public for the State of Virginia at Large, do hereby certify that the foregoing deposition was regularly taken before me in my said county aforesaid, at the time and place and for the purpose set forth in the caption hereof.

Given under my hand this 6th day of March, 1974.

My commission expires: June 24, 1975.

Notary Public

Fee 3/00

VIRGINIA: IN THE CIRCUIT COURT OF PULASKI COUNTY:

BRICE JOHNSTON, JR.
AND
M. TERESA S. JOHNSTON, his wife

v.

COMMISSIONER'S
HEARING

ROBERT MIDDLETON
King, North Carolina

AND

FRED COOK
King, North Carolina

AND

HORACE STRICKLER
HARRY STRICKLER
T/A STRICKLER BROTHERS
Fancy Gap, Virginia

In execution of a decree of reference entered in the above styled matter on the 11th day of December, 1973, the following deposition was continued from those taken on the 31st day of January, 1974, pursuant to agreement of counsel, taken before Eugene L. Nuckols, Special Commissioner, at the law offices of Crowell, Nuckols & Aust, West Court Square, Pulaski, Virginia, on the 14th day of July, 1975, at 10:00 o'clock A. M.

PRESENT: EUGENE L. NUCKOLS, Special Commissioner

BRICE JOHNSTON, JR., in person and by his attorney,

WILLIAM J. McQUEE

A. DOW OWENS, counsel for
Robert Middleton, Fred Cook and Horace
Strickler and Harry Strickler, T/A Strickler
Brothers

(Tr. 1)

BRICE JOHNSTON, JR., a witness of lawful age, after first being duly sworn, deposes as follows:

BY MR. MCGHEE:

Q. State your name.

A. Brice Edward Johnston, Jr.

Q. What is your age and address?

A. Forty-one. Address is 2930 Culley Drive, Roanoke, Virginia.

Q. You and your wife, M. Teresa S. Johnston, are the complainants in this action are you not?

A. Yes, sir.

Q. Do you own real property in Pulaski County, Virginia, which is the subject matter of this suit?

A. Yes, sir.

Q. I will hand you three deeds and will ask if these deeds represent your acquisition of the properties which are the subject matter of this suit?

A. Yes, they do.

Q. For the record would you read who these deeds are from and to whom they are to and the dates thereof?

A. The first one is a deed made and entered on the 18th day of April, 1969, by and between Harless Thurman Lawson and Helen Henley Lawson, man and wife, and myself, Brice E. Johnston, Jr. and M. Teresa Stafford Johnston.

Q. All right, the next one-

A. The second is a deed entered the 22nd day of August, 1964, between Noah J. Simpkins and Dora V. Hylton Simpkins, man and wife, and

myself, Brice, it reads C, but it should be E., Johnston, Jr. and M. Teresa Stafford Johnston.

Q. The next one-

-2-

Tr. 3) A. The next one is a deed entered the 1st day of December, 1964, between Myrtle T. White, widow, and myself, Brice E. Johnston, Jr. and M. Teresa Stafford Johnston.

Mr. McGhee: Mr. Commissioner, we would like to introduce these in evidence and to later withdraw them and substitute copies.

Mr. Owens: Is that the same as shown on your exhibits?

Mr. Commissioner: Very, well, There are copies already entered as exhibits.

Mr. McGhee: All right.

Mr. Commissioner: So as far as I am concerned we can accept the exhibits as true and correct copies of the recorded deeds of property involved and not have to have the originals.

Mr. Owens: No objection.

Q. Mr. Johnston, tell the Court what has occurred since you acquired these properties to have resulted in this suit-

A. During the latter part of December 1972, a friend of mine telephoned me and advised that there was some heavy equipment that had been unloaded from a state maintained road onto my property. This matter was discussed in some detail with him and I anticipated that perhaps there might be a road constructed across my property onto some property that had been recently sold to persons I did not know at that point. I asked my acquaintance,

Mr. T. S. O'dell to place posted signs about the area I anticipated would be trespass. He did this and I have pictures to indicate those signs were placed.

Q. Do you have these pictures with you?

A. Yes, sir. I have one such picture that shows the entrance of the road and there were signs placed to the right and the left of that road. Perhaps not within the space of 500 feet.

-3-

(Tr. 4) Q. (Holding photos) Do these color photos purport to be the road that was constructed on your property by the defendants?

A. Yes, they do.

Mr. Owens: Did I understand that he had a photograph that showed the posted signs? (Looking at pictures) Which one has the signs?

Mr. McGhee: It's hard to read it, they are so dark.

Mr. Owens: All right, of course I have no objection to the photographs being entered, he is testifying to, as to the existence of a newly cut roadway and the photographs don't show where it is. I do object to any statement from this witness as to the date they were posted unless he posted them himself.

Q. Did you post the signs?

A. I placed some signs on the road myself.

Q. That is the road that is depicted by these pictures?

A. Yes, sir.

Q. You put them there yourself?

A. Yes, myself.

(Conversation off the record)

Mr. McGhee: There are signs but the pictures are dark and it is hard to see.

Mr. Commissioner: There is one real good one you can see-

Witness, Mr. Johnston: Yes, I placed that there myself, of course that was after the road was partially constructed.

Mr. Owens: After it was partially constructed?

A. Yes, sir. There are others that were placed before, but-

Mr. Commissioner: Before this was done here was there any road at all at this point?

A. There was a foot path only.

Q. Mr. Commissioner: And you posted this particular sign after

-4-

(Tr. 5) this much road cutting had been done?

A. Yes, sir, but I had other signs when it was only a foot path. I have other pictures or perhaps I don't have them at this point, but I have other slides which show these posted signs.

Mr. Commissioner: Bill, is that the same sign as this one?

Mr. McGhee: No, I think not.

A. This is at the beginning of the road and this is viewed from the opposite end of the road then on the two ends of the road on my property.

Mr. Commissioner: Why don't you have these two marked separately since they are the two that clearly show a sign and offer them and then these others that shows a sign and that one does too--Get the ones that clearly show a sign there--There are three of them that clearly show a sign and have them identified as to where they are and who posted them-----

Mr. McGhee: Mr. Johnston, I hand you a photograph which purports to show an earthened roadway and a sign, would you explain to the Court what that sign says and who placed it there?

A. This is a sign placed on a post in the middle of the road, it would be the northern most end of the road on my property and the sign states "Posted, No Trespassing".

Q. Mr. Commissioner, we offer this as plaintiff's exhibit-

A. I have my initials and the date it was taken on the back.

Mr. Commissioner: Now, that one is clearly identified-He didn't say who posted that sign or the date it was posted.

Q. When did you post that sign?

A. The sign was posted the day before the picture was taken and the date is on the back of the picture, taken by me.

Mr. Commissioner: I don't know what the numbers are because of the other exhibits-We will number them right after this one. I am going

-5-

(Tr. 6) to letter these. That will be plaintiff No. A.

Mr. Owens: No objection.

Q. Mr. Johnston I hand you another photograph and ask you to explain to the Court what it purports to show, when it was taken and who took it?

A. This is a picture taken by me on March 12, 1973. It reflects an earthened road with a post planted in the middle with a sign attached. This was done by me the day before. It shows a cable stretched across the road and the sign as previously referred to stating "Posted, No Trespassing".

It also shows my personal vehicle, a red Datsun pick up truck.

Q. I hand you still another photograph and ask you what it purports to show and who took it and when?

A. This is very similar to the last picture except for the distance it was taken by me on May 12, 1973, and it reflects the sign and cable that I erected the previous day.

Q. I hand you four individual colored photographs and ask you what they purport to show and when were they taken and by whom?

A. These four photographs were taken on January 9, 1973, by me, and they are in an attempt to show the road construction and some of the damage done to the property by that road construction. One of the photographs shows the bull dozer or what appears to be bulldozer tracks, upturned trees and vegetation generally.

Mr. Commissioner: You had the other two, so do you offer these as exhibits D1, 2, 3, & 4?

Mr. McGhee: Yes, sir.

Q. Mr. Johnston, I hand you a folder containing a series of photographs stapled therein and ask you what they purport to show?

A. These are photographs taken in my presence and they reflect the road construction and some of the erosion caused by the construction.

-6-

(Tr. 7) The second picture, figure no. 2, reflects another road not an issue at this point, but an old road similar to the road prior to the construction. Photograph number 3 shows stream that washed out the road and caused erosion down through my property. No. 4 reflects some of the silt caused

by the stream. No. 7 reflects some of the destruction to the vegetation as well as number 8 and number 10.

Q. Mr. Johnston, do you know Robert Middleton, Fred Cook, Horace Strickler and Harry Strickler?

A. I have talked only by phone to Mr. Middleton and Mr. Strickler. I am not sure which Mr. Strickler I talked to. I understand they are brothers and they have a company. That would be the extent of my acquaintance with them.

Q. To your knowledge does Robert Middleton and Fred Cook own real property adjoining yours?

A. That is my understanding, yes.

Q. What was the substance of your conversation with Mr. Middleton, was it, what was the substance of that conversation?

A. On January 4, 1973, Mr. Middleton called me and during my conversation with him he stated that he had constructed a road across my property and at that time claimed that he had a deeded right of way which was recorded. This was discussed in some detail. Mr. Middleton said he would get a copy of that right of way and forward it to me as soon as possible. I have not yet received the recorded deed of right of way.

Q. Do the deeds which you have introduced into evidence provide for any reservation or grant or reference to grant of a right of way to any person?

A. They do not, but later, if I may, on March 14, 1973, I had a conversation with Mr. Bob Middleton by telephone, and there was more discussion of the right of way and at this time he offered to buy the right

d way from me.

Q. Have you had any conversations with Mr. Fred Cook?

A. No.

Q. Do you know of your own knowledge who actually performed the construction itself?

A. Yes, I obtained the name from the bulldozer that was placed on the property and searched out the name of the company, and I found it to be Strickler Brothers of Hillsville, Virginia, and I called this company and I talked to one of the Mr. Stricklers who admitted he had constructed a road for a client from North Carolina.

Q. Did he state who that client was?

A. Yes, Mr. Bob Middleton of King, North Carolina and Mr. Fred Cook.

Q. What action, if any, did you take to put the defendants on notice of their trespass other than the signs in the road which you have introduced?

A. In the conversation with Mr. Middleton on January 4, 1973, I told him that he was trespassing on my property and later I had an attorney, Mr. William Craft, to notify Mr. Middleton by letter.

Q. You have alleged that as a result of the construction there has been damage done to your property, is that correct?

A. Yes, the photographs will reflect damage to trees, and plant life in addition the tenant living on my property has a spring below this road construction and there has been considerable mud and silt in her spring and other source of water.

Q. Do you ask that there be, what we lawyers call, an issue out

of chancery to try to determine the amount of that damage?

A. Yes, sir.

Q. Have you at any time since the acquisition of the subject properties authorized anyone to go across your property for the purposes of

-8-

(Tr. 9) ingress and egress?

A. No, I have not.

Q. When you purchased this property did you have a title search performed?

A. Yes, I did.

Q. Who did that title examination?

A. Mr. Phil Sadler and his law firm.

Off the record---

Mr. McGhee: Would it be proper to introduce that title certificate, Mr. Commissioner?

Mr. Owens: I would object to that as being something purely personal between the complainant and his attorney, that is not of its absolute evidence or the truth and that is an issue that is before this commission.

Mr. Commissioner: Although I would like to have it as a point of reference.

Mr. Owens: I have no objection to that-

Mr. Commissioner: But I think you are right-

Mr. McGhee: I am inclined to agree but let me ask him this.

Q. Did that title certificate reflect any right of way across your property, I think that is proper?

Mr. Owens: That, I would object to because that is the issue in fact for this commission.

Mr. McGhee: I am just asking if that title certificate showed that? I am not saying that is a verity, Dow, I am just asking if the title certificate showed that?

Mr. Commissioner: I think I will admit it for purposes of showing why Mr. Johnston took the position that he did and posted the signs that he did on advice of counsel that there was no right of way across it, I will admit it for that purpose.

-9-

Mr. McGhee: All right, sir.

MR. Commissioner: He can go ahead and answer that question?

Q. Go ahead and answer that I asked Mr. Johnston.

A. As far as I can determine there are no deeded rights of ways across my property.

Q. To go back, my question was, does the title certificate which you received from the law firm of Gilmer, Sadler, Ingram, Thomas & Sutherland show any rights of ways across your property?

A. No.

Q. Mr. Commissioner, I would like to introduce the title certificate into record.

Mr. Commissioner: I will admit this solely on the basis of what Mr. Johnston did to-what he relied upon to place his posted signs upon the property not as to the truth or correctness of whether or not there is a right of way. This will be Exhibit E.

Mr. Owens: No objection to that.

Q. Mr. Johnston in going through the file here a moment ago I ran across three additional photographs and will ask you what they purport to show and the date taken and by whom?

A. The first will be a colored photograph taken by me on January 9, 1973, and it shows a bull dozer and it has a letter "16" with "Stricklers Brothers" written at the top. Apparently this is the machinery, or some of the machinery used in construction of the road.

Q. That is constructing the road across your property?

A. Correct.

Q. I will introduce this photograph.

Mr. Commissioner: This will be plaintiff's exhibit F.

A. The next photograph is a black and white photograph taken by me on January 31, 1974, in the presence of Mrs. Dora Simpkins. This is a

- 10 -

(Tr. 11) photograph to the entrance of Mrs. Simpkins' home with a road leading off to the left. This is where the road construction begins and what I described earlier as the northern most part of the road that was constructed.

Mr. McGhee: I will introduce that Mr. Commissioner.

Mr. Commissioner: O. k. that will be exhibit G.

A. The other black and white photograph was taken by me on January 31, 1974, in the presence of Mrs. Dora Simpkins and it is a view from the road that was constructed at the point of the lane shown in the previous photograph and it reflects a pathway similar to the area where the road was

constructed before the construction across my property.

Mr. McGhee: I ask that that one be introduced Mr. Commissioner.

Mr. Commissioner: O.k. that is exhibit H.

Q. Mr. Johnston, I will ask you whether or not you are asking the Court for an entry for a permanent injunction against the defendants from trespassing across your property?

A. I am.

Q. And further as stated before for an issue out of chancery to determine any damages being suffered by your property?

A. I am.

Q. Who is Mrs. Simpkins that you referred to?

A. She is Mrs. Dora Simpkins, she is one of the persons who conveyed the property, most of the property, where the road is constructed over or through.

Q. She still lives on the property there?

A. Yes, she does.

Q. Mr. Commissioner, I do have one further question-Mr. Johnston, after you first strung the cable across the roadway that was being constructed and placed signs there what occurred?

- 11 -

(Tr. 12) A. In fact, there were a number of cables placed across the road. The first one on April 4, 1973, I placed a cable across the road and it was removed. I think perhaps on April 16, 1973, The cables shown on the pictures were placed across the road on May 12, 1973, with the post planted in the middle of the road and locks on each cable. These cables were cut

and the post removed apparently by heavy equipment. On May 21, 1973, while I was talking with one of the storekeepers in the area and he stated that-

Mr. Commissioner: No, I don't think I can hear what somebody might have told you Mr. Johnston.

Mr. McGhee: I think that is all Mr. Commissioner.

BY MR. OWENS:

Q. Mr. Johnston, you say that you had anticipated that a road would be built over this property, when did you first anticipate that it would be?

A. During the Christmas and New Year holidays of the later part of December of 1972, Mr. O'Dell called me by telephone and stated that there was heavy equipment unloaded on my property from a state maintained road and I knew that someone had purchased the land on the other side of me. I gained this knowledge from Mrs. Dora Simpkins, who told me that they had talked to her and she had told them that--

Mr. Owens: Again, I object.

Mr. Commissioner: I think it might be in the other testimony, anyway don't say what anybody told you.

A. I'm sorry.

Q. Anyway you say that in the later part of December 1972, you come by that there was some heavy equipment unloaded there?

A. Yes.

Q. And when did construction first start on the road, to your knowledge, that you were aware of?

A. I think it was December 29, 1972.

Q. And when did you yourself, post the first sign?

A. I ask Mr. O'Dell to place them-

Q. No, if the Court would please, I am asking when he himself posted the first sign?

A. I would have to estimate that, give me a moment please. I would have to estimate that, it was during the road construction I placed more signs on the area.

Q. Let me ask you Mr. Johnston, you have filed here as Exhibits A, B & C, photographs taken on the 12th day of May, 1973, and you say this was taken the day after you posted the signs?

A. What is that day, please, let me refer to my notes. These signs were placed on the day or the preceding day of the pictures.

Q. That was my understanding that you had posted these signs after the construction had--

A. But I had placed smaller white posted signs some time before this and it was during the first stages of the road construction..

Q. I had understood your testimony to be that these were the first signs you had posted, but of course, I might be in error on this.

A. I placed smaller signs before that not, let me regress please.. It is hard to remember, I have had this land posted for perhaps a year or so previous to this. The signs would get torn down and I would put more up and and I was constantly putting signs up, but I think perhaps there was only maybe one sign, one or two signs, at this time, and this is the reason I ask Mr. O'Dell to place more. I came back within a period of two weeks to

thirty days and placed signs on trees myself in addition to the ones in the photographs.

Q. But can you tell us when this would be, other than just guessing?

-13-

(Tr. 14)

A. Within two to three weeks after construction.

Q. At this point did you know who the owners of the adjoining property were?

A. At which point?

Q. When you first posted any of the signs?

A. I believe I placed the posted signs before they purchased the property. Because I posted this part of my land before they purchased it, and I understood this to be in the summer of 1972.

Q. After you found out that someone claimed and asserted a right of way through this property, can you tell us the approximate date when you determined this?

A. Yes, January 2, 1973.

Q. On January 2, 1973, is when you first determined that someone asserted a right of way over your property?

A. Yes.

Q. And that was after the machinery was there?

A. Yes.

Q. At this point did you contact the owners who had asserted this right and tell them that they did not have the right?

A. I first talked to Mr. Middleton on January 4, 1973.

Q. And did you tell him that he did not have a right?

A. Yes sir, and he claimed that he did have a right of way and he would send me a certified copy reflecting this.

Q. And when did you first write them and tell them that they did not have a right of way?

A. On January 3, 1973.

Q. That was after your conversation with him on the 2nd?

A. No, I did not have conversation with him until January 4th, the following day, I learned his identity on the second and I wrote him on the

-- 14 --

(Tr. 15) 3rd of January and he called me I believe or we had a telephone conversation on the 4th day of January, 1973.

Q. I again refer to Exhibits A, B & C taken on May 12, 1973, this road was substantially completed at this point?

A. Yes, sir.

Q. I have no further questions--

By Mr. McGhee:

Q. Mr. Johnston, in previous testimony you stated that you contacted Mr. Craft of the law firm of Craft & McGhee in regard to this matter?

A. Yes, sir.

Q. And had Mr. Craft put these people on notice a second time ?

A. Yes, sir.

Q. I hand you a copy of the letter from Mr. Craft to Mr. Middleton which shows that you received a copy of this letter?

A. Yes sir.

Q. What is the date of that letter?

A. This letter is dated February 12, 1973.

Q. Would you read that into the records, please?

A. I represent Brice-

Mr. Owens: Let me see-you are certain this is the letter that Bill wrote-you allege it to be ?

A. Yes, I have a copy of it as well.

Mr. Commissioner: Let's just admit it, the whole thing, the copy of the letter into the record.

Mr. Owens: You took this out of your file Bill, and we know it is your copy-

Mr. Johnston: And I have a copy of it as well, I should have referred to it but I overlooked it.

-15-

Mr. Commissioner: This will be admitted as Plaintiff's Exhibit J.

Mr. McGhee: I believe that is all, sir.

Mr. Commissioner: Let me just ask him a question or two-

Q. The post that was implanted in the middle of the road, do you of your own knowledge know who removed it?

A. Of my own knowledge, no.

Q. And of your own knowledge do you know who cut the cable that you had stretched across there?

A. Of my own knowledge, it cannot be heresay?

Q. No.

A. No. I planted the post myself and it was quite deep. I think it

was perhaps 4 feet deep and it was a huge post perhaps 8-10 inches in diameter and a rugged post and I packed it in tight. So it was a very difficult post to remove, therefore, I assumed it was moved by equipment.

Q. Do you authorize the secretary to sign your name to these depositions after they are transcribed?

A. Yes, I do.

Q. That is all-----

BRICE JOHNSTON, JR.

By _____
Notary Public

COMMONWEALTH OF VIRGINIA

COUNTY OF PULASKI, to-wit:

I, Norma K. Trail, a Notary Public for the State of Virginia at Large, do hereby certify that the foregoing depositions was regularly taken before me in my said county aforesaid, at the time and place and for the purpose set forth in the caption hereof.

Given under my hand this 15th day of October, 1975.

My commission expires: July 13, 1975.

VIRGINIA: IN THE CIRCUIT COURT OF PULASKI COUNTY:

BRICE JOHNSTON, JR.
AND
M. TERESA S. JOHNSTON, his wife

v.

COMMISSIONER'S
HEARING

ROBERT MIDDLETON
King, North Carolina

AND

FRED COOK
King, North Carolina

AND

HORACE STRICKLER
HARRY STRICKLER
T/A STRICKLER BROTHERS
Fancy Gap, Virginia

In execution of a decree of reference entered in the above styled matter on the 11th day of December, 1973, and pursuant to agreement of counsel, the following depositions, continued from July 14, 1975, were taken before Eugene L. Nuckols, Special Commissioner, at the Courthouse of the Circuit Court of Pulaski County, Virginia, at 10:00 o'clock A.M. on the 8th day of April, 1976.

PRESENT:

EUGENE L. NUCKOLS, Special Commissioner

BRICE JOHNSTON, JR., in person, and by
his attorney,

WILLIAM R. L. CRAFT, JR.

ROBERT (BOBBY) MIDDLETON and
FRED COOK, in person and by their
attorney,

A. DOW OWENS

BRICE JOHNSTON, JR., a witness of lawful age, after first being duly sworn, deposes as follows:

BY MR. CRAFT:

Q. Mr. Johnston, you are the complainant with your wife in this proceeding now pending in the Circuit Court of Pulaski County, Virginia, styled Brice Johnston, Jr., et al, against Robert Middleton, et al, is that correct?

A. That is correct.

Q. The record would indicate that depositions were taken previously in your behalf, the last taking of which was on July 14, 1975, is that correct?

A. That is correct.

Q. Mr. Johnston, has the situation of which you complained, about the trespassing and use of your land, continued since the taking of the last depositions July, 1975?

A. Yes, it has to some extent.

Q. Has there been any change or addition or supplements to the complaints that you previously testified about? If so, state them.

Q. Yes, on January 17, 1976, I learned from two different sources that a bridge had been erected across a small stream and that it had caused severe erosion because of the construction of this road; and later I went to see that site. I took photographs. I believe you have them.

Q. When did you go to the site? Approximately?

A. I went to the site and took three photographs of this bridge on January 18, 1976.

Q. Do you know who erected the bridge?

A. No.

Q. Is it located on your property?

A. Yes.

Q. Do you know of anyone else that would have any need or use of

-2-

(Tr. 3) this bridge other than yourself or the other person?

A. Not to my knowledge.

Q. Did you say that on this date you took photographs?

A. Yes, I have two photographs of the bridge and the one photograph of my cable - the cable across the road leading to the bridge. This would be in a southerly direction, I believe.

Q. Who installed the cable?

A. I installed it myself.

Q. If you will let me have those photographs.

BY MR. OWENS:

Q. Is this showing the cable?

A. Yes, that is the cable, and you can see the vehicle tracks in the road.

BY MR. NUCKOLS: Before you get any further into this particular aspect of it, it would appear to me after going over this that the only thing I have got to consider is whether or not the defendants had a right to construct a road there, did they have a right of way. Now all the other items such as this would be— in the event that I decided that they did not have the right, and, therefore, it became the question of damage was before the court; the court then would have a jury to determine the amount of any damage. But all these things here have no bearing on what I have got to decide.

MR. OWENS: That is my understanding.

MR. NUCKOLS: It would seem to me unless you all have some other reason, we ought to restrict to the right of building a road across Mr. Johnston's property.

MR. OWENS: As I would understand—

MR. NUCKOLS: I gather that there is no question they built a road across there and the only question is, "Did they have a right to build one?"

(Tr. 4) MR. CRAFT: I am in agreement with your conclusion about the issue before you. The only purpose that I felt this evidence would serve is to show that it is attempted to be used. It has not been abandoned. And that if the court should so rule either way that these people in this use would either be prohibited or permitted — one way or the other we would be entitled to a hearing on damages, an issue out of chancery or we would not.

MR. NUCKOLS: All right. But I just thought I would state this so we would not go into all the other details. We will go ahead and take these but I just think for Mr. Owens' sake too that we restrict it just to this question.

MR. OWENS: That is my only evidence.

MR. NUCKOLS: All right, fine. You want to file those?

MR. CRAFT:

Q. I would like to ask, Mr. Johnston, you consent to introduce these photographs as exhibits and made a part of your testimony?

A. Yes.

Q. Mr. Johnston, this does reflect the continued use of a right of way or road across your property that supplements your previous testimony in this

case?

A. That is correct.

MR. OWENS: I have no questions.

MR. CRAFT:

Q. Do you consent to the secretary to sign your name to the deposition after it has been typed?

A. Yes, I do.

BRICE JOHNSTON, JR.

By

Jewell W. Mathis
Notary Public

-4-

(Tr. 5)

BY MR. OWENS:

I understand that you now rest.

MR. CRAFT:

Yes, sir, that completes our testimony.

THORNTON ALLISON, a witness of lawful age, after first being duly sworn, deposes as follows:

BY MR. OWENS:

Q. Would you state your full name, and your age and address.

A. Thornton Allison. Sixty-nine, will be seventy the 8th day of May.

Q. Where do you live, Mr. Allison?

A. I live in the Allisonia section now.

Q. Are you familiar with the tract of land ^{in issue now} that is now presently owned by Mr. Fred Cook and Mr. Bob Middleton?

A. Yes, we use to own it.

Q. How far from this tract of land do you now live?

A. Six miles approximately.

Q. You live on the south or up the river?

A. Un-hunh.

Q. Is it correct that your family owned this tract of land plus other lands that are not contiguous or adjacent to this land?

A. That's right.

Q. Was this a tract of land that was owned by your dad?

A. Yes, sir. And also my mother. Later owned by both of them.

Q. Do you know approximately when they obtained title to it?

A. I would have to make a guess of that but I would say it must have been 1922 or around in that section. Now what had happened, my father was hired to go in there and cut this timber off this tract of land for Dr. Raby

(Tr. 6) Calfee and that was around 1918. You see he was the one that cut this road off. They bought this road from Lee Grant Simpkins for the amount of ten dollars and so he cut this road off and cleared it out so they could get this timber and then it was the only road I have ever known since then.

Q. Now, let me get into this a little detail. You state that your dad bought it, you think, around 1922?

A. Around there somewhere.

Q. Before then, around 1918, your father had removed timber from the same tract of land?

A. He did. That's right.

Q. I believe this is a mountainous tract of land?

A. It is, yes.

Q. Let me refer you to Defendants' Exhibit #2 that has previously been filed. Let me acquaint you with this because you haven't seen this.

This is the New River—

A. That's right.

Q. The railroad bridge in here—

A. Un-hunh—

Q. This is the state road—

A. Un-hunh—

Q. The paint mine is right in this area—

A. Un-hunh—

Q. This is W.W. Dickerson's property right in this general area—

A. Yes—

Q. Now this is the road going off the main Lead Mine Road up the

hall—

A. Un-hunh—

-6-

(Tr. 7) Q. And this is the area of the property *that is now* owned by Mr. & Mrs. Johnston?

A. Un-hunh. This is the Simpkins' dwelling, is that right?

Q. That is the old N.J. Simpkins' residence. Now, the road in question, check me on this, Mr. Craft, goes off the public state road that runs basically east and west in a southerly direction toward the N. J. Simpkins' home—

A. That's right —

Q. Then can you pick up what was then used by your father and by yourself?

A. From right here we went up to here. Then we left it here and came on around into our property. Just above the house. The road was in above the house.

Q. Now, let me refer you to this exhibit that shows the Simpkins' home. You point out to the commissioner that you came off the state road in a southerly direction—

A. Un-hunh—

Q. To a point near their residence?

A. Well, now, it was just a short distance from the state road to a point we turned left and come up around.

Q. And does this plat faithfully show the course of right of way that was used?

A. It looks fine to me.

Q. Well, this is not, of course, to scale.

A. I know but it looks fine to me.

Q. And in leaving the road was it necessary to cross a small branch?

A. Un-hunh, yes, it was.

Q. Is this what was known as Breeden's Branch?

-7-

(Tr. 8) A. Now, that is a part of it. Just ~~let~~ *That* ~~branch~~ forked up in there but this is known as -- it gathered from there off of our property and came down there. That is part of Breedens Branch.

Q. And was this where you used as a means of getting back to this five hundred acre tract?

A. Un-hunh.

Q. By your father and by you?

A. Yes, many times.

MR. CRAFT: I am afraid I have got to object because all the questions are leading calling for a "yes" or "no" answer.

MR. NUCKOLS: Let him--I realize what you--but don't make them quite as factual in the interest of time.

BY MR. OWENS:

Q. Mr. Allison, you really basically don't know this but let me say to the commissioner. Look at this defendants' exhibit number two and point out to the commissioner the way that you and your father had gotten into this five ^{acre} hundred/tract of land.

A. Now this road right here was the only way we had of getting in there. That was the only right of way we owned at that time and that's the only road we had, and so, more than that, all of this time we owned this tract of land the public used it. American Pigment Corporation used it and everybody come along

that wanted to use it. They hauled timber from over here over our place and see there we never kicked. Everybody used this road.

Q. Now you say the public did use it?

A. The public did use it. Everybody used it that wanted to use it. American Pigment Corporation, you know that owned the plant over there--

Q. Un-huh.

A. Now, they used that road, too, while we owned this tract of land.

Q. Has there to your knowledge ever been any other road as a means of access to this tract of land?

A. No, I don't know of any, never have seen it.

Q. Do I understand you to say that your dad hauled timber out of there?

A. Oh, for, over a period of years, I don't know just how long and how

-8-

much. Probably while we owned it & before, while we was cutting and hauling for Calfee, now, he went there and taken a bunch of men and cut this road out.

(Tr. 9)

Q. This was your dad?

A. Yes, my dad. He did that. He cut the road out. It was in bushes and he cut it out and started the road.

Q. Did he obtain the use of this road from Mr. Simpkins?

A. Raby Calfee did that. Dr. Raby Calfee. He bought that for \$10.00, when they first went in there to--I have seen it, I have seen a receipt of that but I don't have it now. Something happened to it but I have saw the receipt where that Mr. Simpkins, Mr. Lee Grant Simpkins gave him \$10.00 for the right of way.

Q. I am going to refer to a deed dated the 3rd day of December, 1915 from Stephen P.M. Tasker to N. J. Simpkins. It is in Deed Book 38 - Mr.

Commissioner, I am sure you have already found it but I don't have the page here.

number/. Do you remember the name "Stephen P.M. Tasker" and who they were?

A. No, No, I don't. They were owners I had heard but this is just this here. I know that they had an interest in the tract of land that we bought at one time.

Q. Did they not - is it a fair statement to say that they owned a whole lot of land over across the river?

A. They did.

Q. This refers to a right of way to the N.J. Simpkins crossing Breeden's Branch, and you testified that this little area is, shown on the thing, the scribbly lines, is Breeden's Branch?

A. Yeah and back up here is where that little - we called it the Pole Bridge. We built that Pole Bridge so we could go cross there, the branch. That little bridge that he was talking about there that was the Pole Bridge when we sold it.

-9-

(Tr.10)

Q. Well, this would be a little different bridge than the one he just referred to.

A. Yeah, that's right, but that is what we called it.

Q. Now, this deed from Tasker to N. J. Simpkins also refers to something known as the "Miller Beaty Road". You know what that was?

A. No, I don't know that.

Q. Have you ever heard that name?

A. Well, no, I don't know as I ever did but the only thing is, I knowed Beatys, I knew Beatys when they hauled that tanbark out of that mountain up

the creek to the main road. I knew them there then.

Q. Well, Mr. Allison, I will direct questions on that to Mr. Simpkins when we put him on. Mr. Commissioner, I have borrowed from the Clerk's Office a plat entitled "Map of the Properties of Morris and Tasker" dated August 5, 1895; this is in the very back page of Plat Book 1, the second plat book of Plat Book 1. You remember there are two plat books. Now, Mr. Allison, with the commissioner's consent, I would like to offer this as an exhibit with the understanding that, of course, I have to return it to the Clerk's Office.

MR. NUCKOLS: If Mr. Craft has no objection. It is a matter of record. Whether it is an official map or not but it is a matter of record in our Clerk's Office. Right?

MR. OWENS: Right.

BY MR. OWENS:

Q. Mr. Allison, I want to call your attention to the map I have just referred to and place you here where the railroad crosses New River--

A. Un-huh,--

Q. And crosses and then goes on south paralleling the river for a period of time before it leaves it. This is marked at the village of Hiwassee.

-10-

(Tr. 11) Now, I want to call your attention to this plat and show you where Breeden's Branch is on the map; and that runs generally east and west, this being the designation of north, and to the best of your knowledge is that the Breeden's Creek?

A. That is exactly right. This is the road that goes on up there. It

is kept up by the state now but it didn't use to be. People just worked it themselves. Then on up there is where you turn left off of this road into the Simpkins' property. Then we followed it a little ways and crossed this Breeden's Branch and then turned left and went on around above their house.

Q. And you sold this property to Mr. Middleton—

A. That's right—

Q. Approximately when?

A. Oh—

Q. Within the last few years?

A. After my mother died in 1970. In 1971. That is approximately.

Q. From the time that you first started using this property with your dad, say around 1918, until you sold it to Mr. Middleton and Mr. Cook had you and your families and members of the public continued to use this road?

A. Oh, yes, there was never no question. No body didn't ever try to stop us, no body.

Q. And had it grown up some?

A. Yes, it had. We would have to go in occasionally, you know, and cut the grass off it if we didn't use it.

BY MR. CRAFT:

Q. When is the last time you have been on the land?

A. Not since we sold it to Mr. Middleton. I haven't been up there since then.

Q. Do you know as a matter of fact that this right of way and road that you are talking about that is shown on this map that has been introduced is the same one that is being used now?

A. Well, now, I haven't been over that road but I don't know. I haven't been there since Mr. Middleton bought it. I haven't been up there.

Q. Well, there has been evidence introduced here that he went in and built a new road.

A. No, I haven't saw the new road.

Q. You don't know for a fact whether the road he has now built and now using is the same one you are talking about or not, do you?

A. No, I wouldn't know, but that was a cleared out road that we had in there.

Q. Did it have a bridge over it?

A. It had a little bit of bridge over the bank. We called it a pole bridge. We built it over there so we could cross it, built it out of poles.

Q. Is this entrance that you have referred to that exists here on this map, is it still called the same creek?

A. Well, now I don't know. I don't know whether—I couldn't tell you about that.

Q. Do you know whether it is called Spencer's Run or not?

A. No, I wouldn't know that.

Q. When did you acquire this property?

A. My daddy—I don't know exactly but I would say about 1922 my daddy bought it.

Q. How old were you then?

A. Fourteen—I was about fourteen.

Q. You said he bought a right of way?

A. No, he didn't buy the right of way. Dr. Raby Calfee bought

Tr. 13)

-12-

the right of way and sold it to him. He cut the right of way for Calfee-

Q. And sold it to your father?

A. Un-hunh.

Q. That is what your father told you?

A. Well, I saw—I don't have it now but I saw the receipt that Mr. Simpkins gave him \$10.00 for the right of way. I saw it but I don't have it now. I looked for it but I don't have it.

Q. Was there any written document or easement prepared?

A. That was all, was just—

Q. Just a verbal agreement—

A. \$10.00 you can have a road through there for \$10.00. That was—

Q. No map or anything made?

A. Not in my knowledge, no.

Q. You say people used this road. Who else lived back up in there besides you people?

A. We had two houses up there. We had a fellow Bowman and Mr. Quesenberry. He's here. He lived on our place.

Q. Did he rent from you?

A. Un-hunh.

Q. But he didn't own real estate?

A. No, he rented from us and worked for us.

Q. Who else owned real estate up there?

A. Well, now, Mr. Simpkins that is all that I knew that came out over this road there but Mr. Simpkins hauled his timber across this road, part of it, part of it he didn't. But he used it too.

Q. He had other access to his property?

A. He did have other access but he used it too.

-13-

(Tr.14)

Q. He used it to haul timber out?

A. Un-hunh.

Q. You all gave him permission to—

A. Well, I suppose—now, I didn't give him any permission but I suppose he had permission. I would say he did.

Q. Permission from your father?

A. Yeah, un-hunh.

Q. But there was no written easement or agreement?

A. Not to my knowledge anything written about it.

Q. They used it to haul timber out?

A. Un-hunh.

BY MR. OWENS:

Q. Mr. Allison, you have stated on cross examination that you have not been up there since some repairs were made or —

A. No, I have not—

Q. What ever has been done you have not seen it?

A. No, I have not gone back.

Q. But now make certain that I understand that you have previously pointed out in your direct testimony that the right of way you referred to is

above or east of the old N.J. Simpkins' home?

A. That is right.

Q. Now was there any other way to get into this property?

A. Not to my knowing. We had no other way.

Q. Are you familiar with the property that C. C. Abell used and bought and sold to Mr. Glenn Simpkins?

A. I have been on it. Yeah. I know where it is. I have been on it.

Q. Did they use this road?

A. Yeah, there was timber hauled out over there too.

-14-

(Tr.15)

Q. From the Abell tract?

A. Un-hunh. They came out over that road, too.

Q. And did Mr. C. C. Abell use this same road as a means of ingress to his property?

A. Now, they could have come another way but they used that road. There was two ways they could come.

Q. So, Mr. Abell in getting to his property would go off of this road that comes—

BY MR. CRAFT:

I object, Your Honor. He has already said he had another way. He did use it to haul his timber out.

MR. NUCKOLS: Mr. Abell?

MR. CRAFT: Mr. Abell. That's right.

BY MR. OWENS:

Q. All right. Did he to your knowledge use it for any other purpose?

If you don't know—

A. He didn't. Now, I will tell you. Now hunters, lots of hunters would go—that's a good place to squirrel hunt. All the public, everybody used it to go out there. I do know that because I have seen them when they would go out there and kill the squirrels. Most everybody used that route.

BY MR. NICHOLS:

Q. When did you last use this property up here that you sold to the Middletons, and Cook?

A. We didn't use it any more. We didn't use it after we sold our property and the right. We sold it all to Mr. Middleton. We haven't used it any more.

Q. Were you using it up until that time?

A. Yeah, yes, we were.

-15-

(Tr.16)

Q. What were you using it for?

A. We was going to and for hauling wood and logs and stuff out of there. We used that. That was the only road we had.

Q. You didn't use it because you lived up there?

A. Oh, no.

Q. Did you ever live up there?

A. Never did live there. We lived at another tract up home but we did have two houses up there and rented them. We had a farm cleaned up on this seventy-five acres. We had tenants living up there and they used this road. It was the only road we had.

Q. Now, who did you say gave this \$10.00 to Mr. Simpkins?

A. Dr. Raby Calfee.

Q. Was Dr. Calfee - was he interested in hauling timber out of up there?

A. Well, now, he first bought this boundary of timber and hired my daddy to market this timber for him. And that was why my daddy went there and cut this road out. And he was the one that bought this road. Then later my daddy wanted the piece of land. So he goes and buys this piece of land and then— he passed away and deeded it to my mother.

Q. But Dr. Calfee bought it? Your testimony is that he bought that right of way for ten dollars?

A. Un-hunh.

Q. And it was for the purpose of hauling timber out of up there? That was what he was going up there for, is that correct?

A. Un-hunh. They bought it at that time but it never was closed after that. As long as we had it we used it.

Q. And your father bought the property from Dr. Calfee?

A. No, no. He bought from Forney Mining Company. Then he bought Dr. Calfee's rights out but my daddy bought that from Forney Mining Company.

-16-

The deed will show that.

Tr.17)

Q. What I am trying to find out — in your understanding, how did your father get this right which Dr. Calfee had bought?

A. Well, now that question I couldn't answer because he bought—I couldn't answer that but the road was never stopped up. That's all I can say. We used it. How he got the road I don't know.

Q. All right. Now, you sold this property to Mr. Middleton?

A. Yeah, we, the heirs of the property. There was more of it than me. We sold it to Mr. Cook and Mr. Middleton.

Q. Was there a discussion at that time of access to this property?

A. We talked about it. I taken them down there and showed it to them and we talked about the road, and I told them, showed them the road and told them that that was our road. And I thought at the time it was our road. We had used it over a period of years. I was the one taken them in there and showed them the property, went right over this same road.

Q. Do you know anything about a right of way across, through the mountains that Mrs. Simpkins told about that led to your father's property?

A. The only road I know is this one right here. I don't know which one she referred to but this is the only road that I knew, any right of way that I knew that was in there any where. That's the only one we ever used.

Q. Mrs. Simpkins, if I recall, testified that your father had often said he had a right of way across the mountain but it was just too expensive for him to build. Do you know anything about that?

A. No. Our main interest - the best of the land was facing where we went into this road here and the best of the land and most of the timber was there facing that side. And that's the easiest way to get it. It was over this road and we got it there. We just used it. Now, there was another road back of the place over there. But now you couldn't get across there to it. You would have

Tr.18)

-17-

to go down to the river and take up the ridge to go across there. Then you would have to come back. We never used that road. I don't know what kind of road it was or anything about it. I know where it is.

Q. Looking at this sketch here again. Now this shows this road which you said is approximately where you folks went in to get to this piece of property?

A. This is. Now this is kept up by the state. The state ends right here—

Q. I realize that—

A. And we went out to here. Then we turned left and went around above the house and come in on our property.

Q. I realize that. Now this shows it goes all the way through, or swings through your property and then comes back into the Simpkins' property?

A. Yeah, that's right.

Q. Why did it come back into the Simpkins' property?

A. Well, we had a right out there and Simpkins used it too. We both used it. Simpkins used it and we did too. We had timber out there and we hauled. And they did too. Now Noah Simpkins sold his acid wood to Jim Quesenberry and he hauled most all of it out over that road.

Q. So it was used by both the Simpkins and Allison's for hauling timber out of there?

A. Yes, that's right. And even the American Pigment Corporation used this road to go back and forth across there.

BY MR. CRAFT:

Q. Where is this other road that you were talking about that was so difficult to use that you knew about?

A. Over on the other side of the mountain. Way over on the other side— well, it didn't touch our property. It's what they called the Tank

Branch. It's the Alford Branch but you had to go up the river and go way up a steep mountain. You couldn't get up there. We never used it.

Q. But there was a road there?

A. There was a road at that time but it has growed up now. It's washed away. There's no road there now. I was over there not too long ago. There's no road there. It's gone.

Q. Where is it in reference to this other road you are talking about here?

A. Well, now, it would have come way over here up from the back side of our place. It come way up—I don't know who owned that land but it was way back over on the back side, across the railroad track, down about a mile above Hiwassee, and went way up that ridge and then back in. It is all washed away. I don't know whether you could walk in there now or not.

Q. That was on the back side?

A. The back side but it wasn't on our property.

Q. When was it last used to your knowledge?

A. I don't know that.

Q. It was a road?

A. Years ago. The last time I was up there there wasn't any road there.

Q. And where did it come out over here in reference to this creek, Breedens Creek?

A. Now, this was on the opposite side of the mountain to Breedens Creek. This was on Alford's Branch. That's south of this here Breedens Creek. We crossed the mountain, I would say, I believe I would say, it's a mile and a half over there.

Q. Where would it come out? On what road?

A. It came out on the main highway now. What is it? 693.

MR. OWENS: That's the main road.

-19-

A. That's where it came out. You had to leave this road to go up there. And then at one time, way back there in that mountain, there was some people that lived in there. They used this road and they moved out and the road just went down. We didn't use it much. After they quit using it, it just went down. There was nothing there. Washed away.

BY MR. OWENS:

Q. I am going to refer to this "other road". Do I understand your testimony to be on cross examination that this road did not come to your property?

A. No. No. We had no interest in that road at all. The only interest we had was the road that I stated that went right in above the Simpkins' house now. That's the only way we had.

BY MR. NUCHEOLS:

Q. Do you authorize the secretary to sign your name to your deposition after it is typed?

A. Yes.

THORNTON ALLISON

By

Jewell W. Martin

Notary Public

BUSTER QUESENBERRY, a witness of lawful age, after first being duly sworn, deposes as follows:

BY MR. OWENS:

Q. Would you state your name?

A. Buster Quesenberry.

Q. What is your age, Mr. Quesenberry?

A. Seventy-five.

Q. Where do you now live?

A. Dugapur.

-20-

(Tr.21) Q. O.K., Mr.Quesenberry, I want to refer you to an exhibit filed with the commissioner labelled, Defendants' Exhibit No. 2. Now, let me show you where we are on this. This is New River. This is the approximate location of the W. W. Dickerson Store. This is the paint mine or the plant itself. It's in this area. This is the road going off the Lead Mine Road back up toward the property we are concerned with. Now, were you familiar with the five hundred acre tract of land that was owned by the Allison family.

A. Yes, I worked up there and lived up there.

Q. You did live up there?

A. Yes.

Q. On the Allison land?

A. Yes, sir.

Q. Can you tell us approximately when you first went there?

A. I can't tell you exactly.

Q. I understand but can you tell us approximately your age or roughly how long ago it was?

A. Forty-five years ago.

Q. Approximately forty-five years ago?

A. Yes, sir.

Q. How long did you live on the property?

A. About three years.

Q. For what purpose did you live on it?

A. I farmed up there and cut timber for Mr. Allison.

Q. Was this land then in addition to producing timber, was it being farmed or part of it?

A. Part of it was farmed.

Q. And how did you get to this property?

A. That road that goes up there is the only way you can get in there.

-21-

(Tr. 22) Q. In going into this property would this require you to pass by the home of N. J. Simpkins?

A. Yes, sir.

Q. Would you pass above his home or —

A. Above it.

Q. And after you passed his home did you continue straight or —

A. It went on up about straight, on up where I lived, through there.

Q. Referring to this exhibit again, Mr. Quesenberry, and this is the boundary line of the property of the Allison Estate. Did you live close to—can you point out to the commissioner approximately where you lived? Where your cabin was?

A. I lived right on up above Noah's place there, right straight up the hollow above there.

Q. On the Allison tract?

A. Yes, sir.

Q. Did you pay any rent for this or was it part of the compensation?

A. No, it was part of the compensation.

Q. For working for Mr. Allison?

A. Yes, sir.

Q. Did other people ever use this road while you were there?

A. Yes, there was people used it.

Q. Do you know who used it or for what purpose they used it?

A. They cut timber out back in there. Mr. Simpkins did. Noah. He had to come through some of that place of his he had on the mountain there.

Q. And let me ask you this. Did Mr. N.J. Simpkins also use this road to remove timber from the back part of his place?

A. Yes. He came out that ridge and down through there back of his place.

Q. Then I understand your testimony to be that Mr. Allison and Mr.

-22-

Simpkins both used this road?

(Tr. 23) A. Yes, sir. They both used it.

Q. Do you remember anybody else that used the road?

A. There was people that came in there to hunt, you know. They used that road. Anybody used it that wanted to when I lived there.

Q. And you left ^{there} ~~then~~ some forty years ago, is that approximately how long ago?

A. Yes, sir.

Q. Were you familiar with any other homes or houses that were built upon this Allisen tract?

A. No, sir.

Q. You know nothing about the rental property that Mr. Allisen spoke of?

A. They had two - one little house up there Bowman used to live in it but there wasn't nobody lived there but me when I lived up there.

Q. Was what you referred to as the Bowman house also on the Allisen property?

A. Yes, sir.

Q. And was there any other road or means of access to this property?

A. No, sir.

Q. You are not familiar with what has transpired since then?

A. No, sir.

Q. Are you related to any of these people?

A. No.

Q. Did you know Mr. Cook or Mr. Middleton before you testified?

A. Yeah, I knew them. I sold them my place up there.

Q. Now where was your place?

-23-

(Tr. 24)

A. Off N. Dagspur. In Carroll.

Q. That's how you happened to know?

A. Yes, sir.

Q. That has no relation to this tract?

A. No.

BY MR. CRAFT:

Q. This tract of land that you are talking about here that you lived on forty years ago or forty-five years ago—

A. Forty-five—

Q. Forty-five years ago. When is the last time you have been on it?

A. I haven't been on it since I left from down there.

Q. Forty-five years ago?

A. Yes, sir.

Q. So you don't know what road anybody is using going in and out of there now?

A. I don't know nothing about it. I just know where it was when I lived down there.

Q. You know where the road was when you lived down there?

A. Yes, sir.

Q. But you don't know whether that road is the same one they are talking about here on this map or not, do you?

A. I don't know what about that. I haven't been in there. The same road I guess from what they say.

Q. From looking at the map, you don't really know. Unless you went out there and took a map and went on the property, you wouldn't know whether it is the same road now or not, would you?

A. Yeah, that would be the same road.

Q. You haven't been there in forty-five years?

A. No, sir.

Q. You know whether this map here shows the road as it is now or as it is forty-five years ago?

A. I talked to people that lived up there. They said it was the same way it was.

Q. People told you that?

A. Yeah. I ain't been in there myself.

Q. You don't know of your own knowledge?

A. No, I don't know of my own knowledge.

Q. When you did live there you were living and working for a man that owned the land and living in his house?

A. Yes, sir.

Q. What kind of road was it? Dirt road?

A. It was a dirt road.

Q. How wide was it?

A. It wasn't too wide. It was about wide enough to get through it. Wasn't no passing on it. Wasn't no place to pass. A narrow road. A wagon road.

Q. There wasn't much room to pass on it?

A. No.

Q. And you said other people used it to haul timber out and go in and hunt?

A. Yes, sir.

Q. That is about all the use you know of?

A. About all I knew of.

Q. It wasn't posted.

Q. No, sir. They never posted it.

-25-

(Tr.26)

Q. No gates on it?

A. No, sir.

BY MR. NUCKOLS:

Q. The road after you passed the Simpkins' house, did it go straight or go off at an angle, or what?

A. It went about straight up through there.

Q. Now, was the road the same width as it passed the Simpkins' house and went all the way up to where you were living or did it get narrow?

A. It was about the same all the way.

Q. From this public road over there?

A. Yes.

Q. And was it wide enough for just one car to go up? If you met somebody you would have to get off the road?

A. It would be a few places you could get out maybe.

Q. Sir?

A. There would be some places you could get out of the road.

Q. But generally it was just the one way?

A. One way in there.

Q. Now, the back side of this tract of land - you were living down over in this area, somewhat, the back side of this. Is this mountain land? Is this the top of the mountain back up here?

A. Yes, sir. That's mountain back in there.

Q. Was there timber from up here?

A. Yeah, there was timber all back in there when I lived there.

Q. Do you know whether or not at any time any timber from up at the top was hauled in this direction?

A. Mr. Simpkins hauled his from out this way from in there.

Q. Well, Mr. Simpkins is back over here but—

Q. He came in through that place, the corner of it.

(Tr. 27)

-26-

Q. But the top of the Allison property up here on top of the mountain, do you know whether any of it was hauled this direction?

A. I don't know whether it was or not.

Q. Do you authorize the secretary to sign your name to your deposition after it is typed?

A. Yes.

BUSTER QUESENBERY

By

Jewell W. Martin
Notary Public

Glenn L. Simpkins, a witness of lawful age, after first being duly sworn, deposes as follows:

BY MR. OWENS:

Q. Would you state your full name.

A. Glenn L. Simpkins.

Q. Where do you now live?

A. Just south of Ann Arbor, in the little town of Miland, Michigan.

Q. I believe that at the request of Mr. Middleton and Mr. Cook you were willing to come here and testify?

A. Yes, they called me and said that they were going to give depositions, and me and Marie threw something in the car and tore down here.

Q. What is your age?

A. Seventy.

Q. Are you originally from this area of the county?

A. My father came from this area and owned the land, I think back in 1894.

Q. Mr. Simpkins, referring to this defendants' exhibit number two, take your time and acquaint yourself with that. Are you familiar with it?

A. The State Road 693, that is the Lead Mine Road, then you had this 692 going up to Mrs. Charlie White or Myrtle White's property at the end of

-27-

(Tr. 28)

the county maintenance road. If you turned left you would go into Mrs. White's or Mr. Johnston's property. If you—left—if you turned left you would go into Mrs. White's or Johnston's property. If you turned right you would go into this N.J. Simpkins property.

Q. That we are now discussing?

A. Right. And when you started into N.J. Simpkins, a short distance there, if you went across the stream, you went left and went above the cleared land of the Lee Graham and N.J. Simpkins' property in the woods, and there is a road that was there as long as I can remember.

Q. Let me refer you to this defendants' exhibit number two showing this road coming in. I believe it is labelled there the "Farm Road". Does this

to the best of your knowledge reflect the roadway as you remember it?

A. To the best of my knowledge, yes.

Q. Now, go ahead and tell the commissioner what you know about these tracts of land and why this road happens to be there and what use has been made of it?

A. I would just like for the record to get my date and the approximate time of my mother's death when I was up there. I was born September 5, 1905, and my mother died in 1909, and I went to stay with Lee Grant Simpkins, 1909 to approximately — until my father was married again and I think I was nearly six, between five and six, and every summer I would go up there and visit with them for two or three summers after that, but ever year I tried to go back up there and see the folks and go back on the ridge; and due to the fact that my father had owned it at a point overlooking Hiwassee, out of sentiment I wanted the land. I bought it from Mr. Abell in 1962.

Q. Now, this is the land shown on Exhibit 2 as the C. C. Abell Tract?

MR. CRAFT: If you would, please, I would like to let the witness identify which piece and so forth—

Witness: What piece was that?

-28-

(Tr. 29)

MR. CRAFT: I am just objecting to the Commissioner that Mr. Owens designate which piece, where it is and what number it is on the map. I object to that.

MR. NUCKOLS: Ask him if he can identify from the map the property that he is referring to that he bought from Mr. Abell.

A. No, unless I have this old map which you had in your office.

MR. OWENS: I don't know what happened to that map.

A. I would have to reserve because I don't want to make any guesses here because I know this is important to you to get this very factual.

BY MR. OWENS:

Q. Well, let me ask you this. Mr. Simpkins, if you will describe the road that led off the public road, Route No. 692, in a generally southerly direction across the N.J. Simpkins property into what was the Allison property and describe its location from the time you remember it. I believe, did you say, 1909?

A. 1909 but there was no road in there then.

Q. O.K.

A. There was no road in there then. My best recollection of the road, and that was when I used to play around with this Thornton Allison, was when Mr. Allison went in there and cut the road in. They made the road wide enough for these big tanbark wagons to get in and out, to haul tanbark. And that's the first thing that I knew that they were hauling out over from Hiwassee. That was their turn around there for whatever they went to pick up. Also, they hauled, back in the chestnut days, acid wood out of there. Then, N.J. Simpkins hauled logs out of there for a logging operation and brought them to a sawmill over, right off of 692 where he had his two sawmills set.

(Tr. 30)

-29-

Q. And did he use the same road?

A. Yes.

Q. Describe this road that was used by these people in reference to the home of N. J. Simpkins. was it above the home or below it?

A. It was - the land elevation - it was above. The land was steep. It went up through a field that formerly was an orchard when Lee Grant Simpkins had it and went past, oh, just a decent distance from the cleared land, around. I just vaguely remember that bridge that Thornton Allison mentioned there, not too well, but the only way that anyone ever got in or out of there as long as I can remember was this road that is in there now.

Q. Are you familiar with the location of the road now?

A. Yes.

Q. Is this the same roadway and same roadbed that has been used as far back as you can remember?

A. I think it's a little wider and it's graded, which it wasn't before, to my knowledge. It was over the terrain and I know of one or two places where they had to go up around and grade out slightly to get through.

Q. But generally speaking is it the same general roadbed that was used as far back as you can remember?

A. To the very best of my knowledge it is.

Q. And you say it may be a little wider than it was back in those days?

A. Yes.

Q. And was it used then primarily as a means to remove timber from the back--

A. Tanbark, acid wood as they called it, the chestnut wood and also timber out of there.

Q. And was this also used by Mr. N.J. Simpkins?

A. Yes, it was. In fact I went over it with him several times.

Q. And in fact, is this the right of way that you have to get to your property?

A. That's what—Mr. Abell took me over it twice in his truck when he went up there to get wood, and took to his little sawmill over here on Dora Highway. He took me up there twice when we were negotiating for this property. If I may introduce this, prior to taking this trip with Mr. Abell, in 1962 or prior to 1962, Mrs. Dora Simpkins, Mrs. N.J. Simpkins, her half sister, May Quesenberry of Max Creek, and Dora's two sons, my wife and I walked from the N.J. Simpkins house up to the point of land overlooking Hiwassee, and when we were up there Mr. Abell was up there getting timber out then and he used that road; and we walked back down the road to a certain point, then out back through N.J. Simpkins farm to his house; and when N.J. Simpkins used that to bring stuff to his house, firewood and so forth, he came across this same identical road to just immediately above his house, and then had a road that went down to his house, just behind his house.

Q. Off of this road?

A. Yes.

Q. Mr. Simpkins, you testified that you have, as often as you could and almost yearly, returned to this general area of the county?

A. That is correct.

Q. And each time that you have returned, since you have been away to follow your profession, has the roadway as you remembered it still been there?

A. Yes. But it started out real small. Real small places that the

horse and wagon or, you know, mules could go over, but Mr. Abell got in there and whether he clipped it out I do not know, but he was driving a Ford, to the best of my knowledge, I am a Ford Motor man, driving a three-quarter

-31-

(Tr. 32) ton truck in there, and if you want to know the color, I think it was about three different colors, red, green and I think truck green and red, and he used that to go back out to the point overlooking Hiwassee to get up this firewood and also logs for his mill that he had over on Dora Highway.

Q. And did you go into this area with him?

A. Yes, I did, twice, prior to the time that I bought it in 1962.

Q. And is this generally the same roadbed that is there now?

A. To the best of my knowledge.

Q. Now, I want to ask you, to refer you to a photograph here. Would you identify that photograph?

A. Yes, in 1922, Mr. Lee Grant Simpkins, approximately the year, was selling this land or turning it over, or assigning it to his son, N.J. Simpkins. I was up there and took pictures of the N.J. Simpkins property, and this was the only roadway at that time. It was used for taking stuff off of the farm only, no timber or anything else, to the main road. And here they were taking this up to the main road there, 692, at the time I took this picture. This is N.J. Simpkins and Mr. Haley and Mr. William Trail.

Q. And is this the roadbed as it appeared in the year 1922?

A. No, this is right at the house.

Q. Right.

A. In front. Now this wasn't the road that went up around the turn.

Q. Well, let me ask you this. I believe this shows the house in the background?

A. It shows the number two shop that he had. He had two shops, one for large lathe work. This was where he turned out the round stuff. He made chairs and beds and stuff like that, and that's the number two shed directly ahead. It's not there any more. That hasn't been there for the last few years. The house was just, as you are facing this, just to the right or below this

-32-

picture.

(Tr. 33)

Q. All right. Then as you look at this photograph the house is to the right of it?

A. Yes, sir.

Q. Which places the road above it?

A. That's right.

Q. Mr. Commissioner, I would like to introduce that as an exhibit, Your Honor.

A.. In connection with that, to the best of my knowledge, there was never, ever any roadway through the N.J. Simpkins property that went back out to the point where my land is or back through their fields there.

A. And this is the only road that you can ever remember?

A. That is the only road.

Q. And you speak of the point overlooking Hiwassee?

A. Well, that is where my land is, where we would go and look down over Hiwassee. And its sixty-two acres there right on the tip of the- right up at the tip overlooking Hiwassee.

Q. Is this above the W. W. Dickerson's store?

A. No, it's immediately above where the N & W comes - over where they process the paint. Well, it's between Dickerson's Store and where the N & W Railroad came across on the Hiwassee side.

Q. Are you familiar with a roadway that is referred to in a deed as the "Miller Beaty Road"?

A. I have heard them talk about the Miller Beaty Road but the only part of that road I was familiar with was where they were going down to the Cole Property. C-O-L-E. Mr. Cole. And that is Virginia Dickerson's father's place.

Q. Well, is that anywhere near this area or—

-33-

(Tr. 34) A. The part that we used was this 692 that I knew of and they use to come back in there and take stuff out but I just knew of it and I couldn't swear specifically who they were or whenever they were in there.

Q. Let me ask you this. Again referring to Defendants' Exhibit No. 2 and to the map that I have taken from Plat Book 1, are you familiar with the creek called "Breedens"?

A. I have heard the name but the thing that confuses me, they had different names for them. Different people had different names. And I think this is extremely confusing so I think I had better just stay away from the Breedens.

Q. You are just not certain about it?

A. No, when I was a youngster what they called Breedens Branch used to come down between the Trail and the Simpkins property to the best of my

knowledge.

Q. Let me, referring to this map of the Tasker Tract that I have previously referred to, point out the railroad bridge crossing the river and this creek running up through here is Breedens Branch. Now, would you point out your property in relation to that?

A. Here is the railroad and the point of land is right here; and if I recall, to the best of my knowledge, the Dickerson store was here.

Q. Referring to this plat that has the mountain ranges superimposed on it, you refer to this as being your point of land?

A. That is right, sir, to the best of my knowledge.

Q. And can you point out where the Allison land would be in reference to that?

A. I was never real familiar, just took for granted as to where the Allison land was in relation—

Q. O.K. I have no further questions.

-34-

BY MR. CRAFT:

(Tr. 35) Q. Do you know when State Route No. 692 was built, constructed?

A. No, Mr. Craft, I would like, off the record I would like to tell you a couple of things, to orientate you if I may. Then I will get to this—

Q. If you don't know—

A. Well, it is not going to be a yes or no. I want to tell you this off the record. (Off Record).

I don't believe that they called it 692 then to my knowledge. The Miller Beaty Road I think it was called then.

Q. It was called what?

A. The Miller Beaty Road.

Q. Approximately when was that built?

A. I would go back there years after that to visit. I definitely remember them hauling tanbark out. Then also iron ore out, but I was never there when they were hauling paint out, to go back and see them hauling paint out. They all used this 692, what's now called 692.

Q. Does it follow the same road bed as it did the time you knew it?

A. Yes, sir.

Q. Then that would be more than twenty-five years ago, I would say?

A. That is right.

Q. When is the last time that you have been on this road that is in dispute here that you have identified following the same roadbed serving the property of—

A. I have been over it the last three years.

Q. You were over it then this last year?

A. Three years, yes, sir. But I come down here which is yearly, we had gone to Florida and coming back we planned to go up there.

Q. Have you observed any change in it in the last three years?

A. Yes, sir, I noticed it.

Q. What kind of change have you noticed?

A. Well, instead of the slight, small brush that you could pull with a car or team, it was cleared out and a little wider and I noticed that there was a

-35-

(Tr. 36) culvert there, that I don't remember. Then there was better grading where it went up around the point, to go back out to the point overlooking Hiwassee.

Q. The bridge—

A. The bridge was not too far from being directly, and as you are looking from the N. J. Simpkins house to the right, where the stream comes through, that is where the culvert was. Whether you call it a culvert or bridge,

that's up to you.

Q. Then you say that in the last few years that you have noticed widening and improvement and construction and cutting out timber and so forth?

A. Well, there wasn't any timber cut out, it was just little brush. We had driven our cars up there, you know.

Q. No big timber?

A. Oh, gosh, no, there was never - no, to my knowledge, there was never any, now this is to my knowledge, I never knew of any timber or didn't see because that was cut over pretty thoroughly. My uncle cut it pretty thoroughly, I know, and I know the Allison's cut it over pretty thoroughly. Anything that is in there would be second growth.

Q. Anything cut then that's over two or three inches along the road then would not be along the roadbed that you knew about then?

A. No.

Q. You say you bought property here in 62?

A. Yes, sir.

Q. Now, before 1962 how many times were you over this property?

A. My cousin, Mae Quesenberry, Mae Simpkins Quesenberry, from Max Creek, and I would go up, oh, we use to visit with Mrs. N.J. Simpkins, Dora, because it is her half sister and she is in no way related to me.

Q. Well, how often would you do that, yearly?

A. We tried to make it yearly, but we didn't make it up there yearly. And sometimes we would go up and see Mrs. White and go back over the property, and go back in there aways, and walk back in. And one year, Dora, Mrs. N.J. Simpkins, Mae Quesenberry, and Dora's two sons, my wife and I walked all the way back out to the point.

(Tr. 37)

Q. You still own your property?

A. Yes, sir.

Q. Mr. Simpkins, I want to ask you, is there an old right of way that goes from 692 to your property that doesn't go this route here?

A. No, sir, there is not.

Q. Never was one?

A. Never was one.

Q. Are you familiar with any bridge or old road?

A. No, absolutely not.

Q. How do you get to your property?

A. This road. That is the way Mr. Abell took me on two occasions and said this is our right of way.

Q. And you are denying that there is any other road—

A. Absolutely—

Q. To get to your property—

A. Emphatically.

Q. So you have an interest in this roadway, do you not?

A. Very definitely.

Q. That's right. You need it to get to your property?

A. That is correct.

Q. That is the way that you would like to get to your property?

A. This is the—when Mr. Simpkins assigned this right of way to him, to Mr. Abell, and Mr. Abell transferred it to me and there is the assignment right there.

Q. Does your deed refer to this road?

A. That's right.

Q. That road is not—you are sure that it doesn't exist over another route down below—

A. Absolutely not. Mr. Abell took me in there and said "This is the road". He took me in there twice and the road, to the best of my knowledge, that Mr. Abell used when we saw him up there with Mrs. Simpkins and Mrs. Ouesenberry.

was that he came over this road. There is absolutely no other road, either in writing or implied.

Q. You don't know of any other road at all that previously was used to reach the property you acquired?

A. Mrs. Simpkins—

Q. I am just asking that, is that true?

Q. Would you state that again, please.

Q. That you are not aware or never heard of any prior road—

A. Absolutely not—

Q. Or other road to reach the property that you now own except this road?

A. That is right. Nobody ever talked to me about it, about any other road. In writing or implied.

Q. How old were you when you left here and went to Michigan?

A. When I went from West Virginia my father was with the N & W Railroad. When we left West Virginia, we were at Bluefield and Williamson, I was eighteen. And every year when we would come down to see the folks in Carroll County, my mother's folks were the old Senator Webb up in Carroll County. We would come down every year to see them, my relatives.

Q. But you have never lived on this property?

A. No. I bought it out of sentiment and hoped someday to have a little cabin up there.

Q. But you don't have any house or anything up there now?

A. No.

Q. You just have a piece of land?

A. That is correct.

Q. Do you know Dora Vivian Simpkins?

A. Yes. Know her well.

Q. Did you ever talk to her about the property that you now own?

A. Never one word.

Q. Never have mentioned--

-38-

(Tr. 39) A. Not one word--

Q. Never have talked to her about the access or road to go into your property?

A. Absolutely not.

Q. Was she an older resident of that area?

A. No, she came to Lee Grant Simpkins after I was there.

Q. But she still lives in that area, doesn't she?

A. She married my uncle.

Q. Does she still live there?

A. Yes, she does.

Q. Is she a reliable person?

A. I never found her to be reliable.

Q. You never found her to be reliable?

A. That is correct.

Q. You would not believe her under oath in a matter in which you had an interest or she had an interest?

A. No, I wouldn't. I absolutely would not.

BY MR. OWENS:

Q. Let me ask you one other question, Mr. Simpkins. Do you ever remember any road below the N.J. Simpkins' home?

A. There was never any road below, except the people on the farm used; I can remember one threshing machine coming in and going up to a field between where they come into the road, into their property, and the house. They went up on a hill and threshed. Mr. Cole did. And they used to have

a road that they used to go back out along the point overlooking this Miller Beaty Road and get firewood. They would go through there and get firewood but there was never any road. At one time my uncle, N.J. Simpkins, was short on time to get down to a train to Hiwassee. And he went down through a rough hollow, there was boulders and stones in there nearly as big as wagons and he went through that, and he said someday he would like to build a road through there because it was a short cut.

-39-

(Tr. 40) Q. But it was never—

A. Never, never did they—

Q. Does the Commissioner have any questions?

BY MR. NUCKOLS:

Q. You own sixty and one-half acres?

A. Sixty-two, more or less.

Q. During the time that you know that Mr. Shell owned it, did he use it just for getting timber out of it?

A. Timber and firewood, apparently for his own use, and apparently selling it. I am not absolutely sure of that but I know he was using it. On different occasions we went up there the road could be gone over.

Q. Did anybody live on this property that you know of?

A. On my property?

Q. Yes, sir.

A. No, sir.

Q. It has never been lived on as far as you know?

A. No. We have taken boy scouts up there from the Powhatan Camp, taken them up there and we have had little cook-outs. I have been a boy scout commissioner for nearly fifty years now. We would take them up there but we never—we walked back through that road going in there.

Q. But the only use that you know of that this sixty-two acres has ever been used for, has been for timber and for visitation like you do for your own enjoyment and so forth?

A. Yes, sir.

Q. No family has ever lived on it?

A. Not to my knowledge, ever.

Q. Did you ever use the road going up to it for other than family purposes or anything?

A. Other than just visitations. One thing I might tell you. When the wagons came in there so that they wouldn't hit each other, they had their time tables, apparently, and they would come out to this point overlooking Hiwassee and make their turn-around, these big, long tanbark wagons. They were merely like hay wagons with the wide sides.

-40-

BY MR. OWENS:

(Tr. 41)

Q. Mr. Simpkins, were you familiar with any use of this road by people who lived in cabins on the Allison property?

A. I knew they were in there. Then there was a family by the name of "Hinkley" that lived on the Simpkins' property years ago. But that was a little before my time.

Q. Well, Mr. Thornton Allison—

A. I knew they were up there, I knew that they used this road up above the property but the kids, the youngsters and stuff going to school or going down to Hiwassee, instead of going around this road, they cut right through the N. J. Simpkins property, and it came right through where that little picture shows. It came back through by the house there.

Q. Mr. Thornton Allison testified that there had been two rental units on this property that they had rented, and that people had used this same roadway

to get in there, but you are not familiar with any rental arrangements that the Allison family had.

A. No, I am not.

BY MR. NUCKOLS:

Q. Mr. Simpkins, when you bought this property from Mr. Abell in 1962, the deed that you have, and you have a copy of it there—

A. I have the other in the bank, deposit box. I have a copy of it signed.

Q. But the one that you have is just like the one on record.

A. That's right.

C. It grants you a right of way as per the deed from Mr. Simpkins, N. J. Simpkins, and his wife, Dora, to Mr. Abell, is that correct?

A. That is correct.

Q. Did you ever read that deed between Mr. Abell and Mr. Simpkins which established this right of way?

A. The only thing I just went by—I did not read it, no. The only thing I went by is Mr. Abell took me over the property twice to show me where the road way was.

Q. What he showed you was this particular road here?

-41-

(Tr. 42) A. That is correct, yes, sir.

Q. And that right of way not only went through Mr. Simpkins' property but went through the Allison property?

A. That is correct.

BY MR. OWENS: Is this the deed you are referring to, Commissioner, of September 13, 1952, from N. J. to C. C.?

MR. NUCKOLS, Yes, un-hunh.

BY MR. NUCKOLS:

Q. Are you aware, Mr. Simpkins, that Mr. Abell, when he got this

property from Mr. and Mrs. Simpkins, the right of way granted to him was a right of way for the purpose of ingress and egress to this property over other lands of the properties of Mr. and Mrs. Simpkins and doesn't mention the Allison property?

A. Not to my knowledge. There was no roadways or graded roadways or roads used to my knowledge because we walked back there through the fields and we walked back around the road. There never was any other roads or any mention of any other roads or any planned roads. Mr. Abell specifically drove me over the road that's here twice in his truck, in talking to him, and he said at the time that he wanted to get some more timber off of it, then he would consider selling it to me. And in 62, prior to 62, approximately prior to 62, he agreed that he would sell it.

Q. Now, when you went over this road on these two occasions with Mr. Abell, were you aware that this road also traversed property belonging to the Allisons?

A. I don't believe that I could be too specific on that, and if it is, it is vague. I don't think that in fairness I should try to make any commitment there. We take so many things for granted when, you know, you are going in, you are just interested to get back to your property.

Q. I realize that, but Mr. Abell did not make any reference to the fact that you were traveling on Simpkins property and Allison property to get to the property he was selling you?

A. No, he didn't. He just said—he said, "I will take you up there

-42-

(Tr. 43) and show you where our right of way is that goes into the property". And he did this and we went up there twice.

MR. OWENS: I understand the Commissioner's concern is how Mr. N.J. Simpkins could have conveyed Glenn Simpkins a right of way over the Allison property.

MR. NUCKOLS: That's right.

A. N.J. Simpkins or Dora Simpkins never in any way talked to me about a roadway or deeding me a right of way or anything. I've never said one word. It was never in any way mentioned.

BY MR. CRAFT:

Q. Was that Dora Simpkins, the one you said you wouldn't believe under oath?

A. That is correct.

Q. I want to ask you, is it because of some dispute over this roadway?

A. No, sir, absolutely not.

Q. Why wouldn't you believe her?

A. Because specifically they had a large grocery bill down here—I'll tell you this—I don't think— you want this on the record?

Q. I don't know why you wouldn't believe her, something personal?

A. Yes. I can tell you and be very brief and very quick.

Q. Just a personal relation between you and Mrs. Simpkins?

A. That's right. Dora and Noah Simpkins was living on the old Lead Mine Road, near where the bridge goes across, what we use to call the Bowman Ferry, that's the road that comes back over it from the Lead Mine—

Q. Let's limit it to what this problem was between you and Mrs. Simpkins.

A. That's what I am telling you right now. They lived there and she wrote me and I have got the letter right here with me where she wrote, that this man was loading her up with work and she just couldn't take it any more. He was not keeping his promise on what they were to get off that little farm as tenants, and I said out of dignity, "Why don't I buy the old property up on the mountain", and they were about to lose it at the time. I've got to tell you this.

Tr. 44) And they were about to lose it and I bought the property, and I said, "I will give you a life tenure on it and whatever you do to fix it up I will try to match that" but they didn't do any fixing up, so I didn't. But I did pay their grocery bill off with Hiwassee. I think it was approximately \$80.00, to the best of my knowledge.

Q. How much did you pay for the land?

A. I think it was \$1,000.00.

Q. You paid \$1,000.00 for the land and paid their grocery bill?

A. I didn't pay the full \$1,000.00. I was paying on it, \$30.00 a month. And I wanted this for Mr. N.J. Simpkins and his wife, Dora, who both had heart conditions, to keep them going. Then one time Dora Simpkins had to walk to Hiwassee to get gas while the boys had bought a car with this money I was sending up there for them to use for medical use, made her walk to Hiwassee to get gas so they could drive the car down to take her to shop for groceries in Pulaski. So then when I found out these boys were using all the monies that I was sending her for a car, I even sent a title, got the title here with me, I even gave them a title to a car and said, "I will give you a title to a car you can use. I will buy the car on shares with you. We will split it three ways so everybody will have an interest in the car."

Q. What has that got to do with not believing Mrs. Simpkins under oath?

A. I have to tell you this to get..... So then they sent the title back and said, "No", and said "you promised to fix the house up". I have got the original, pencilled copy agreement. That's what it would be. Nothing is said about fixing the house or anything but I said, "Anything you do to fix it I will try to match and help you on the house." But I, here I got—put six kids through college and I was just barely squeezing out this \$30 .00 a month if you want to know it. So then they started getting on my back, and

wanted the roof fixed, wanted me to rebuild the house, and there was nothing in—
I have the written contract right here with me.

MR. OWENS: Let me see it—

MR. NUCKOLS: I don't know whether—

A. So then they got pretty hostile with me.

-44--

(Tr. 45)

MR. CRAFT: I am willing to terminate it there.

A. Well, we have been in a hassle ever since about that, Mr. Craft.

MR. CRAFT: The problem about the house.

A. Yes, I mean what they were going to do. I think that briefly will settle it.

MR. NUCKOLS: And that's why you wouldn't believe—

A. That is correct. She made statements on her depositions that I can disagree with right through the deposition.

MR. CRAFT: You have read her deposition?

A. I have.

MR. OWENS: Mr. Craft?

MR. CRAFT: I have no questions.

MR. OWENS: Let me ask you this, Mr. Simpkins. I am going to refer to—

MR. CRAFT: If you are going to go into that contract then I will ask—

MR. OWENS: Yes, sir—

MR. CRAFT: Some more questions—

MR. OWENS: Yeah, O.K. I am going to go into it.

MR. CRAFT: I think it is immaterial. The question I asked was why he disbelieved. I think all this is remote to that except—

MR. SIMPKINS: We had a signed and written agreement and she wanted me to go over and above that written agreement and expect me to re-

build the house, re-roof the house, and these things and I could not do it and would not do it. I told them whatever improvements they did I would match them.

MR. NUCKOLS: Let me say this, Mr. Owens, and Mr. Simpkins and Mr. Craft, what one witness feels about another witness in this case, people who are not parties to the action, I don't think has any relevancy, no bearing, is not going to have any bearing on my report or anything as to whether Mr. Simpkins believes Mrs. Simpkins or vice versa. I would just as soon not go into it.

-45-

(Tr. 46)

MR. OWENS: I agree and I didn't ask the question, Mr. Commissioner.

MR. NUCKOLS: It is not going to have any bearing on my report.

MR. OWENS: Now, may I pursue at this point the contract that Mr. Glenn Simpkins has referred to or do you want me to just recall him. Mr. Craft, any objection to my recalling Mr. Simpkins?

MR. CRAFT: I am of the opinion, as the Commissioner ruled, that that contract, whether she demanded more or less or whether he gave more or less, is irrelevant to the issues and I have no objection. If you go into it, of course, I will have to cross-examine.

MR. OWENS: Oh, surely.

MR. NUCKOLS: Frankly, gentlemen, I would just as soon you all didn't go into it. I don't think it is going to have any bearing whatsoever on this case. (discussion off record)

MR. OWENS: Mr. Commissioner, for and on behalf of the people involved in this matter, I wish to offer to you a written agreement between N.J. and Dora Simpkins and Glenn Simpkins for the sale of the very property we are now concerned with, that is, this being the property over which the disputed right of way goes. At this point a contract had been entered into whereby

N.J. Simpkins and wife were agreeing to sell the property to Mr. Glenn Simpkins at a payment of \$30.00 per month and that he, in fact, made payments on that contract—

WITNESS: Up to about two hundred and twenty, between two hundred and twenty and two fifty—

MR. OWENS: All right. Now, as I understand, it's the Court's ruling that this is improper or irrelevant.

MR. NUCKOLS: Yes, I feel it is improper and irrelevant.

MR. OWENS: Then may I introduce the contract and the letter from Mrs. Simpkins in the record and except to the court's ruling and save my exception on it.

MR. NUCKOLS: Yes. These will be exhibits along with this picture of this particular witness.

MR. OWENS: Yes, un-hunh.

-46-

(Tr. 47) MR. NUCKOLS: Do you authorize the secretary to sign your name to your deposition after it is typed?

WITNESS: Yes.

GLENN L. SIMPKINS

By James H. Patton
Notary Public

BOBBY M. MIDDLETON, a witness of lawful age, after first being duly sworn, deposes as follows:

BY MR. OWENS:

Q. State your full name, your address and your age?

A. Bobby M. Middleton, Route 2, King, North Carolina.

Q. Mr. Middleton, are you and an associate and partner of yours, Mr. Fred Cook, the owners of the tract of land that you purchased from the Allison Estate?

A. Yes, sir.

Q. And prior to the purchase, Mr. Allison has already testified that he took you into this property and showed you the right of way into the property--

A. Yes, sir--

Q. Is this correct?

A. Yes, sir, we drove in, in a vehicle.

Q. Do you know how many times you went into the property--

A. And looked at it?

Q. Un-hunh.

A. Just once before we purchased it.

Q. Now, as you drove into the property could you drive over an existing roadway?

A. Yes, sir, we did.

Q. Was this with a truck or--

A. We drove a Jeep - four drive.

Q. What was the condition of the roadway at this time?

A. Just small underbrush.

(Tr. 48)

-47-

Q. Small underbrush. Any timber at all in there?

A. No, sir.

Q. Could you give us the approximate size of the roadbed?

A. Well, this roadbed was approximately, I guess, a half mile long--

Q. No, the width, I mean, not the--

A. And the total amount of the debris that was taken out of the road to be hauled was two six yard trucks. It was pushed all the way to our property and it is still there in a pile to be looked at if need be. Everything was pushed out of this roadbed. It was pushed twelve foot in width - one dozer blade width.

Q. A twelve foot width?

A. Yes, sir.

Q. Let me refer you to this Defendants' Exhibit No. 2 showing the right of way in dispute. Is this the right of way as it existed when you purchased the property?

A. Yes, sir.

Q. And is this the right of way that you cleaned off?

A. Yes, sir. We started at this point right here, and pushed all the debris from here back to our property.

Q. Now, you point to your starting point on the road leading off of 692. Is that near the cabin?

A. That is approximately two hundred feet, I guess, from the state road to this point. And approximately six - eight hundred feet to the house from there, I would say.

Q. And as you come in from 692 did you cross a small branch there?

A. Small branch, right here.

Q. And then you went off in a generally southerly direction?

A. Yes, sir. There is an old fence on this side of the river coming along here, which the bank, the road is this deep, it's three foot deep, the embankment into the old road bed, and the fence is on the side of the road.

Q. Is that on the easterly side, this being north?

A. This being north--

Q. North running this way--

(Tr. 49) A. All right. East and west—

Q. East over here. On the easterly side of the road there is an old fence?

A. Un-hunh.

Q. And you used a twelve foot blade—

A. Yes, sir—

Q. And pushed what you called the small brush?

A. Right.

Q. And did you follow this same path in doing this as you did when you were there with Mr. Allison?

A. Identical.

Q. Did you create any other damage to the property at all?

A. None.

Q. Did you remove any timber?

A. No, sir.

Q. A photograph has been introduced showing a bridge—

A. Yes—

Q. Did you make this bridge?

A. I built it sometime in January. People called me. Said people was in there hunting. The bridge that Mr. Thornton Allison talked about is still there at the

Q. When you built this bridge in January of this year, do I understand your testimony that you took it right over an old existing bridge?

A. I put a culvert in there when the dozer came across it.

Q. At this time and when you started this work were you of the opinion and belief that it was your right of way?

A. Yes.

Q. Is there any other right of way you are aware of?

A. No.

Q. Has Mr. Johnston attempted to.....

A. Before Mr. Johnston..... we had already pushed the debris back to our property.

-49-

(Tr. 50) Q. Did you know Mr. Johnston prior to this?

A. No.

Q. You all were not acquainted until this came up—

A. Until this came up.

Q. How many times did you use this road getting into your property?

A. I guess three or four times.

BY MR. CRAFT:

Q. Mr. Middleton, I believe you testified that during the last year you had been on the premises—

A. Approximately three times, I guess.

Q. And you put this bridge in?

A. Yes, sir.

Q. Did you cut and remove any timber?

A. No, sir.

Q. Did you remove any cable that Mr. Johnston put across the road?

A. Now, the cable at the entrance, which you would say down at this point right here, is a cable that is tied on one end and the other end is wrapped around a tree and stuck to a leash. I have been up on occasions and put the cable back myself. The time before I was up there somebody had cut the cable—he had put it back—somebody had put it back with clamps—they had took the clamps off the cable. The cable was not even together the last trip I was up. The cable on the other end had been cut and had been cut by some one other than me or Mr. Cook. I don't know who cut it but there is shot gun shells up on my property. I guess some hunters have been in there.

Q. And cut the cable?

A. Yes, sir. Because someone came to me and talked to me about it and didn't like it because the cable was up. I told them I didn't have nothing to do with the cable. If they wanted to hunt on my land and could get to it, they could hunt.

Q. So you gave them permission to use the road?

A. I gave them permission, just as I stated, if they could get to my property they could hunt on it.

-50-

(Tr. 51) Q. Well, you fixed the bridge so they could get in didn't you?

A. No, sir.

Q. You didn't fix the bridge?

A. I owned this property, 71 or 72, that bridge was put in this past January.

Q. While this suit was going on?

A. Yes, sir.

Q. When you knew your right to use that road was in controversy?

A. I had not been told not to do it.

Q. You told the people not to put the bridge in?

A. No, I said, I had not been told not to use that road or not to go in.

Q. But you knew your right to use it was in controversy?

A. Right.

Q. But you used it any way?

A. Twice.

Q. When you first went in there were there posted signs?

A. No, sir.

Q. You didn't see any signs at all Mr. Johnston had put up?

A. Not when I bought the property.

Q. Well after you bought it?

A. Yes, sir.

Q. What did you do with the posted signs?

A. I didn't do anything with them.

Q. Along the road, what you call the old roadbed, what did you do with it?

A. I didn't do anything with it.

Q. You just pushed debris out?

A. That is correct, sir.

Q. You didn't cut any trees.

A. No, sir.

Q. What kind of equipment did you use?

-51-

(Tr. 52)

A. I used a bulldozer.

Q. That is the only thing you had in there?

A. Yes, sir.

Q. Now, when you bought this property did you have a title examination made?

A. To the extent to see if there was anything against the property.

Q. You didn't determine whether or not there were any easements or rights of way?

A. No, sir, Mr. Thornton Allison said it had been in the family for years. I figured it was a right of way by intent. Everybody used it.

Q. Well, did you have a telephone conversation with Mr. Johnston here about it?

A. After we did the grading, yes, sir.

Q. You told him that you had a right of way in there?

A. Yes, sir.

Q. That you would send him a written copy of it?

A. Yes, sir.

Q. But you didn't do that?

A. I couldn't produce one. I brought a lawyer over and we checked the records. I couldn't find one when it was checked.

Q. Found out you didn't have one so you couldn't provide it. That is correct, isn't it?

A. Yes, sir.

Q. Now, after that conversation didn't you talk to Mr. Johnston and offer to buy one from him?

A. I told him that I had been in business up here for fourteen years. I had never had a problem I felt that couldn't be settled. I had bought land and give it away, where I sold land I didn't own or someone had misrepresented me in buying, I had bought land and give it away to make a settlement. I wanted to be a friend of his, if there was any way we could work the thing out, I would consider paying him a reasonable amount for a right of way in writing, yes, sir.

-52-

(Tr. 53) Q. Did you have counsel representing you when you bought the land?

A. Yes and no. It was in dispute. Dow was representing one of the parties. They could not make a settlement with the other six heirs. They worked everything out that way. Mr. Johnny Alderman is my attorney in Hillsville for title opinions on property. He came over to take care of things for me.

Q. Before you bought it?

A. Yes, sir, before closing.

Q. Before you closed?

A. Yes, sir.

Q. Have you talked to him since then about whether or not you have a legal right of way through there?

A. We came over and looked for the right of way and couldn't find it,

except this right of way across Breedens Branch. He said it all tied back into the big estate there, was all one piece of property at one time and there was no question of right of way.

Q. You don't deny that you all have been responsible, either you or people working for you, in doing the things in this construction of this road along its present bed—

A. Well, we didn't construct.

Q. Well, call it improvement—

A. We improved the existing roadbed—

Q. What you called the existing roadbed?

A. Right. I even pushed the debris to my property line. There is nothing left on Mr. Johnston's property at all that came out of the roadbed. It was all pushed to my property which was half a mile, approximately.

Q. Did you have the property surveyed when you bought it?

A. No, sir, it called for five hundred acres, more or less, and if you get to the survey point, Mr. Allison said that where Mr. Johnston had surveyed is up on my property. But that doesn't concern me. My deed calls for five hundred acres, more or less, I am not going to argue over a little bit of land.

Q. You and Mr. Cook are partners in this—

A. ^{In this} Particular tract of land, yes, sir.

-53-

(Tr. 54) Q. And what does Horace Strickler have to do with it?

A. He is the man I contracted to do the dozer work. He has nothing to do with this.

Q. He brought his vehicle in there, and the dozer and did the work, right?

A. Right. You couldn't get in with a dozer. You had to walk in.

BY MR. OWENS:

Q. You made reference to a dispute among the Allison heirs and I represented Thornton. This was really a dispute involving other land—

A. Estate sale—

Q. Not this particular tract of land but how much he was going to keep out of his old—

A. Homeplace—

Q. Right.

A. We were working together.

Q. And the dispute was among the heirs, you were not involved in it?

A. No.

BY MR. NUCKOLS:

Q. When you were purchasing this property, negotiating the purchase of this property, who did you deal with?

A. We dealt with one of the Allison girls. She had a sister that came in here and we talked with her sister. There was seven heirs. Thornton was only out with the other six. Two of them was dead; he was the black sheep of the family according to the family, you know. So he would not sell his part so we purchased six/sevenths. Then in return we traded with Thornton giving him what he wanted beside his house, the old homeplace, land to make a settlement with him. We gave him a deed for our part in that tract and he gave us a deed for his part in the other tract to get that cleared up.

Q. Who did you discuss the right of way with?

A. Thornton, after we got over the deal, you know.

Q. And Thornton is the only one that told you about how to get into the property:

-54-

R. 55) A. Yes, sir. The girls said they had been down there, they had carried food down there when they had the sawmill, they had a camp like, set near it. They carried their dad stuff down, you know, to eat.

Q. Did Thornton take you over the entire roadway or right of way?

A. Yes, sir.

Q. Is there a discernible tract looping through your property now?

A. This right here.

Q. Yes. Is that discernible, can you drive over it?

A. On this roadbed now?

A. Un-hunh.

A. Yes, sir.

Q. And it swings back onto the Simpkins property?

A. Yes, sir. It just winds on around to a branch. I have been to that branch. That's where the road ends, right there in the branch. I don't know what the name of the branch is.

Q. Back on your property?

A. No, sir, on past that. Further.

Q. Then the road that you had graded out swings on through your property and then back on the Simpkins' property and then back on Mr. Glenn Simpkins' property?

A. Right. Not this point right here. I drew this map. I am not positive of this but it looks to me like this line, the way Mr. Johnston had it surveyed, it comes up to the road and crosses a little bit and goes back off the road, it makes a little loop there. In my opinion it crosses this road just a little bit at this point right here. I have found his flags and what not along this route. Mr. Thornton Allison says this line is too high upon the hill.

Q. Who owns this property right now?

A. This is Mr. Johnston's property now.

Q. Right here. He owns this property and over here now?

A. Right, un-hunh. There is also a road, talking about no other road, there is also a road right here that goes back into my property right here, off of this existing road going back up into these woods, which is back in here,

(Tr. 56) and also it cuts down and goes down to Mrs. Simpkins' house off of that road right there. There is a little cross over right there, one goes right through her field, that goes up to my property line here. There is an old fence going across here which I would presume to be the property line between me and Mr. Johnston. About two hundred feet up. I have driven up to that point.

Q. Is there a barrier right here?

A. At this point right here there was an old fence, two posts with old plank nailed across it, used it as a drawbar, like, you know, like drawbars on a farm. The posts were there on one side of the road, and then the fence took off and you could find one strand of wire now and then. And that's where the beginning point was recognized.

Q. So there was a drawbar gate so to speak where you went from the Simpkins' property into your property?

A. Just one section of drawbar on one side and then there's an old fence that comes up—

Q. Now, as it swings through what is now your property is there any barriers along it?

A. No, sir.

Q. What about when it comes back from the Simpkins' property?

A. The only thing we could find there was just Mr. Johnston's survey marks. Now, Thornton knows where this—he took and showed me this rock but I can't find it again. I have done been down there and tried to find it. This corner here. Thornton knows this boundary, this one, and this point here, and also where it joins in the back, coming in from the boy scout reservation.

BY MR. OWENS:

Q. This road also gives Mr. Johnston access to the back of his property, doesn't it?

A. Right.

Q. That's all. I will state to the Commissioner that Mr. Fred Cook,

a partner of Mr. Middleton, is here but he really knows nothing of this transaction but he is available for examination.

-56-

(Tr. 57)
BY MR. CRAFT:

Q. Do I understand you to say this yellow drawing designated DNo. 2 that you prepared—

A. Along with Mr. Owens to give him some—

A. The two of you together worked it out—

A. Yes, sir.

Q. Did I understand you to testify in response to the commissioner's question that this swing up here was probably not correct, that it is more down here?

A. No, you come to this point right here. I think it comes back onto this property right in this corner here, before it gets back over to the Simpkins side. The way the survey line runs through there you have got the trees marked.

Q. What information did you all use in preparing this?

A. I have been around the property.

Q. This is from memory or—

A. This is from actual surveillance and looking. The county has no map of this mountain, Mr. Johnston's property or my property. For tax purposes or anything. There is no map or nothing to go on. The deed will read five hundred acres, more or less.

Q. Bounded by—

A. It don't call for any boundary. You know a lot will call for where the creek meanders or something like that, but this one doesn't even have that.

Q. I would like to point out to the commissioner that this is not to scale, or it doesn't represent so many feet or anything—

A. Oh, no—

Q. It is just your idea of the way you—

A. I don't know if Mr. Johnston knows where all his property is or not.

BY MR. OWENS:

Q. At the junction of the boundary line between your property and the Johnston property, you spoke of a drawbridge. Did you find what? Simply two posts?

A. Two posts and couple of loose timber nailed resembling bars.

-57-

There is nothing on the other side of the road.

Tr. 58)

Q. This is to block off, to keep cattle or livestock or anything from getting from the Allison property back here.

A. Right.

Q. But easily moved?

A. Right.

BY MR. NUCKOLS:

Q. Do you authorize the secretary to sign your name to your deposition?

A. I do.

BOBBY M. MIDDLETON

By

Jewell W. Martin
Notary Public

COMMONWEALTH OF VIRGINIA

COUNTY OF PULASKI, to-wit:

I, Jewell W. Martin, a Notary Public for the State of Virginia at Large, do hereby certify that the foregoing depositions were regularly taken before me in my said county aforesaid, at the time and place and for the purpose set forth in the caption hereof.

Given under my hand this 19th day of May, 1976.

My commission expires: June 4, 1979.

Jewell W. Martin
Notary Public

Fee: \$ 62.50

134

VIRGINIA: IN THE CIRCUIT COURT OF PULASKI COUNTY:

**BRICE JOHNSTON, JR.
AND
M. TERESA S. JOHNSTON, his wife**

v.

**COMMISSIONER'S
HEARING**

**ROBERT MIDDLETON
King, North Carolina**

AND

**FRED COOK
King, North Carolina**

AND

**HORACE STRICKLER
HARRY STRICKLER
T/A STRICKLER BROTHERS
Fancy Gap, Virginia**

In execution of a decree of reference entered in the above styled matter on the 11th day of December, 1973, and pursuant to agreement of counsel, the following depositions, were taken before Eugene L. Nuckols, Special Commissioner, at the Courthouse of the Circuit Court of Pulaski County, Virginia, at 3:00 o'clock P. M. on the 18th day of April, 1978.

PRESENT:

EUGENE L. NUCKOLS, Special Commissioner

**BRICE JOHNSTON, JR., in person, and by
his attorney,**

WILLIAM R. L. CRAFT, JR.

**ROBERT (BOBBY) MIDDLETON and
FRED COOK, in person and by their
attorney,**

A. DOW OWENS

BRICE EDWARD JOHNSTON, JR. , a witness of lawful age, after first being duly sworn, deposes as follows:

BY MR. CRAFT:

Q. State your full name, please.

A. Brice Edward Johnston, Jr.

Q. You are the complainant in this proceeding pending against Robert Middleton and others?

A. Yes, I am.

Q. And you have previously testified in this matter?

A. Yes.

Q. Since the last hearing have you had occasion to procure a drawing and replica of a valid map of areas involving your land the Middleton's lands and an access route to the Middleton property beginning at the N & W Railway right of way proceeding in a southerly direction?

A. Yes, I have.

Q. Would you please present that and explain to the -explain the drawing and where you obtained your information to make this drawing and how it got into place?

BY MR. OWENS:

Q. Are you presenting a map prepared by a surveyor or -

A. This is a map secured from Malcolm's Blueprinting in Roanoke, and which is prepared by United States Department of Interior, Geological Survey Map. I have added to this an approximate area of still a second map. This is the approximate location, and Pulaski County which is indicated in the State of Virginia.

BY MR. NUCKOLS:

I am familiar with this map and I will accept it as an Exhibit, I don't know what is going to indicate but I will accept it.

BY MR. OWENS:

Let me show an exception to that as Mr. Johnston superimposed the drawings -

1

(Tr.2)

A. Yes, right. I superimposed the red designs indicating an approximate area of a map which is to follow, that I will introduce in a moment.

BY MR. CRAFT:

Q. If you would please mark this as Exhibit 1-A, I don't recall how we have marked them-

BY MR. NUCKOLS:

Plaintiff Exhibit 1-A. All right Mr. Johnston-

A. This is a map showing general boundary lines of property obtained from the Department of Revenue of Pulaski. I have added considerably to this map which is made up of approximately three maps photographed at Malcolm's of Roanoke.

BY MR. CRAFT:

Q. Are the lines taken from the official map that you secured in Pulaski, the areas shown?

A. Yes they are.

Q. The coloring, they are your own?

A. Yes.

Q. And the red broken line is your own addition, is that correct?

A. That is correct.

Q. And you will explain what they are suppose to signify as you testify?

A. Yes, sir.

Q. In all other respects these boundaries are actually from the official map?

A. Yes, if I may-

BY MR. OWENS:

I have the same objection to that your Honor, of course, not the introduction of the maps as taken from the Commissioner's Office but the superimposition of the various boundary lines and the roadways, I don't know whether they are correct or not.

BY MR. NUCKOLS:

Well, I am going to receive it for consideration but not accept it as evidence until I have heard your testimony to see whether it is relevant

2

(Tr. 3)

and could rely upon it. Now, I am going to reserve the right of whether to reject it or not. But I will mark it as Exhibit 2-A.

BY MR. CRAFT:

Q. Do you have in your possession Mr. Johnston, the actual originals from which you assembled this drawing?

A. Yes, I do.

Q. Will you please produce them as Exhibits. Now your Honor this is going to get into a lot of time in this admission of proof. I wasn't aware that we was going to run into this, but these are
See they had to be assembled.

(Discussion off the record.)

BY MR. NUCKOLS:

I am going to accept this, accept it subject to my checking to see whether it corresponds with the land maps in the local Clerk's Office or Commissioner of Revenue's Office and I will also accept these boundaries as outlined in green and blue subject to confirming that they are the - as reflected in these land maps. Now the roads that are on here in black or

black broken line I will accept as shown on the land maps. Now I will reserve accepting this-I'm referring to the broken red line subject to the testimony of the witness.

BY MR. CRAFT:

Q. Mr. Johnston, referring to Exhibit 2-A there is colored in green and does that represent your property?

A. Yes, it does.

Q. Whose property is represented by the areas in blue?

A. That would be F. Cook and R. Middleton.

Q. Now the heavy black lines appearing on your property indicate a point marked State Road 692. Are those lines at that point drawn by you or are they part of the official map?

A. Part of the official map.

Q. Now if you would proceed and show where that road 692 intersects and the broken line that proceeds therefrom in a southerly direction (indicating on map)?

3

(Tr. 4) A. State Route 692 ends in generally the approximately middle of my property and the official map shows kind of a broken line to the end of my property, where I added a red dotted line into Mr. Cook and Middleton's property where it forks.

Q. What does that red line represent though? An actual road.

A. An actual road. Yes.

Q. Now do you submit that that is layed out accurately or it the general pattern of the road?

A. General approximate pattern, I have no way of making it accurate.

Q. How did you arrive at putting it at that point? What information did you use?

A. I walked this road with Mrs. Dora Simpkins on April 9, 1978.

Q. And what did you do as you walked it?

A. I took a series of thirteen pictures with a polaroid camera so it would develop at that time. And I did indicate on the back of these pictures that it was taken by me and witnessed by Mrs. Simpkins.

Q. Now did you make any notation on the map indicating the points these pictures were taken?

A. I attempted to show the approximate location of the picture by an arrow and indicating pictures 1 - 13.

Q. Then those identification points are shown on the map in pencil?

A. In black pen.

Q. Now, do the pictures reflect the route that you and Mrs. Simpkins followed?

A. Yes they do.

Q. Then if you would go forward and testify by showing the pictures the points where you took the picture and what was there, what is reflected in the picture?

A. Picture No. 1 indicates a picture taken on the Cook-Middleton property as it forks to the approximate southeast and to the approximate southwest. This picture I'm showing shows a fork in the road and Mrs. Simpkins standing very near that fork.

4

(Tr. 5)

Q. Now, looking at the picture which way did you then proceed?

A. We proceeded in a southwest direction.

Q. If you were looking straight at the picture, did you proceed to the right or to the left of the picture?

A. We would proceed to the left as you look at the picture.

Q. Continue with the course that you took.

A. Picture No. 2 is in approximate the same location but looking back to the intersection, looking almost in a northerly direction, in other words turning and taking the picture from a direction that I had already traveled. Again this is on the Cook-Middleton property.

BY MR. OWENS:

Q. You have them marked 1, 2, and so on?

A. Yes, I have them marked 1 - 13, the date taken by me and witnessed by Mrs. Simpkins. She appears in some of the pictures.

BY MR. CRAFT:

Q. Go on-

A. The third picture is simply on the road that was improved, apparently by Mr. Cook or Mr. Middleton, proceeding in a southwest direction on their property. It had been improved in the last few years by what appeared to be a bulldozer. The trees were uprooted, and so forth. Picture No. 4 was taken on the same date and on the same property. It was a continuation of that road that had been improved. If you look carefully it seems to end. This was very very near the Cook-Middleton property line. It shows an end of the improvement of the road very near what we think to be the property line. Picture No. 5, my apologies for my photography, picture no. 5 was the remains of an old bridge still on this same roadway over a branch which I understand to have the name of Tank Branch or Double Covered Branch. This would be on other properties I assume to be W. W. Dickerson.

Q. Now, stopping there, is this point that you refer to now with the bridge, the remains of an old bridge, is that the remains of an old bridge that provided roadway across this property line that you are talking about?

A. It would be on the Dickerson property but it would be continuing around that road. It would be across a branch.

Tr.6)

Q. I notice on this sketch that you have here you have that as Tank Branch and Alford's Branch, is that one and the same thing?

A. I understand it has about three or four different names, maybe Double Covered Branch as well.

Q. Can you tell us whether this road is passable or not, useable?

A. Yes.

Q. Is there any evidence that it has been used recently?

A. There was very little growth in it. Maybe little small bushes that had seeded in the last year. Basically could be traveled with the exception of a fallen tree, occasionally, not very many.

Q. After you reached this point at the bridge, did you continue on?

A. Yes, I did.

Q. Was there an obvious roadbed or roadway where you walked from there?

A. Yes, very obvious.

Q. Do you have pictures of that?

A. Yes, Picture No. 6 indicates a continuation of that road just after the fallen bridge, if I may so describe it. Picture No. 7 is taken in what appeared to me as an obvious old homeplace in that there were domestic flowers growing in kind a wooded area. I understand this to be the old Atkins property. There are no buildings there. But it was an old homeplace. You can tell by the lack of timber.

Q. Now where was that picture taken as shown on your sketch?

A. I have a little house xx'ed out indicating that it is no longer there on this same road. Picture No. 8 is just a continuation of the road below the old house place. If I may, the condition of the road can be seen fairly well

there. Picture No. 9 is just another picture of the road further toward the main highway. Again indicating some grading many years ago. Picture No. 10 is on down the road some more. Pictures Nos. 11 and 12 are approximately the same location. But my photography is lacking in one, so I took the

6

(Tr. 7)

second. This picture looks down the road and in the distance of the picture one can see the railway track and the lake beyond and perhaps the gate giving access to this road. Picture No. 13 is after I had crossed through the gate with Mrs. Simpkins, crossed the railway tracks and crossed state route 693 and looking back in the direction that I had just walked. This shows an embankment or easement from the state road on up to the railway tracks and crossing the railway tracks and allowing traffic to go through this road.

Q. Now that last picture ties in with the end of this course of travel that you have outlined and that picture you have taken, you say, was taken from the State Highway?

A. From the opposite side of the State Highway looking on to the entrance of this road.

Q. The heavy line that indicates that entrance and of crossing the tracks did you put that on or did that come off of the county map?

A. That was part of the official map, I deliberately used red to separate my line from the official map.

Q. In other words the official map shows this crossing and this approach here across the tracks to this roadway that you have described?

A. Yes.

Q. What you have just stated indicates a roadbed beginning at State Route 693 and running a course through all these properties, Dickerson and others, back to the Cook-Middleton property, is that right?

A. That is exactly right.

Q. Did anybody else go with you to view this roadway that you have outlined?

A. Mrs. Dora Simpkins. She accompanied me through this whole trip from her house through the road to State Route 693 and back by public highway to her home.

BY MR. NUCKOLS:

Q. Mr. Johnston, the black line on your property, the black broken line is it the approximate location of the road that is in contention now?

A. Yes.

Q. And what you took was a continuation of that road to make your red line?

7

(Tr. 8)

A. Yes. (indicating on map) From here to here.

Q. This is the broken line (indicating on map) is the road which Mr. Middleton cleared and which is in contention now?

A. Yes, it is.

BY MR. OWENS:

Q. As I understand it Mr. Johnston, you are submitting this to the Court as your interpretation of what you found as a road that in effect extends from the, near the Simpkins' house at Route 692 through the Simpkins' lands, through the Cook-Middleton lands, and what you show here as the Dickerson lands to Route 693, extending then from one public road to another public road?

A. These are roads to some extent, they are questionable as roads all of them even from 692. They are open ways near the road in black on the official map was approximately the same condition wise as the road I have indicated in the broken line.

Q. Anyway, the black lines and the red lines run from one public

road to another public road?

A. Yes, as a path way or some kind of trail.

Q. Path or some kind of trail?

A. Yes, it is all of the same general quality.

Q. Now, where are the lands of Mr. Glenn Simpkins?

A. I would have to guess but I would put it in this corner here (pointing to map).

Q. By that you are pointing to the west of the lands that you now own and north of the lands of Cook & Middleton?

A. Approximately, yes.

Q. Is there not another road that leads down off of this red line to the land of Glenn Simpkins?

A. I think so. Yes.

Q. And you submit this red line as your superimpositions and the black line as the public roads?

A. Yes,

Q. I have no further questions at this point--

8

BY MR. CRAFT:

(Tr. 9)

Q. Which of this black area was built and constructed, do you know who built and constructed the black areas from your property up to the Cook-Middleton lands?

A. Yes, it was contracted by Mr. Middleton and Mr. Cook to cut this road, that's on the official map as dotted black and they continued this road until the fork, shown on pictures 1 and 2 and continued it onto their property line, to the southwest and perhaps in another direction.

BY MR. OWENS:

Q. When you say cut you mean they reworked the-what you found to be

the existing roadway?

A. Yes.

Q. That's all-

BY MR. CRAFT:

Q. And do you authorize the secretary to sign your name to these depositions after they are typed?

A. Yes.

BRICE EDWARD JOHNSTON, JR.

By _____
Secretary

DORA V. SIMPKINS, a witness of lawful age, after first being duly sworn, deposes as follows:

BY MR. CRAFT:

Q. State your full name.

A. Dora V. Simpkins.

Q. Mrs. Simpkins you have testified before in this case?

A. I have.

Q. Are you familiar with the map and the additions that have been put on there by Mr. Brice Johnston?

A. I think so, I am quite familiar with the whole thing up there.

9

(Tr. 10)

Q. How old are you?

A. Seventy-three.

Q. Mr. Johnston stated in his testimony that you heard, that he followed this route of an existing road and that he took pictures along the way, were you with him that day?

A. I was with him.

Q. When was this done, approximately?

A. Last Sunday a week ago, whatever date that was I don't remember.

BY MR. OWENS:

Mr. Commissioner we don't dispute the testimony of Mr. Johnston and that he took these pictures as he indicated on them and on the map.

BY MR. NUCKOLS:

And she is in the pictures- They don't dispute that he took the pictures in her presence and I will accept them as that-

BY MR. CRAFT:

Then we have stipulated that her testimony will be the same about the pictures taken, the roadway and the date and time of taking .

BY MR. OWENS:

Yes, I will stipulate that -

BY MR. CRAFT:

Q. Mrs. Simpkins, is there an existing roadbed, roadway running from property that is shown on that map as owned by Middleton down through other property on this map as you follow the red broken line to -

A. Through the Dickerson property-

Q. Yes, ma'am, to Route 693?

A. They are.

Q. Is that a new road or an old road there?

A. A very old roadbed.

Q. How long to your knowledge has it been used?

A. Well, I would say that it hadn't been used, just guessing at it, for the past fifteen or sixteen years, other than people just walking on it, pleasure tripping.

(Tr. 11)

Q. How long would you say that it has been in existence?

A. Beyond my knowledge.

Q. So it has been existing as long back as you can remember?

A. It was there when I come to this country and that was sixty-six years ago, and I don't know how much longer.

Q. Now that was the road that has been described in the pictures as crossing a railway and following a course that would lead to and through the Cook-Middleton property?

A. All the way through.

Q. To your knowledge does anybody live on the Cook-Middleton property?

A. They have in time, not lately.

Q. How many years ago?

A. Taking a guess I would say it has been fifteen years.

Q. No homes, nobody living up there now?

A. Nothing now.

Q. In your early memory did these properties serve any use for mining operations or research?

A. Timber work. There was a lot of timber bought and moved off of it. I don't remember any mining.

Q. And to your knowledge was there any houses located on the Middleton property?

A. Back a few years there was two, but not recently.

Q. Then in your time people did live there?

A. Oh, yes.

Q. Do you know whether or not they ever had occasion to go out this route that you described here and is shown on the pictures?

A. I have no idea. They went either way I guess. Both roads were

open.

Q. You live on the property that is owned now by Brice Johnston?

A. I do.

Q. You all sold him some of that property?

11

(Tr. 12) A. We sold him the property where I now live.

Q. Is there any other access or way out from the Cook-Middleton property to a State road other than this one here you refer to?

A. I don't know of any. That is the road I always knowed. Don't know of any more.

Q. Did people living on your property or other property over there ever go that way too? To your knowledge?

A. Well, they hauled and went, like I say, back and forth either way, the road was open and it used to be a right good road.

Q. But it hasn't been used for a good many years?

A. For quite a while. It is still there but it is old.

Q. I believe you previously testified that you talked with Mr. Middleton and Mr. Cook both before they bought this land?

A. I did.

Q. And you say they have no other way out to your knowledge, but this way?

A. They could go out this way or out that a way (pointing on map). There is a road going both ways.

Q. Now you are pointing both ways do you mean, do you mean through the Brice Johnston property?

A. That road I say goes through there. It goes out both ways.

Q. Do you know anything about the Able property?

A. Yes, we owned that at one time.

Q. In reference to this map do you know where-about where it was located?

A. I guess, maybe- it's back over in that way (indicating on map) . It's right in there, approximately. The approximate location, we sold that.

Q. Did they have a right of way out ?

A. There is a road coming another direction behind where I live. A deeded right to that property.

Q. Does that serve the Cook-Middleton property?

A. No, that serves the Glenn property.

12

(Tr.13) Q. Mr. Middleton and Mr. Cook, then, couldn't use that road?

A. I don't know, they would have to go through Glenn -and I don't think they could go through Mr. Johnston either.

Q. You don't know whether they bought a right of way through there or not do you?

A. Which?

Q. Through the Able property? The adjacent property.

A. I know Glenn has got a right of way, beginning north of my house and going west, an old road over his property.

Q. Does it touch the Brice Johnston property?

A. It goes through the Brice Johnston property.

Q. Have you lived in this area continuously since you came here sixty years ago or more?

A. Mostly, most of the time. I've lived right where I'm at most of the time.

BY MR. OWENS:

Q. Mrs. Simpkins. I understand your testimony to be just as

Mr. Johnston's was that this road that is shown on the map the black part and the red part is the road that . . . State Route 692 and goes through your lands, the Middleton lands and into other lands on back down to State Route 693 and it is just a road that goes all the way through?

A. All the way through.

Q. I want to point to the blue line that is the westerly line of the Cook-Middleton property, you bought your land from Forney Mining Co.?

A. No-

Q. No-Coles, W. R. Coles?

A. W. R. Coles.

Q. Was not this land that lies between this blue line and the area down here, part of the Morris Tasker. . . . (pointing to map) ?

A. Well, I just can't tell you. It has been owned by so many people, I'm not sure.

Q. I have no further questions-

13

BY MR. NUCKOLS:

(Tr.14) Q. Mrs. Simpkins as far as you know from this point here where this little bridge .. all the way down to the railway tracks that is W. W. Dickerson estate?

A. That is W. W. Dickerson estate.

Q. And in your memory do you know of people using this road here going up to houses and so forth in here?

A. There used to be on the top of the mountain at that old homeplace, people lived for years as far as I have been around here til the last few years.

Q. Did they sometimes cross this bridge going out this way?

A. Well, I don't know for sure but they used this way I guess most of the time because it was shorter.

Q. But you said there were some people who lived on the Cook-Middleton property that went both ways?

A. They could go both ways. There is no right down through us, but we never objected to people going.

Q. But it was the same type of road throughout, approximately the same type.

A. Yes.

Q. I believe that's all-

BY MR. OWENS:

I have no further questions-

BY MR. CRAFT:

Q. Mrs. Simpkins to your knowledge there is no right of way granted over any of your property that is now owned by Brice Johnston to Cook and Middleton or anybody prior to them?

A. Nothing, only that right of way to Glenn Simpkins that is all I know anything about.

Q. That's all- Do you authorize the secretary to sign your name to these depositions after they are transcribed?

A. Yes.

14

DORA V. SIMPKINS

(Tr. 15)

By _____
Secretary

JOE MACK BAKER, a witness of lawful age, after first being duly sworn, deposes as follows:

BY MR. CRAFT:

Q. State your full name.

A. My name is Joe Mack Baker and I am the Chief Forest Warden for Pulaski County.

Q. How long have you been a resident of Pulaski County?

A. All of my life, sir.

Q. How old are you?

A. Fifty-eight.

Q. Have you had occasion to hear the testimony of Mr. Johnston and Mrs. Simpkins here in reference to those maps and roads that are in question?

A. Yes, sir, today was the first time I have heard it.

Q. Have you seen the maps before or the pictures.

A. Today, yes, sir.

Q. Are you familiar with the area that we are talking about?

A. Yes, sir, I'm very familiar with that I think.

Q. Do you know whether or not there is a road existing from Route 693 across the railroad tracks and proceeding to what is said to be the W. W. Dickerson property, on, over, and up to a bridge crossing over into the blue area on this map known as the Middleton property?

A. Yes, sir, I think so.

Q. Have you had occasion in your work to travel any of these lands at any time?

A. Yes, sir. I have had two fires in this area.

Q. Is that crossing at the railroad just an improvised approach to the railroad tracks or an old established, well constructed crossing even though

.....

(Tr.16)

A. Well to my knowledge it was a constructed road to get across the railroad.

Q. And if you can get across the railroad the only place that road would lead was to what land?

A. Well now, the way this is drawn in here... I'm not familiar with- but I know there is an existing road through there. I know where the bridge is you are talking about, I have been on that. We have a road in here to the top of the mountain, right here. This is called Dean Pine Mountain and we reconstructed this road. I have scouted this area from what we call Double Covered Hollow here. At one time we were thinking of tying this road into this one. I have walked over the most of this road that Mr. Johnston is referring to. Now the point I don't know the exact point.

Q. But you have walked over most of that road?

A. Yes, I have.

Q. Has it been there for any extended period of time?

A. I have been working full time since 1956 with the division. It was there when I went to work.

Q. Do you call it Double Covered- Is that the same road that maybe-

A. That is the same vicinity where that road comes out-

Q. I have no further questions-

BY MR. OWENS:

Q. Mr. Baker the other fire route you are speaking of it comes in down here, doesn't it, southerly?

A. It comes up here at Max Creek by the Boys Scout Camp.

Q. But where does it come into the old Allison property?

A. Up here on top of-

Q. Look at this, this is the old Allison property, doesn't it come in some where in that area?

A. (Indicating on map) Back in this section... just a corner of that..

Q. Mr. Baker, I want to lay this map, it is a copy of the map in the

16

back of Plat Book 1 in the Clerk's Office-

A. I want to show you where we constructed our road. It ended right down, where he's got this drawn in it looks like its over on the Allison property but I think we stopped right-

(Tr. 17) Q. But it just comes to it, right?

A. Yes. -

Q. I am going to lay this in the same compass direction as the plaintiff's exhibit 2-A and I am going to point out as shown on their map the branch, that is Route 692, where the L. S. Simpkins property is and that is here (indicating all on map). Now I am going to point out the area that is the Allison farm as shown by black marks. Now, Mr. Commissioner I have placed these black marks on there myself. They are subject to your confirmation by mates and bounds running this way, these are the approximate corners of it. Now this blue westerly line of the Middleton-Cook property, do you know whether that was the northerly tract of what was called the Morris Tasker property as distinguished from the Forney Mining tract. If you don't just say so.

A. No, sir, I don't know.

BY MR. OWENS:

Mr. Commissioner I would like to file this and there is a much clearer copy in the Clerk's Office, as a defendant's Exhibit 1-A, I suppose. To show that the Tasker property is property that lays to the west of the Allison property as distinguished from the Forney Mining Company and these will match with the mates and bounds description in the Clerk's Office.

BY MR. CRAFT:

What is this intended to show

BY MR. OWENS:

That the property to the west of the Allison property belonged to strangers to W. R. Coals-

(Discussion off the record)

BY MR. OWENS:

I have no further questions-

BY MR. CRAFT:

No questions-

17

BY MR. NUCKOLS:

And Mr. Baker do you authorize the secretary to sign your name to these depositions after they are typed?

(Tr. 18) A. Yes, sir.

JOE MACK BAKER

By _____
Secretary

BY MR. OWENS:

We have no further evidence your Honor.

BY MR. CRAFT:

I want to introduce those three deeds there. They have been referred to in the proceedings.

BY MR. OWENS:

O. k. I have no objection. You say that they are copies from the records-

BY MR. NUCKOLS:

These are the three deeds where the defendants received title to their property, is that correct?

BY MR. CRAFT:

Yes, sir.

BY MR. NUCKOLS:

We will receive them marking them defendant's exhibits 2-A, 3-A and 4-A-

BY MR. OWENS:

I'm not introducing them-

BY MR. CRAFT:

I'm introducing them-

BY MR. NUCKOLS:

O.k., we will mark them plaintiff's Exhibits 3-A, 4-A and 5-A.

COMMONWEALTH OF VIRGINIA

COUNTY OF PULASKI, to-wit:

I, Norma K. Trail, a Notary Public of and for the State of Virginia at Large, do hereby certify that the foregoing depositions were regularly taken before me in my said county aforesaid, at the time and place and for the

18

purpose set forth in the caption hereof.

Given under my hand this 16th day of June, 1978.

My commission expires: June 28, 1981

Notary Public-State of Virginia at Large

Fee: \$ 21.50

IN THE CIRCUIT COURT OF PULASKI COUNTY, VIRGINIA:

BRICE JOHNSTON, JR., et al

v.

ROBERT MIDDLETON, et als

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REPORT
OF
COMMISSIONER IN CHANCERY

TO THE HONORABLE JUDGE OF SAID COURT:

Pursuant to a decree of reference entered in this cause on the 11th day of December, 1973, the undersigned did, upon agreement of the parties, on the 31st day of January, 1974, on the 14th day of July, 1975, and on the 8th day of April, 1976, proceed to take evidence to answer the inquiries presented in the aforesaid decree of reference, a copy of said depositions and exhibits filed by the parties being filed herewith, and having considered the same and briefs filed by the parties and having searched the records of the Clerk's Office of Pulaski County, Virginia, submits the following report on the matters directed to be inquired into.

(1) The interest in said real estate owned by the complainants and respondents as alleged in said bill of complaint and responsive pleadings.

Your commissioner finds that the title to real estate across which is the "roadway" in question was conveyed to the complainants by deed from Noah J. Simpkins and Dora V. Hylton Simpkins dated the 22nd day of August, 1964, of record in said Clerk's Office in Deed Book 219, page 582.

Your commissioner finds that the title to the real estate to which said "roadway" leads was conveyed to Bob L. Middleton, et ux, and Fred P. Cook, et ux, two of the respondents, by deeds from Gertrude Allison Brabston, et al,

and Thornton Allison, et ux, dated the 3rd day of July, 1972, and the 1st day of December, 1972, and of record in said Clerk's Office in Deed Book 281, page 93, and Deed Book 284, page 355, respectively.

(2) What easements and rights of way exist in favor of the respondents in, over and across the lands of the complainants; and the source thereof.

Most of the evidence before the commissioner concerned the construction of the road, actions of the parties related thereto, witnesses that had used the road before the defendants cleared and graded the road, how the use began and the purpose for which the use was made. The respondents in their answer allege they have a right of way and easement over the lands of the complainants "either by deed or by usage".

The evidence shows the respondents' predecessors in title constructed the road approximately in 1918, and had used the road, along with many others, since that time.

Your commissioner finds that the road or easement was not acquired by the respondents or their predecessors in title either by deed or usage. No deed was presented in the evidence nor could your commissioner locate a deed of record establishing a right of way or easement. The construction of the road arose from an agreement between the predecessors in title of both the complainants and the respondents for the removal of timber by both of them. Thereafter the road was used by anyone who so desired. This precludes a finding that the use was adverse to complainants' predecessors in title and thereby precludes the acquiring of the right to use the road by "usage" or prescription.

Your commissioner finds that the adjoining lands of the complainants and the respondents were parts of lands owned by a common grantor, W.R. Cole. In 1887 W. R. Cole conveyed 700 acres to David S. Forney and in 1894 conveyed 98 acres to L. S. Simpkins. The Forney deed makes no reference to

any easements or rights of way, whereas, the Simpkins deed grants him a right of way through said Coles land to the Floyd County road leading down Max Creek". Part of the Forney land is now owned by the defendants and part of the Simpkins land is now owned by the complainants. The question now arises: Is there a way of necessity across the complainants' land for the benefit of the respondents' land.

Your commissioner finds that there is a way of necessity across the complainants' land for the benefit of the respondents' land. There was clear and convincing evidence that there is no existing means of ingress or egress from respondents' land except across complainants' land or the lands of strangers. Authority for this is found in 1 Minor on Real Property (Second Edition, Bible) §98, p. 132:

But the most usual and important of these easements is the right of way by necessity, which arises by implied grant where one conveys to another land which is either entirely surrounded by the lands of the grantor, or else is bordered in part by the land of a stranger and in part by the lands of the grantor. In either case the grantee of the land, even in the absence of express stipulation, has a way by necessity over the grantor's land, since otherwise the land granted to him would be unapproachable and useless. The grantor cannot take advantage of the absence of stipulation thus to derogate from his own grant.

Your commissioner finds that even though there was some evidence there was another means of access to respondents' property and the deed from Cole to Simpkins mentions a road leading from Cole's remaining property to "the Floyd County road" there is no evidence that either of these are in existence or were ever available to the respondent or his predecessors in title.

The case of Keen v. Paragon Jewel Coal Company, 203 Va. 175, 122 S.E. 2d 543, was the principal authority relied upon by your commissioner.

(3) What, if any trespass or road construction was made in, over and across the said lands of the complainants by the respondents.

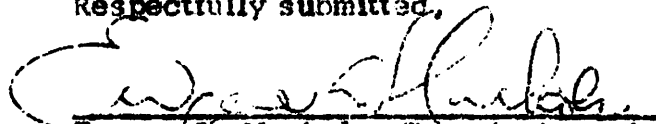
Your commissioner finds that no trespass was committed by the

respondents as they had a way by necessity. Respondents did undertake the road clearing and grading which your commissioner finds did not exceed their rights to the use of the right of way as the principles set forth in the above cited case.

(4) Any other matters decreed pertinent to this cause.

None.

Respectfully submitted,


Eugene L. Nuckols, Commissioner in
Chancery

The undersigned hereby certifies that on the 24 day of June, 1977, a true copy of the foregoing report was mailed to William R. L. Craft, Jr., Esquire, Craft & McGhee, Three North Franklin Street, Christiansburg, Virginia, 24073, counsel for complainants, and A. Bow Owens, Esquire, P.O. Box 737, Pulaski, Virginia, 24301, counsel for respondents.


Eugene L. Nuckols, Commissioner in Chancery

VIRGINIA: IN THE CIRCUIT COURT OF PULASKI COUNTY

BRICE JOHNSTON, JR., et al

V.

EXCEPTIONS TAKEN TO
REPORT OF
COMMISSIONER IN CHANCERY

ROBERT MIDDLETON, et als

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now, the respondent, Robert Middleton, et als, and files the following exceptions to the report filed in this cause on the 1st day of July, 1977, by Eugene L. Nuckols, Special Commissioner in Chancery:

I.

That the said Robert Middleton, et als, excepts to so much of the report that fails to establish a right-of-way by useage, and alleges that the factual circumstances and applicable law are such that a right-of-way is established by use, in addition to the right-of-way found by the Commissioner.

Respectfully,

ROBERT MIDDLETON, et als

By _____
Of Counsel

A. Dow Owens
Attorney at Law
33-3rd Street
Pulaski, Virginia
Counsel for Respondents

VIRGINIA, IN THE CIRCUIT COURT OF PULASKI COUNTY:

BRICE JOHNSTON, JR., et al

V.

ROBERT MIDDLETON, et als

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EXCEPTIONS TAKEN TO
REPORT OF
COMMISSIONER IN CHANCERY

TO THE HONORABLE JUDGE OF SAID COURT:

Come now the complainants, Brice Johnston, Jr. et ux and
file the following exceptions to the report filed in this cause on July 1, 1977,
by Eugene L. Nuckols, Special Commissioner in Chancery:

I

The finding of said commissioner on page 3 of said report and
designated as No. "(2)" to the effect that the respondents, Robert Middleton
et als, now own or hold a right-of-way which they have constructed across
the lands of the complainants by reason of "necessity" is in error. It is an
erroneous finding for the reasons that (1) it is contrary to the law and evidence
of this case; and (2), it is without evidence to support it. The pleadings of
the respondent contended that they owned a right-of-way by a deed or grant;
and secondly by "usage." They did not produce evidence of a deed or grant
and the commissioner found correctly that they did not acquire such by
"usage." The law will not support a finding of having acquired a right-of-way
by necessity under the facts of this case.

II

The finding of said commissioner in paragraph no. "(3)" on

page three of said report is in error for the reason that it is contrary to the law and evidence; and said finding by the commissioner arises out of the error in the finding hereinabove described in paragraph no. I of these exceptions.

Wherefore, the complainants do hereby except to the report of said Commissioner in Chancery and pray that said exceptions be sustained; and that the same be corrected and amended to the extent necessary to sustain the relief prayed for by the complainants.

BRICE JOHNSTON, JR. et al

By William R. L. Craft, Jr.
Of Counsel

Craft & McGhee
Attorneys at Law
P. O. Box 240
Christiansburg, VA 24073

CERTIFICATE

I hereby certify that I have this the 8th day of July, 1977, mailed a copy of the foregoing Exceptions Taken to Report of Commissioner in Chancery to A. Dow Owens, Attorney at Law, 33-3rd Street, Pulaski, Virginia, counsel for respondents.

William R. L. Craft, Jr.
William R. L. Craft, Jr.

VIRGINIA: IN THE CIRCUIT COURT OF PULASKI COUNTY

BRICE JOHNSTON, JR., et al.
Complainants

v.

ROBERT MIDDLETON, et al.
Defendants

ADDITIONAL REPORT
OF
COMMISSIONER IN CHANCERY

TO THE HONORABLE JUDGE OF SAID COURT:

Pursuant to a request by the parties after a conference with the Court the undersigned did proceed to hear additional evidence presented by the complainants on the 18th day of April, 1978. A copy of the evidence and the exhibits filed by the parties are filed herewith.

All evidence presented was addressed to the findings of the undersigned in his report of June 24, 1977, that the defendants had a way of necessity across the complainants' land.

Is There Evidence That Defendants Have No Need For Right of Way of Necessity Across Property of The Complainants

Your commissioner finds that there is clear and convincing evidence that there is another roadway leading from State Route 693 across property belonging to the Estate of W. W. Dickerson to the property of the defendants. This roadway has been used by unknown parties for a number of years and appears to have been used by predecessors in title to the defendants' land.


Your commissioner finds that if there is another right of way or roadway legally available to defendants' land the way of necessity across complainants' property for the benefit of defendants' land would not be valid. No evidence was presented that defendants had a granted right or a right by usage across the Dickerson property.

It is therefore, the finding of your commissioner that the additional evidence presented by the complainants does not alter his report of June 24, 1977.

Respectfully submitted,


Eugene L. Nuckols, Commissioner
In Chancery

The undersigned hereby certifies that on the 21 day of April, 1978, a true copy of the foregoing report was mailed to William R. L. Craft, Jr., Esquire, Craft & McGhee, Three North Franklin Street, Christiansburg, Virginia, 24073, counsel for complainants and A. Dow Owens, Esquire, P. O. Box 737, Pulaski, Virginia, 24301, counsel for respondents.


Eugene L. Nuckols, Commissioner In
Chancery

Fee: \$ 150.00

Costs:

VIRGINIA, IN THE CIRCUIT COURT OF PULASKI COUNTY

BRICE JOHNSTON, JR., et al)	
)	
V.	)	<u>EXCEPTIONS TAKEN TO</u>
	)	<u>ADDITIONAL REPORT OF</u>
ROBERT MIDDLETON, et als	)	<u>COMMISSIONER IN CHANCERY</u>

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now the Complainants, Brice Johnston, Jr., et ux,
and file this their Exceptions to the "Additional Report of Commissioner
in Chancery" filed April 27, 1978:

I.

The Complainants as a preliminary exception deem the
additional report as contrary to the procedure directed by the Court in
its ruling to the effect that the Complainants would be allowed to take
additional evidence on the point that the original Report of said Commissioner
in Chancery found a right-of-way or easement vested in the Respondents
by reason of "necessity". The Court in accordance with counsel for the
Respondents directed the additional evidence to be taken by the Special
Commissioner with a supplementary report to be filed. It was the
conclusion of counsel for the Complainants that the depositions were to
be taken and filed with the Court as a part of the evidence to be considered
by the Court in the exceptions to the original report. It is a contention
of the Respondents that the further taking of evidence before the
Commissioner placed the Complainants in the position of having to
introduce evidence to overcome a finding of the Commissioner which

created a burden of proof which was prejudicial to the Complainants. However, the Complainants submit these exceptions to the additional report based upon the assumption that the Court did so advise counsel for the Respondents that this was the Court's intention in its ruling.

II.

The additional report of the Commissioner, which was filed prior to the evidence having been transcribed confirms the verbal finding made by the Commissioner at the conclusion of the evidence taken on April 18, 1978. The Commissioner stated verbally to counsel for both the Complainants and Respondents on that date that the evidence heard was not sufficient to modify the original finding that "the Respondents had a way by necessity across the Complainants' land".

III.

In the original report of said Commissioner dated June 24, 1977, as a basis for his finding he stated that "there was clear and convincing evidence that there was no existing means of ingress or egress from Respondents' land except across Complainants' land" etc.

The Complainants respectfully submit that the additional evidence submitted by the witnesses on April 27, 1978, refutes the basis for the Commissioner's initial finding. Photographs and testimony were introduced to prove a well defined access road with a permanent crossing built with stone and other permanent materials across the railroad tracts and extending through other lands to the property owned by the Respondents. There was testimony from the Fire Marshall, who referred to the photographs and who was familiar with all these properties, that this road had been used

by the owners and others for many years, and that it provided an access to the lands of the Respondents.

One of the original owners of all of said lands, Mrs. Simpkins, testified in these last depositions that this access was used by all property owners, including the predecessors of Respondents' lands. The photographs clearly prove that this access and ingress, exists and that it had been used for many, many years.

The law recognizes rights across stranger's lands by the rule of right-of-way or easement by "implication".

IV.

In addition to this evidence, a deed was introduced establishing proof that the Respondents had acquired additional lands that adjoin the property they now own which provided access to all their lands without the need of building and constructing a new road through the Complainants' land. The date and timing of this deed refutes the argument of "necessity" for egress and ingress over Complainants' lands.

In summary, the Respondents have access to their lands both by the purchase they made when they were initially notified that they could not build a road through Complainants' lands; and it would appear that they, likewise, had access which they acquired by an implied easement over other lands adjacent to them.

V.

The Commissioner's finding that a way of "necessity" came into existence by deeds made in 1887, but not heretofore sought to be established by affirmance of the same in other deeds or by prior access.

Neither is the location of such a way of necessity accurately described.

The effect of the Commissioner's finding is that the Respondents can build a road across the Complainants' land at any place they choose because of a failure to give an express right-of-way in the year 1887 or shortly thereafter. This is not a finding of a right-of-way of egress and ingress which the Respondents allege existed in their pleadings. Respondents' claim of a right by necessity came into existence based solely on the Commissioner's determination from a study of old records of deeds.

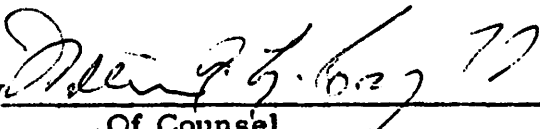
The Respondents did not rely upon it when they purchased the land, and their sworn testimony is that they had the title examined and reported to the Complainants that they had an express grant. Thereafter, or on or about the same time, they purchased a way of access by a deed exhibited in this evidence offered in the last depositions.

The entire thrust of the Commissioner's finding is to shift the burden to the Complainants to prove that the Respondents do not have a way either by express grant, usage or necessity. Your Complainants respectfully submit that this is not the law applicable to this case, and that the evidence is as forceful and strong that the Respondents had a way of egress and ingress over other properties as it is that they are now entitled many, many years later to assert a new way of necessity at a site of their own choosing over Complainants' lands.

In conclusion, counsel for the Complainants call attention to the Court that a fair presentation of exceptions cannot here be presented when the Commissioner has filed his report prior to the availability of the transcript of the evidence taken.

Respectfully Submitted,

BRICE JOHNSTON, JR., et al

By 
Of Counsel

Craft & McGhee
Attorneys at Law
Three North Franklin Street
P. O. Box 240
Christiansburg, VA 24073

VIRGINIA: IN THE CIRCUIT COURT OF PULASKI COUNTY

BRICE JOHNSTON, JR., ET AL, Complainants

v.

ROBERT MIDDLETON, ET AL, Defendants.

MEMORANDUM OPINION

The sole issue in this case is whether or not the defendants have a right of way of ingress and egress by necessity over the lands of the complainants out to Public Highway No. 692. Complainants have filed a bill for injunction to enjoin the defendants from crossing their land. The cause was referred to a Special Commissioner and he has filed his report finding that the defendants do have an easement by necessity over the lands of the complainants. Exceptions have been duly filed by the complainants.

It is uncontroverted that at one time the lands of the complainants and of the defendants were owned by a common grantor; that the common grantor then conveyed a portion of said land to David Forney (predecessor in title of the defendants); that at this point the Forney land was surrounded by the remaining lands of the grantor, W. R. Coles, and by the lands of strangers; that subsequently Coles conveyed his remaining land, a portion of which is now owned by the complainants.

In §98 of Minor on Real Property, 2d Edition, we find the familiar discussion of easements by necessity which has many times been approved by ^{the} Virginia Supreme Court. On pages 132 and

133 Professor Minor has the following to say:

"But the most usual and important of these easements is the right of way by necessity, which arises by implied grant where one conveys to another land which is either entirely surrounded by the lands of the grantor, or else is bordered in part by the land of a stranger and in part by the lands of the grantor. In either case the grantee of the land, even in the absence of express stipulation, has a way by necessity over the grantor's land, since otherwise the land granted to him would be unapproachable and useless. The grantor cannot take advantage of the absence of stipulation thus to derogate from his own grant."

At page 134 it is further pointed out "that in order to establish such a way, it is essential that the alleged dominant and servient tenements should be proved at some time in the past to have belonged to the same person."

Again at pages 134 and 135 we find this:

"In the case of ways by necessity, it is the intention of the parties that is sought to be inferred from the uselessness of the land to the grantee unless such a right of way be implied. Whether degrees of uselessness may be admitted as a ground of determining this intention is a question upon which the courts are divided. Upon principle, it would seem that, if there already be another mode of access to the land, though much less convenient, or more expensive to develop, the reason for the inference of a grant of a way by necessity ceases."

Inasmuch as W. R. Coles was the common grantor of both of the tracts of land involved in this suit and since the evidence indicates that a right of way was open and apparent and was used for many years for the benefit of the alleged dominant tract over the alleged servient tract, it appears that all of the elements of an easement by necessity are present unless the alleged dominant

tract has another mode of access, though much less convenient or more expensive to develop.

The Special Commissioner, in his report filed July 1, 1977, reported that the defendants have an easement by necessity over the lands of the complainants out to Public Road No. 692. In that report he states that "your commissioner finds that even though there was some evidence that there was another means of access to respondent's property and the deed from Cole to Simpkins mentions a road leading from Coles' remaining property to "the Floyd County road", there is no evidence that either of these are in existence or were ever available to respondent or his predecessors in title."

Complainants excepted to the Commissioner's finding, inter alia, on the ground that the respondents did not contend in their pleadings that they are entitled to an easement by necessity, but rather to an easement by express grant or by "usage". By letter of December 20, 1977, the Court allowed the complainants to take additional evidence on the question of easement by necessity and thereafter on April 27, 1978, the Commissioner filed his supplemental report in which he makes the following findings:

"Your commissioner finds that there is clear and convincing evidence that there is another roadway leading from State Route 693 across property belonging to the Estate of W. W. Dickerson to the property of the defendants. This roadway has been used by unknown parties for a number of years and appears to have been used by predecessors in title to the defendant's land.

"Your commissioner finds that if there is another right of way or roadway legally available

to defendant's land the way of necessity across complainants' property for the benefit of defendants' land would not be valid. No evidence was presented that defendants had a granted right or a right by usage across the Dickerson property."

The Commissioner then found that the additional evidence presented by the complainants did not alter the finding contained in his prior report, namely, that the respondents own an easement by necessity over the lands of the complainants. Complainants have excepted to the supplemental report of the Commissioner and argue that in effect the Commissioner has put the burden of proof upon the complainants to prove that the respondents have an access to their land other than over the lands of the complainants out to Highway 692. In other words, the complainants argue that the burden is upon the defendants to prove that they do not have another access to their property if they are to successfully claim that they have an easement by necessity over the lands of the complainants. I am of the opinion that this point is well taken.

"A right of way by necessity will not be decreed unless the evidence showing the need therefor is clear and convincing, and it does not arise if there is another way of access although less convenient or more expensive to develop." Chaiken v. O'Meara Tile Company, 212 Va. 510,513.

In Chaiken O'Meara owned a parcel of land which was surrounded by Chaiken lands and by the Southern Railway right of way. For more than twenty years access to the O'Meara property was over a road running parallel to the railway from the O'Meara tract to Black Lick Road. Apparently Black Lick Road had been rebuilt and raised some 15 to 25 feet above the level of the

access road, resulting "in a physical loss of access to Black Lick Road, but there is no evidence in the record of any loss of legal access." The Court pointed out that this loss of physical access might be inferred from the record but that "O'Meara [had] failed to carry the burden imposed upon it" to prove that there was no other access to the land, although less convenient or more expensive to develop.

The evidence, including photographs, supports the finding of the Commissioner in his supplemental report "that there is clear and convincing evidence that there is another roadway leading from State Route 693 across property belonging to the estate of W.W. Dickerson to the property of the defendants." The Commissioner further finds, however, that "no evidence was presented that defendants had a granted right or a right by usage across the Dickerson property", in effect placing the burden of such proof upon the complainants.

No explanation or proof was offered by the respondent, upon whom the burden rested, to show that their land never had a right of way by prescription or otherwise out to Public Road 693 or that, if at one time they did have such access, the same had terminated. That was the precise situation that obtained in Chaiken and I am constrained to hold here as the Supreme Court held there that the respondents have failed to carry their burden of proving one of the essential elements of an easement by necessity, that is, that they have no other reasonable access.

The exceptions to the report of the Special Commissioner will, therefore, be sustained and the prayer of the complainants for an injunction is granted.

I note that the complainants pray for compensatory and punitive damages in their bill of complaint. I am of the opinion that this record clearly shows that the complainants are not entitled to punitive damages, but if they wish to pursue the prayer of their bill for compensatory damages by way of issue out of chancery, they, of course, may do so.

I request Mr. Craft to prepare an appropriate decree carrying this opinion into effect and that he submit it to Mr. Owens for endorsement as to form.



R. William Arthur, Judge

Wytheville, Virginia

July 12, 1978

BRICE JOHNSTON, JR. ET AL)
)
V.)
)
ROBERT MIDDLETON ET AL)

This cause came again this day to be heard upon the bill of complaint filed herein by Brice Johnston, Jr. et al; the answer and responsive pleadings filed by the respondents, Robert Middleton et al; on the orders and decrees heretofore entered; on the report of Eugene L. Nuckols, Special Commissioner, filed herein on the 1st day of July, 1977, the exceptions taken thereto by the complainants, Brice Johnston, Jr. et al, and by the respondents, Robert Middleton et al; on the additional and supplemental report filed herein by Eugene L. Nuckols, Special Commissioner, on the 27th day of April, 1978; on the exceptions taken thereto by the complainants, Brice Johnston, Jr. et al; on the depositions and exhibits filed in this cause; on the memoranda filed by both the complainants and the respondents; upon the written opinion of the Court filed herein; and was argued by counsel.

175

opinion that as a matter of law the burden of proving a right by necessity is upon the respondents. Therefore, it is ADJUDGED, ORDERED and DECREED that these exceptions taken by the complainants to said report be, and the same is hereby sustained. In all other respects the Court is of the opinion that the report of the said Special Commissioner should be ratified and approved, and it is so ADJUDGED, ORDERED and DECREED.

By reason of this adjudication and sustaining said exceptions filed by the complainants, the Court is of the opinion that the complainants are entitled to an injunction against the respondents from further trespass and use of the complainants' property described in said bill of complaint; and it is, therefore, ADJUDGED, ORDERED and DECREED that the respondents, Robert Middleton and Fred Cook be, and they hereby are, enjoined from further trespass and entry in, upon, over or across the lands of the complainants as described in said bill of complaint.

By reason of the adjudication herein made as to the complainants' rights, the Court is of the opinion that the complainants are entitled to have an issue out of chancery for the purpose of fixing the amount of damages to which the complainants are entitled to recover by reason of the respondents' trespass and construction of a road through the properties of the complainants, and that the complainants are entitled to have this matter determined by a jury. The complainants and the respondents by counsel having represented unto the Court that they have compromised and agreed that the amount of damages to which the complainants are entitled to recover is the sum of Five Hundred (\$500.00)

Dollars, it is, therefore, ADJUDGED, ORDERED and DECREED that the complainants recover and have judgment against the respondents in the sum of Five Hundred (\$500.00) Dollars for damages to their properties by reason of the respondents trespass thereon and damages caused thereto.

It is ADJUDGED, ORDERED and DECREED that the complainants recover their taxable costs expended in this cause, including the costs assessed by the Special Commissioner, including a fee to said Special Commissioner for his services rendered in the taking of said report in the amount of \$1,000.00; and that the total amount of said costs shall constitute a judgment against the respondents, Robert Middleton and Fred Cook.

It appearing unto the Court that there is nothing further remaining to be done in this cause, it is ADJUDGED, ORDERED and DECREED that the same be, and it is hereby dismissed and stricken from the docket.

I ask for this decree.

Counsel for Complainants

I have seen this decree and except thereto.

Counsel for Respondents

Enter this decree on this the 10
day of Oct, 1978.

Judge

II. ASSIGNMENT OF ERROR

These defendants, Robert Middleton and Fred Cook, do aver that the Judge of the Circuit Court of Pulaski County, Virginia, did error as follows:

1. In confirming the finding of the Special Commissioner dated 27 June 1977, that these defendantd did not have a right of way by usage, adverse possession, or implication and severance.
2. In over-ruling the finding of the Special Commissioner dated 27 June 1977, that these defendants did, in fact, have a right of way over the lands of the complainant's by necessity.
3. That the Court was in error in it's finding that it was incumbent upon the defendants to prove that they did not have another right of way except over the lands of the complainant's and finding that the defendant did not prove in fact and carry the burden of proof that they did not have a right of access by any other means. That the Court, in effect, required the defendant's to prove a negative.

4. In over-ruling a factual finding by the Special Commissioner that no other right of way existed as means of access to the lands of the defendant.

VIRGINIA: IN THE CIRCUIT COURT OF PULASKI COUNTY

BRICE JOHNSTON, JR.
AND
M. TERESA S. JOHNSTON, his wife

V.

ROBERT MIDDLETON
King, North Carolina

AND

FRED COOK
King, North Carolina

AND

HORACE STRICKLER
HARRY STRICKLER
T/A STRICKLER BROTHERS
Fancy Gap, Virginia

NOTICE
OF
APPEAL

The Respondent's, Robert Middleton and Fred Cook, in the above-styled action, being aggrieved by the final decree of this Honorable Court entered on October 20, 1978, hereby files a notice of appeal to The Supreme Court of Virginia. Copies of the depositions and all related documents are part of the record pursuant to Rule 5:8.

ROBERT MIDDLETON
and
FRED COOK

By   
Of Counsel

A. Dow Owens
Attorney at Law
33-3rd Street
Pulaski, Virginia
Counsel for Respondents

The following list of exhibits are made part of this appendix by designation, but are not reproduced herein because all original photographs are with the Court file and other exhibits are too large for reproduction.

1. Appellees Exhibit 1, 1A, 1B, and 1C, consisting of photographs of old roadway.
2. Appellees Exhibit 1A (second designation of 1A) Area Geological Survey with two tracts in issue shown in red outline.
3. Appellees Exhibit P2A (also identified in the depositions as 1-A), showing lands of Appellees outlined in green, and lands of Appellants outlined in blue.

This exhibit shows heavy, black line of roadway leading from public road through lands of Appellees to lands of Appellants.

This exhibit also shows red mark inserted by Appellees over lands of Appellants and through lands of W. W. Dickerson to the public road.

This exhibit was filed by Appellees along with photographs marked Exhibits E1 through E13 showing extension and location of red marks inserted by Appellee.

4. Appellees Exhibits 4A, 4B, 4C, 4D, D1, D2, D3, showing improvement and grading work done by Appellants.
5. Appellants Exhibit 1, vicinity map showing lands of Appellants, Appellees, and of Glen Simpkins.
6. Appellants Exhibit 1-A, from Plat Book 1, of the Clerk's Office of the Circuit Court of Pulaski County, Virginia, showing lands of Morris-Tasker surrounding lands of Appellants and Appellees (when the same was owned by Forney Mining Company).
7. Appellants Exhibit 2, showing lands of Appellees, Appellants, Glen Simpkins, W. W. Dickerson and New River.
8. Appellants Exhibit 3, a photograph taken on the road in issue in 1922.
9. Appellants Exhibit 4, a sales agreement from Dora Simpkins to Glen Simpkins of the lands now owned by Appellees.
10. Appellants Exhibit 5, a letter from Dora Simpkins to Glen Simpkins.

APPELLANT'S EXHIBIT NUMBER 6

Revenue Stamps \$0.55

THIS DEED made and entered into this the 13th day of September, 1952, by and between N. J. Simpkins and Dora V. Simpkins, his wife, parties of the first part, and C. C. Abell, party of the second part,

W I T N E S S E T H :

THAT for and in consideration of the sum of Five (\$5.00) Dollars, cash in hand paid by the party of the second part unto the parties of the first part, the receipt of which is hereby expressly acknowledged, the said parties of the first part do hereby bargain, sell, deed, grant and convey, with covenants of General Warranty of Title, unto the said party of the second part, but subject to the exceptions and reservations hereinafter contained, that certain tract or parcel of land situate in the County of Pulaski, Virginia, on the south side of New River, and on the waters of Breeding's Branch, and being a part of the Tasker "Northernly Tract", and being bounded and described as follows, to-wit:

BEGINNING at a large white oak and stone on a ridge and running with the Cole and Tasker line N. 12 deg. E. 94 rods to a stake on a steep hill side above a bluff; thence along the side of the mountain S. $84\frac{1}{2}$ deg. W. 34 rods to a stake and a pine and chestnut saplings, pointers; thence N. $80\frac{1}{2}$ W. $106\frac{3}{4}$ rods to a stake on a steep mountain above Hiawassie flag station (and standing N. $85\frac{1}{2}$ deg. E. about 400 yds. from the store house); thence running with the water shed of said mountain, S. 45 deg. E. 11 rods to an old pine stump; thence S. $3\frac{1}{4}$ deg. W. 25 rods to a pine on a steep hill side near the top of the mountain; thence S. $23\frac{1}{2}$ deg. E. $19\frac{1}{2}$ rods to a stake; thence S. 47 deg. E. 84 rods to a stake; thence S. 88 deg. E. 44 rods to the Beginning, and containing by survey made by A. C. Hall, Surveyor, in April, 1915, $61\frac{1}{2}$ acres, more or less, this sale being made in gross and not by the acre,

AND BEING the same property conveyed unto the said N. J. Simpkins by Stephen P. M. Tasker and wife, by deed dated December 3, 1915, and of record in Pulaski County Clerk's Office in Deed Book 38, page 217, reference to which is herewith made for a more particular description of the property hereby conveyed.

THERE is excepted and reserved however from this conveyance all minerals and mineral substances, commercial clay, gas and oil, in, under and upon said tract of land, together with all mining rights and privileges which were excepted and reserved unto the said Stephen P. M. Tasker by said deed dated December 3, 1915, and of record in said Clerk's Office in Deed Book 38, page 217, reference being herewith specifically made to said deed for a more particular description of said mining rights and privileges so excepted.

IN AND FOR the same consideration the said parties of the first part do hereby grant unto the party of the second part, his heirs or assigns, as an easement appurtenant to the tract of land hereby conveyed, a right of way for the purpose of ingress and egress to and from the property hereby conveyed over the other lands of the parties of the first part adjacent to the property hereby conveyed.

TO HAVE AND TO HOLD said tract or parcel of land together with the easements and appurtenances thereunto in anywise belonging, subject to the exceptions and reservations herein contained, unto the said C. C. Abell, his heirs and assigns forever.

WITNESS the following signatures and seals of the parties of the first part the day and year first above written.

N. J. Simpkins (SEAL)

Dora V. Simpkins (SEAL)

STATE OF VIRGINIA

COUNTY OF PULASKI, to-wit:

I, Dorothy Stoots, a Notary Public of and for the county and state aforesaid, do hereby certify that N. J. Simpkins and Dora V. Simpkins, his wife, whose names are signed to the foregoing writing bearing date the 13th day of September, 1952, have this day personally appeared before me in my county aforesaid and acknowledged the same to be their act and deed.

Given under my hand this the 13th day of September, 1952.

My commission expires March 16, 1955.

Dorothy Stoots, Notary Public

VIRGINIA: In the office of the Clerk of the Circuit Court
of Pulaski County, September 16, 1952 9:30 A. M.

The foregoing deed was this day presented in said office and,
with certificate annexed, admitted to record.

Teste:

Clerk.

APPELLANT'S EXHIBIT NUMMBER 7

Deed Book 41, Page 384.

THIS DEED, made and entered into this the 3rd day of September, 1919, by and between FORNEY MINING COMPANY, INC., party of the first part, and H. B. ALLISON, party of the second part.

W I T N E S S E T H

THAT for and in consideration of the sum of Two Thousand Five Hundred Dollars (\$2,500.00), of which Eight Hundred Fifty Dollars (\$850.00), is cash in hand paid, the receipt of which is hereby acknowledged, and the remainder is payable in one and two years after date with interest, as evidenced by two notes bearing even date with this deed, the party of the first part doth hereby grant and convey to the party of the second part with covenants of General Warranty and subject to the reservations hereinafter contained, that certain tract or parcel of land situate in Pulaski County, Virginia, South of New River, containing five hundred acres, more or less, by estimate, but this conveyance is made in gross and not by the acre, the said land being bounded and described as follows:

BEGINNING at two pines and a black oak near a bluff of rock North of Alford's Branch; thence S. 88-3/4 E. 75 poles, 15 links to a white oak, N. 10 E. 7 poles, 3 links to a stake and dogwood; thence N. 84½ E. 257 poles to a stake and chestnut oak on Morris and Tasker's line; and with the same S. 17 E. 37 poles, 3 links to a pine and chestnut oak, thence S. 70 W. 52 poles to a chestnut oak near a branch; thence S. 11 W. 27 poles to three chestnut oaks in a hollow; thence S. 42 E. 96 poles to a chestnut oak; thence N. 74 E. 36 poles to a chestnut oak on the top of a mountain; thence S. 28½ E. 22 poles to two chestnut oaks, S. 17 W. 134 poles to a pine and chestnut oak, S. 56 W. 58 poles to three chestnut oaks from one root; thence a new line N. 45 E. 100 poles to a white oak and pine, N. 39 W. 44 poles to a chestnut, N. 74 W. 74 poles to a birch and chestnut oak, N. 59 W. 40 poles to a pine and N. 33 W. 166 poles to the BEGINNING.

But it is hereby expressly covenanted and agreed between the parties to this deed that the Forney Mining Company, Inc. reserves and excepts from the operation of this deed the minerals, metals, mineral substance including clays, in, under and upon the said tract of land together with all the usual and necessary mining rights and privileges which shall include among others the right to explore, dig for, mine and remove all said minerals and mineral substances as may be found on said land with sufficient surface room on which to deposit minerals, mineral substances and deads taken in mining and exploring the aforesaid; the right of egress and ingress;

the right to construct wagon roads, railroads, tramways and electric lines over said land and to operate them in connection with said mining; the right to use water from any of the streams on said land and to convey water over the same from such streams or from any other waters or springs to and about the mines for the purpose of washing or mining ares and preparing the same for market and for the use of washers and engines and other machinery and for the use of men and beasts used and worked in the operation of the said mines and machinery but sufficient shall be left in said springs and streams for domestic use and for watering stock and to pipe water by pipes or troughs over or under the surface and returning water to the streams by pipes, troughs or natural channels or to collect the same in settling ponds as needed; the right to erect and operate machinery, engines, washers, etc., necessary or useful in mining, washing, and preparing the ores for market; the right to erect suitable buildings for the protection of machinery or otherwise and for the habitation of employees and workmen engaged in

mining operation of said land and suitable stalls and stables for beasts, employed in the work with the right to remove all machinery, buildings, railway, tracks and lines at any time; also the right to take and use necessary timber, (but the party of the second part may at any time cut and remove any timber that he may want to and from said property) for mining purposes; also for laying or stretching wires over or through said property for conveying electricity across the property or using it on the property and it is further covenanted and agreed that the above enumeration of rights shall in no way impair the right of the Company to use any modern methods of economic mining not herein above enumerated.

But the said Forney Mining Company, Inc., its alienees and assigns are to do no more damage or injury to the land or timber thereon than may be necessary for the exercise of the above rights and are to protect the fences to be put upon said property as far as practicable.

But the said Forney Mining Company, Inc., its alienees and assigns are to do no more damage or injury to the land or timber thereon than may be

necessary for the exercise of the above rights and are to protect the fences to be put upon said property as far as practicable.

This conveyance recognized any former contracts with or conveyance of record to the Appalachian Power Company.

A Vendor's Lien is hereby retained until the whole of the purchase money shall have been paid.

WITNESS the following signatures and seals the day and year first above written.

FORNEY MINING COMPANY,
INCORPORATED

By: s/ R. M. LAWSON, Pres.

ATTEST:

s/ M. M. CALDWELL, Secretary

Corporate Seal

Stamps \$2.50

STATE OF VA.

COUNTY OF TAZEWELL, to-wit:

I, A. S. GREER, a Notary Public in and for the County and State aforesaid, do hereby certify that R. M. LAWSON, President, of the Forney Mining Company, Incorporated, whose name is signed to the foregoing Deed bearing date on the 3rd day of September, 1919,

has acknowledged the same before me in my County
aforesaid.

Given under my hand this 11th day of September,
1919.

My commission expires June 16, 1919.

s/ A. S. GREER, N. P.

STATE OF VIRGINIA

CITY OF ROANOKE, to-wit:

I, W. W. ANDERSON, a Notary Public in and for the
City aforesaid certify that M. M. CALDWELL, Secretary,
of Forney Mining Company, Incorporated, whose name is
signed to the foregoing Deed bearing date on the 3rd
day of September, 1919, has acknowledged the same in
my City.

Given under my hand this 13th day of September,
1919.

My commission expires Jany. 4, 1923.

s/ W. W. ANDERSON, N. P.

VIRGINIA: IN THE OFFICE OF THE CLERK OF THE CIRCUIT
COURT OF PULASKI COUNTY

October 21, 1919, 4p.m.

The foregoing Deed was this day presented in
said office and, with certificate, annexed, admitted
to record.

Teste:

s/ J. N. BOSANG, Clerk

APPELLANT'S EXHIBIT NUMBER 10

Deed Book 8, Page 278

THIS DEED, made this Thirtieth day of December in the year of our lord 1878 between C. BULLARD and BETTIE BULLARD, his wife, of the Co. of Pulaski and State of Virginia, of the first part, and WILLIAM R. COLES, of the County of Pulaski and State of Virginia, of the second part.

W I T N E S S E T H

THAT in consideration of Five Thousand Dollars of which the receipt of Six Hundred and Forty-Five Dollars is hereby acknowledged and for the remainder of which Thirty Three Hundred and Fifty Five Dollars the said Wm. R. Coles has executed his hand and for the payment of which a lien is retained upon the land conveyed by this instrument, except upon Five hundred forty eight and one third acres of the Western end of the third tract of land mentioned in this Deed, the said C. BULLARD and BETTIE, his wife, do grant, bargain, and sell, and convey, unto the said WM. R. COLES three

certain tracts or parcels of land lying and being in the County of Pulaski and State of Virginia, the first of said tracts is known as the "James Reed Survey" containing two hundred and ninety eight acres, more or less, and bounded as follows, to-wit:

BEGINNING at three white oaks on the East side of a hill S. 22 E. 80 poles crossing a branch to three white oaks in the edge of a bank thence S. 53 W. 450 poles crossing two small branches to three chestnuts on the top of a hill two of which are from one root N. 19 W. 81 poles to a white oak black oak and chestnut on the North side of a hill thence N. 53 E. 138 poles crossing a branch to a double white oak and spanish oak thence N. 22 W. 78 poles crossing a branch to two chestnuts thence N. 17 E. 294 poles to the BEGINNING.

The second tract adjoins the above containing three hundred and thirty acres more or less and bounded as follows:

BEGINNING at a chestnut a Northwest corner to the first described land and with a line of the same S. 22 E. 18 polesto a double white oak thence S. 22 W. 20 poles to a white oak thence leaving said line N. 41 W. 152 poles to a white oak and two chestnuts and in the top of thence N. 13 E. 11 poles to a chestnut thence S. 8 E. 3 poles to a chestnut thence N. 1 E. 3/18 poles crossing Max Creek at 350 poles to a pine and red

oak sapling thence N. 7 E. 50 poles to a pine black oak and hickory sapling on a steep hill side thence S. 25 E. 22 poles crossing Max Creek twice to two large white oaks on the bank of said creek thence with said creek S. 9 W. 34 poles to two spruce pines thence S. 10 W. 272 poles to two white oaks and red oaks thence S. 2 E. 32 poles to a white oak and red oak thence S. 53 W. 42 poles to a white oak and two chestnut oaks in a hollow thence N. 47 W. 52 poles to a pine and red oak on a line of the first survey and with a line of the same N. 53 E. 214 poles to a white oak thence N. 22 W. 18 poles to a chestnut thence S. 17 W. 225 poles to the BEGINNING.

The third tract contains about seven hundred acres more or less being a tract of a certain survey made by authority of Treasury Warrants No. 21731 and 21744 and dated Nov. 4th 1853 containing Twelve hundred and Eighty acres and three fourths and granted by patent bearing date 1st day of Dec. 1854 to Ino. W. Carnahan, the land hereby conveyed in this land mentioned is that which remains after deducting the land conveyed to W. Cecil by said Ino W. Carnahan by deed bearing date the 28th July 1851, of record in the Clerk's Office of the Co. of Pulaski.

And the said C. Bullard and Bettie his wife,
covenant with the party of the second part to
warrant generally these several tracts of land
reserving to the Lead Mine Company the mineral
privileges which it reserved in conveyances to
said C. Bullard, I. J. Bullard, J. B. Snow,

WITNESS the following signatures and seals.

s/ C. BULLARD (SEAL)

s/ BETTIE BULLARD (SEAL)

STATE OF VIRGINIA

PULASKI CO., to-wit:

I, D. B. BILL, a Notary Public for the State
and County aforesaid, do hereby certify that C.
BULLARD whose name is signed to the within Deed
bearing date Dec. 30, 1878 personally appeared
before me in my County aforesaid and acknowledged
the same.

Given under my hand this 31st day of December,
1878.

s/ D. B. BILL, N. P.

STATE OF VA.

PULASKI CO., to-wit:

I, D. B. BILL, a Notary Public in and for the County and State aforesaid do certify that BETTIE BULLARD the wife of C. BULLARD whose name is signed to the within Deed bearing date Dec. 30, 1878, personally appeared before me in my County aforesaid, and having the Deed aforesaid fully explained she the said BETTIE BULLARD acknowledged the same to be her act and that she had willingly executed the same and does not wish to retract it.

Given under my hand this 31st day of Dec.
1878.

s/ D. B. BILL, N. P.

VIRGINIA, IN THE CLERK'S OFFICE OF PULASKI COUNTY

February 17th 1881 this Deed from C. BULLARD et ux to WM. R. COLES dated Dec. 30th, 1878, was this day presented in said office and with a certificate of acknowledgement endorsed thereon admitted to record.

Teste:

s/ R. T. Gardner, Clerk

APPELLANT'S EXHIBIT NUMBER 12

Deed Book 11, Page 513

THIS DEED, made this 3rd day of May in the year 1887 between WILLIAM R. COLES and FRANCIS E., hiswife, parties of the first part, and DAVIS S. FORNEY, party of the second part, all of the County of Pulaski and State of Virginia:

W I T N E S S E T H

THAT for and in consideration of Seven Thousand Dollars, of which Two Thousand Eight Hundred and Forty-Two Dollars has been in hand paid, the receipt whereof is hereby acknowledged, and for the balance thereof the said DAVID S. FORNEY has executed his four several bonds bearing even date with this Deed to the said WILLIAM R. COLE, one for the sum of Eleven Hundred and Fifty-Eight Dollars payable on or before the first day of June 1887 and the other three bonds in equal installments of One Thousand Dollars each payable respectively in one, two, and three years from date with interest from the first day of January, 1888, and to secure the payment of said bonds a Vendor's Lien is hereby expressly

retained, the parties of the first part have bargained and sold and do hereby bargain, sell, and convey unto the said DAVID S. FORNEY, with covenants of general warranty a certain tract or parcel of land lying and being in the County of Pulaski and State of Virginia, south of New River; containing by recent survey seven hundred acres be the same more or less and bounded as follows:

BEGINNING at two pines and black oak near a bluff of rock north of Allfrondo Branch thence S. 88-3/4 E. 73 poles 15 links to a white oak, N. 10 E. 7 poles 3 links to a stake and dogwood, thence N. 82½ E. 25 poles to a stake and chestnut oak on Morris & Tasker line and with the same S. 17 E. 37 poles 3 links to a pine and chestnut oak, thence S. 70 W. 52 poles to a chestnut oak near a branch, thence S. 11 W. 27 poles to 3 chestnuts oaks in a hollow; thence S. 42 E. 96 poles to a chestnut oak, thence N. 74 E. 36 poles to a chestnut oak on the top of a mountain; thence S. 28½ E. 22 poles to two chestnut oaks S. 17 W. 134 poles to a pine and chestnuts oak S. 56 W. 58 poles to three chestnut oaks from one root S. 37 W. 66 poles to a pine S. 49 W. 111 poles to a pine and hickory S. 56 W. 40 poles to a chestnut S. 64½ W. 42 poles to a pine, S. 42 W. 20 poles to a pine; S. 80 W. 42 poles to a chestnut pine and white oak, S. 66 W. 214 poles to a pine and black oak and a white oak N. 48 W. 88 poles to a white oak and pine, N. 24 E. 37 poles to two pines, corner to Cecil, S. 69 E. 100 poles to two pines, N. 49 E. 436 to a white oak and chestnut and pine, N. 39 W. 44 poles to a

chestnut, N. 74 W. 74 poles to a birch and chestnut oak, N. 59 W. 40 to a pine and N. 35 W. 160 poles to the BEGINNING.

Also the entire mineral right and privileges of the parties of the first part in two certain tracts or parcels of land lying and being in the County of Pulaski and State of Virginia, South of New River and bounded as follows, known as the "James Reed Survey" containing 298 acres more or less:

BEGINNING at three white oaks on the East side of a hill, thence S. 20 deg. E. 80 poles crossing a branch to three white oaks on the edge of a bank, thence 53 W. 450 crossing two small branches to three chestnuts on the top of a hill two of which are from one root; thence N. 19 deg. W. 86 poles to a white oak, black oak and chestnut on the North side of a hill, thence N. 53 deg. E. 138 poles crossing a branch to a double white oak and spanish oak, thence N. 22 deg. W. 78 poles crossing a branch to two chestnuts, thence N. 67 deg. E. 294 poles to the place of BEGINNING.

2nd adjoining the above containing 330 acres, more or less:

BEGINNING at a chestnut a Northwest corner to the last above described tract and with a line of the same, S. 22 deg. E. 78 poles to a double white oak, thence S. 52 deg. W. 20 poles to a white oak, thence leaving said line N. 41 deg. W. 152 poles to a white oak and two chestnuts on the top of a ridge, thence N. 73 deg. E. 66 poles to a chestnut, thence S. 8 deg. E. 3 poles to a chestnut, thence N. 67 deg. E. 368 poles crossing

Max Creek at 350 poles to a pine and seed oak sapling; thence S. 67 deg. E. 50 poles to a pine black oak and hickory sapling on a steep hill side, thence S. 25 deg. E. 92 poles crossing Max Creek twice to two large white oaks, on the bank of said creek, thence with the said creek S. 9 deg. W. 34 poles to two spruce pines; thence S. 60 deg. W. 272 poles to two white oaks and seed oaks; thence S. 2 deg. E. 32 poles to a white oak and seed oak; thence S. 53 deg. W. 42 poles to a white oak and two chestnut oaks in a hollow; thence N. 47 deg. W. 52 poles to a pine and seed oak on the line of the first survey and with a line of the same, N. 53 deg. E. 214 poles to a white oak; thence N. 22 deg. W. 78 poles to a chestnut, thence S. 67 deg. W. 223 poles to the place of BEGINNING

It is intended by this conveyance so far as the same purports to convey the mineral rights and privileges of the parties of the first part in the above described tracts or parcels of land to convey only such rights and privileges therein as the parties of the first part have and to reserve from the operation of this conveyance the mineral privileges reserved by the Lead Mine Camp and to itself in its conveyance of said land to C. Bullard, T. S. Bullard and S. B. Snow, said reservation being the same made by the said C. Bullard and wife in the conveyance of said land to said W. R. Cole, it being the intention hereby to convey the first above described tract or parcel of land and the

entire interest of the parties of the first part in the mineral right and privileges in all three of the above described tracts or parcels of land.

To have and to hold to him the said David S. Forney and his heirs forever.

WITNESS the following signatures and seals.

s/ W. R. COLE (SEAL)

s/ F. E. COLE (SEAL)

STATE OF VIRGINIA

COUNTY OF PULASKI,

I, R. C. PEDIGO, a Justice of the Peace in and for the County aforesaid and State of Virginia certify that WILLIAM R. COLE, whose name is signed to the writing hereto annexed bearing date the 3rd day of May, 1887, has acknowledged the same before me in my said County.

Given under my hand this 13th day of May, 1887.

s/ R. C. PEDIGO, J. P.

STATE OF VIRGINIA

COUNTY OF PULASKI,

We, R. C. PEDIGO and WILLIAM CAPEDEY, Justices of the Peace in and for the County and State of

Virginia certify that FRANCIS E. COLE the wife of W. R. COLE, whose name is signed to the writing hereto annexed bearing date the 3rd day of May, 1887, personally appeared before us in our County aforesaid and being examined by us privately and apart from her husband, and having the writing aforesaid fully explained to her, she, the said FRANCIS E. COLE acknowledged the said writing to be her act and declared that she had willingly executed the same and does not wish to retract it.

Given under our hand this 13th day of May, 1887.

s/ R. C. PEDIGO, J. P.

s/ WILLIAM CAPEDEY, J. P.

VIRGINIA IN THE PULASKI COUNTY COURT CLERK'S OFFICE

January 26th 1888.

The foregoing Deed from WILLIAM R. COLE and wife to DAVID FORNEY, this day presented in said office and certificate being annexed is admitted to record.

Teste:

s/ C. H. MORRIS, D. C.

APPELLANT'S EXHIBIT NUMBER 13

Deed Book 13, Page 167

THIS DEED, made this third day of July, 1890, between D. S. FORNEY and NANCY FORNEY, his wife, parties of the first part, and "THE FORNEY MINING COMPANY" party of the second part.

W I T N E S S E T H

THAT the said parties of the first part for and in consideration of the sum of One Dollar in hand paid, the receipt whereof is hereby acknowledged do grant unto the party of the second part: with covenants of general warranty, all the right, title, and interest, mineral rights, mining privileges and easements of every sort and character now owned or possessed by them of which they stand seized, in the following tracts and parcels of land, situate in Pulaski County, near Allisonia, on both sides of New River and described as follows:

First: In a tract of land lying on the North side of New River containing One Hundred Forty-Six acres, and the same conveyed to the said D. S. Forney and O. P. Nunn and others by Deed dated the fifth of May, 1887, and recorded in Pulaski County

in Deed Book No. 12, Page 387.

Second: In a tract of Seventy acres, lying on the north bank of New River, adjoining tract No. One, and the same conveyed to the said D. S. Forney by A. B. Clark and others by deed dated the fifth day of March, 1887, and recorded in Pulaski County in Deed Book No. 11, Pages 508 and 509.

Third: In two parcels of land, one containing sixty, and the other sixty two and one half acres, and also in certain mineral rights in the bed of New River, said tracts also situate on the North bank of New River adjoining Tract No. 2., and being the same tracts and mineral rights conveyed to the said D. S. Forney and H. C. Clark and others by Deed dated the 15th day of February, 1890, and recorded in Pulaski County in Deed Book No. 12, Page 538, and by H. C. Clark, Commissioner, by Deed dated the fifth of April, 1890, and of record in Pulaski County in Deed Book No. 12, Page 591.

Fourth: In a tract of Three Hundred acres, more or less situate in Pulaski County on the North bank of New River, adjoining No. 3 and the same conveyed by J. Bullard Clark to said D. S. Forney by Deed dated the 21st day of April, 1890, and recorded in Pulaski County in Deed Book No. 13, Page 178.

Fifth: In a tract of seventy acres also on the North bank of New River adjoining Tract No. 4 and the same conveyed to the said D. S. Forney by W. W. Breeding and wife by Deed dated the sixth day of October, 1888, and recorded in Pulaski County in Deed Book No. 11, Pages 511 and 512.

Sixth; In one undivided half of two tracts or parcels of land lying on the South bank of New River known as the Tipton and Cecil lands containing together about One Hundred Seventy-Five acres, and the same parcels or tracts of land described in a Deed from A. H. Flanagan and others to D. S. Forney dated the first of December, 1886, and recorded in Pulaski County in Deed Book No. 11, Pages 510 and 511.

Seventh: In a tract of thirteen hundred acres be the same more or less, situate on the South side of New River known as the Bullard or Cole land and the same conveyed by W. R. Cole and wife to D. S. Forney by Deed dated the third day of May, 1887 and recorded in Deed Book No. 11, Page 513.

Reference to each of the said Deeds above named here made for a full and complete description of said several tracts of land.

WITNESS the following signatures and seals.

s/ D. S. FORNEY (SEAL)

s/ NANCY FORNEY (SEAL)

VIRGINIA: PULASKI COUNTY

I, WILLIAM CASSEDY, a Justice of said County and State do hereby cerryfy that D. S. FORNEY and NANCY FORNEY, his wife, whose names are signed to the foregoing writing dated the third day of July, 1890, acknowledged the same before me in my said County.

Given under my hand this fifth day of July, 1890.

s/ WILLIAM CASSEDY, J. P.



VIRGINIA, IN THE CLERK'S OFFICE OF THE COUNTY

COURT OF PULASKI

The 14th day of July, 1890, the foregoing Deed from D. S. Forney and wife to the Forney Mining Company was this day presented in said office and with certificate annexed admitted to record.

Teste:

s/ R. D. Gardner, Clerk

APPELLANT'S EXHIBIT NUMBER 14

Deed Book 21, Page 456

THIS DEED, made this 23rd day of March, 1894,
between W. R. COLES and F. E. COLES, his wife, of
the one part, and L. S. SIMPKINS, of the other part,
all of Pulaski County, and State of Virginia.

W I T N E S S E T H

THAT for and in consideration of the sum of
Four Hundred Ninety Dollars (\$490.00), the receipt
of \$50.00 of which is hereby acknowledged, and
\$50.00, to be paid within six months and the
remainder to be paid in three equal installments
of \$130.00 each in one, two and three years, with
six percent interest from date notes for the same
are this day executed by the said Simpkins to the
said Coles, the said Coles and wife, do bargain,
sell and convey and by these presents have bargained,
sold and conveyed to the said Simpkins with covenants
of general warranty a certain lot or parcel of land
in Pulaski County and State aforesaid about one mile
South of Max Creek known as the Irish Cabin Land,
containing Ninety-Eight acres, be the same more or
less, and bounded as follows, to-wit:

BEGINNING at a stake 7 poles 3 links from a white oak on a line of the Tipton land and a corner to the land of D. S. Forney and with a line of the Tipton land N. 10-3/4 E. 116 poles to a stake on the Spencer Branch and up said branch with its meandering of 114 poles to a white pine stump, thence leaving the branch S. 12½ E. 125 poles to a stake on Forney line and with the same S. 84½ W. 155 poles to the BEGINNING.

A Vendor's Lien is hereby retained on said parcel of land till all the purchase money with its interest is paid.

The mineral interest of said tract of land is reserved with mining privileges, and a road is hereby granted by the said Coles to the said Simpkins through said Coles land to the Floyd County road leading down Max Creek, which is to be a gated road.

WITNESS the following signatures and seals this 23rd day of March, 1894.

s/ W. R. COLES (SEAL)

s/ F. E. COLES (SEAL)

VIRGINIA, PULASKI COUNTY, to-wit:

I, J. M. HURST, a Notary in and for the said County of Pulaski do certify that W. R. COLES and F. E. COLES, whose names are signed to the foregoing Deed dated the 23rd day of March, 1894, personally

appeared before me in my said County of Pulaski and
acknowledged the same to be their act and Deed.

Given under my hand this 23rd day of March,
1894.

s/ J. M. HURST, N. P.

VIRGINIA, IN PULASKI COUNTY CLERK'S OFFICE

MARCH 15th, 1902

The foregoing Deed from W. R. COLES, et ux,
to L. S. SIMPKINS was this day presented in said
Office and with certificate annexed admitted to
record.

Teste:

s/ J. N. BOSANG, Clerk

Summary

consideration of the sum of Ten Dollars (\$10.00)

211-A

District), Pulaski County, Virginia, and more particularly described as follows:

PARCEL NO. 1: Being situate on Big Reed Island Creek, and containing in the aggregate 230 acres, more or less, and being a part of the property of which W. T. Allison and Mary A. Allison died seized and possessed, and which was partitioned among the heirs of the said W. T. Allison and Mary A. Allison, by deed dated January 3, 1905, and recorded in the Clerk's Office of the Circuit Court of Pulaski County, Virginia, in Deed Book 24, page 11, and being Tract No. 5 containing 16 acres assigned in said deed to Lilly G. Allison; Tract No. 6 in two parcels of 20-1/2 acres and another of 12-1/2 acres, assigned in said deed to G. G. Allison; Tract No. 7 containing 39-3/4 acres, assigned in said deed to Frank Allison; Tract No. 8 containing 47 acres, assigned in said deed to Mattie Lowman; Tract No. 9 containing 62-3/4 acres assigned in said deed to the said H. B. Allison, said H. B. Allison having by subsequent conveyances purchased the interest of the said Lilly G. Allison, G. G. Allison, Frank Allison and Mattie Lowman, so that he became the owner of Tracts Nos. 5, 6, 7, 8 and 9, in said partition deed, reference to which is here made for a more particular description of said property; and another tract containing 33-3/4 acres, adjoining the aforesaid tracts of land, being separated therefrom by Big Reed Island Creek and lying on the East side thereof; and being the same property conveyed to the said H. B. Allison by W. T. Allison and Mary A. Allison, his wife, by deed dated November 22, 1894, and recorded in the aforesaid Clerk's Office in Deed Book 17, page 170.

HOWEVER, there is EXCEPTED and RESERVED from this conveyance a portion of the aforesaid Parcel No. 1 conveyed to Thornton Allison and Macie G. Allison, his wife, as tenants by the entirety, by deed dated the 13th day of March, 1958, from Margaret W. Allison, widow, recorded in the aforesaid Clerk's Office in Deed Book 180, page 96, and conveyed to Thornton Allison by deed dated the 16th day of June, 1959, from Margaret W. Allison, widow, et al, recorded in the aforesaid Clerk's Office in Deed Book 187, page 178.

PARCEL NO. 2: All of that certain boundary of land containing

five hundred (500) acres, more or less, that was conveyed to the said H. B. Allison by Forney Mining Company, Inc., by deed dated the 3rd day of September, 1919, and recorded in the aforesaid Clerk's Office in Deed Book 41, page 384, and to which reference is here made for a more particular description of the land hereby conveyed.

PARCEL NO. 3: All of that certain lot or parcel of land that was conveyed to the said H. B. Allison by the Trustees of the Kayoulah Baptist Church by deed dated the 28th day of September, 1926, and recorded in the aforesaid Clerk's Office in Deed Book No. 57, page 12, and to which reference is here made for a more particular description of the land hereby conveyed.

And with the exception of approximately fifty (50) acres contained in aforesaid Parcel No. 1, which said fifty (50) acres was omitted from the following described deed, the land herein conveyed are the same tracts or parcels of land conveyed to Margaret W. Allison by deed dated the 15th day of February, 1945, from Henry B. Allison, her husband, described as H. B. Allison, recorded in the aforesaid Clerk's Office in Deed Book 129, page 418.

The said Henry B. Allison, being the said H.B. Allison, having passed away intestate on or about the 22nd day of June, 1948, seized and possessed of the said fifty (50) acres of land, more or less, and survived by the following named persons, being his sole heirs at law, with their relationship to the said deceased being set out, a list of heirs being recorded in the Clerk's Office of the Circuit Court of Pulaski County, Virginia, in Will Book 22, page 505, but being correctly set out as follows:

<u>NAME</u>	<u>RELATIONSHIP</u>
Margaret W. Allison	wife
Gertrude Allison Brabston	daughter
Eugene Allison	son
Ruth Allison Turman	daughter
Thornton Allison	son
Burton Allison	son
Raby W. Allison	son
Elmer Allison	son

The said Elmer Allison having passed away intestate on or about the 12th day of February, 1953, without leaving issue, and survived by his sole heir at law, being the following named person with her relationship to the said deceased being set out as follows:

<u>NAME</u>	<u>RELATIONSHIP</u>
Eugenia Allison	wife

The said Burton Allison having passed away intestate on or about the 15th day of April, 1961, survived by the following named persons, being his sole heirs at law, and their relationship to the said deceased being set out as follows:

<u>NAME</u>	<u>RELATIONSHIP</u>
Pauline Allison	wife
Peggy Allison McMillian	daughter
Carlenc Allison Mabe	daughter

The said Eugene Allison having passed away intestate on or about the 28th day of September, 1961, survived by the following named persons, being his sole heirs at law, and their relationship to the said deceased

being set out as follows:

<u>NAME</u>	<u>RELATIONSHIP</u>
Hester Allison	wife
Virginia Allison	daughter

HOWEVER, there is hereby EXCEPTED and RESERVED from the said tract of approximately fifty (50) acres of land, all mineral rights as described in the will described below, which shall be for the benefit of the same persons as set out in the aforesaid will; it being the intention of the parties of the first part that the said tract of approximately fifty (50) acres of land shall be hereby made subject to the same mining rights as are in existence on the remaining land herein conveyed, and

There is EXCEPTED and RESERVED from this conveyance all mineral rights and other rights of every kind and description reserved and set out in the will of Margaret W. Allison described below.

The said Margaret W. Allison having passed away testate on or about the 1st day of August, 1970, seized and possessed of the remaining land described above and by her will dated the 7th day of March, 1953, and recorded in the aforesaid Clerk's Office in Will Book 28, page 33, she devised the surface rights with appurtenances thereunto belonging, subject to certain mining rights reserved therein, to her children as set out therein; a list of her heirs being recorded in the aforesaid Clerk's Office in Will Book 28, page 34.

The said Burton Allison and the said Eugene Allison, two sons of the said Margaret W. Allison mentioned in the aforesaid will, having passed away intestate as described above.

HOWEVER, there is further EXCEPTED and RESERVED from this conveyance, the "Allison Family Cemetery" containing one (1) acre of land

and located on the aforesaid Parcel No. 1; and there is further EXCEPTED and RESERVED for the benefit of the parties of the first part, their heirs and assigns, a right of way and easement, with the rights of ingress, egress and regress, from the state road to the said cemetery, the aforesaid right of way and easement being over an existing roadway and the location of the aforesaid right of way and easement may be changed from time to time by the parties of the second part, their heirs and assigns, provided the aforesaid right of way and easement is at all times convenient and practicable for persons lawfully using the same.

Reference being made to the aforesaid deeds for a further description of the aforesaid parcels.

The parties of the first part, for the said consideration, also bargain, sell, grant and convey all of their rights and interests unto the parties of the second part, as tenants by the entirety, in the proportions and manner as set out above, in any other real property lying in the former Hiwassee Magisterial District of Pulaski County, Virginia, and owned by the said Henry B. Allison and/or the said Margaret W. Allison at the time of their passing away and not previously conveyed.

TO HAVE AND TO HOLD said tracts or parcels of land, together with all the appurtenances and easements thereunto belonging, unto the parties of the second part, as tenants by the entirety with the right of survivorship as at common law, their heirs and assigns forever, in the proportions and manner as hereinabove set forth.

WITNESS the following signatures and seals of the said parties of the first part the day and year first above written.

Gertrude Allison Brabston (SEAL)
Gertrude Allison Brabston

Clinton A. Brabston (SEAL)
Clinton A. Brabston

Hester Allison (SEAL)
Hester Allison

Virginia Allison (SEAL)
Virginia Allison

Ruth Allison Turman (SEAL)
Ruth Allison Turman

Edgar L. Turman (SEAL)
Edgar L. Turman

Pauline Allison (SEAL)
Pauline Allison

Peggy Allison McMillian (SEAL)
Peggy Allison McMillian

Ray McMillian (SEAL)
Ray McMillian

Carlene Allison Mabe (SEAL)
Carlene Allison Mabe

Carl Mabe (SEAL)
Carl Mabe

Raby Allison (SEAL)
Raby Allison

Ruby Allison (SEAL)
Ruby Allison

Eugenia Allison (SEAL)
Eugenia Allison

STATE OF VIRGINIA,

COUNTY OF PULASKI, to-wit:

I, Susan P. Linn, a Notary Public in and
for the County and State aforesaid, do hereby certify that Gertrude Allison
Brabston and Clinton A. Brabston, her husband, whose names are signed to

the foregoing deed bearing date on the 3rd day of July, 1972, personally appeared before me in my County and State aforesaid and acknowledged the same.

Given under my hand this 31st day of July, 1972.

My commission expires November 10 1975.

Deputy Commissioner, State of Illinois

Susan P. Burroughs
NOTARY PUBLIC

STATE OF ILLINOIS

CITY/COUNTY OF Waukegan, to-wit:

I, Mary Alice Brown, a Notary Public in and for the City/County and State aforesaid, do hereby certify that Hester Allison, widow, whose name is signed to the foregoing deed bearing date on the 3rd day of July, 1972, personally appeared before me in my City/County aforesaid and acknowledged the same.

Given under my hand and notarial seal this 10th day of Aug. ~~July~~, 1972.

My commission expires April 1975.

Mary Alice Brown
NOTARY PUBLIC

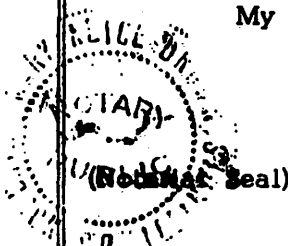
(Notarial Seal)

STATE OF ILLINOIS,

CITY/COUNTY OF Waukegan, to-wit:

I, Mary Alice Brown, a Notary Public in and for the City/County and State aforesaid, do hereby certify that Virginia Allison, single, whose name is signed to the foregoing deed bearing date on the 3rd day of July, 1972, personally appeared before me in my City/County aforesaid and acknowledged the same.

Given under my hand and notarial seal this 10th day of Aug. ~~July~~, 1972.



My commission expires April 1975

Mary Alice Brown
NOTARY PUBLIC

STATE OF VIRGINIA,

COUNTY OF PULASKI, to-wit:

I, Susan P. Burroughs, a Notary Public in and for the County and State aforesaid, do hereby certify that Ruth Allison Turman and Edgar L. Turman, her husband, whose names are signed to the foregoing deed bearing date on the 3rd day of July, 1972, personally appeared before me in my County aforesaid and acknowledged the same.

Given under my hand this 31st day of July, 1972.

My commission expires November 10, 1975
I was commissioned as Susan P. Burroughs

Susan P. Burroughs
NOTARY PUBLIC

STATE OF VIRGINIA,

CITY/COUNTY OF Pulaski, to-wit:

I, Susan P. Burroughs, a Notary Public in and for the City/County and State aforesaid, do hereby certify that Pauline Allison, widow, whose name is signed to the foregoing deed bearing date on the 3rd day of July, 1972, personally appeared before me in my County aforesaid and acknowledged the same.

Given under my hand this 29th day of July, 1972.

My commission expires November 10, 1975
I was commissioned as Susan P. Burroughs

Susan P. Burroughs
NOTARY PUBLIC

STATE OF VIRGINIA,

CITY/COUNTY OF Pulaski, to-wit:

I, Susan P. Burroughs, a Notary Public in and for the City/County and State aforesaid, do hereby certify that Peggy Allison McMillian and Ray McMillian, her husband, whose names are signed to the foregoing deed bearing date on the 3rd day of July, 1972, personally appeared before me in my City/County aforesaid and acknowledged the same.

Given under my hand this 29th day of July, 1972.

My commission expires November 10, 1975.
I was commissioned as Susan P. Burroughs

Susan P. Burroughs
NOTARY PUBLIC

STATE OF VIRGINIA,

CITY/COUNTY OF Pulaski, to-wit:

I, Susan P. Burroughs, a Notary Public in and for the City/County and State aforesaid, do hereby certify that Carlene Allison Mabe and Carl Mabe, her husband, whose names are signed to the foregoing deed bearing date on the 3rd day of July, 1972, personally appeared before me in my City/County aforesaid and acknowledged the same.

Given under my hand this 3rd day of July, 1972.

My commission expires 7 November 1975.

Notary Public

Bessie M. Webb

NOTARY PUBLIC

STATE OF VIRGINIA,

COUNTY OF PULASKI, to-wit:

I, Bessie M. Webb, a Notary Public in and for

the County and State aforesaid, do hereby certify that Raby Allison and

Ruby Allison, his wife, whose names are signed to the foregoing deed

bearing date on the 3rd day of July, 1972, personally appeared before me

in my County aforesaid and acknowledged the same.

Given under my hand this 1st day of August, 1972.

My commission expires March 3/1975.

Bessie M. Webb

NOTARY PUBLIC

STATE OF VIRGINIA,

CITY/COUNTY OF Pulaski, to-wit:

I, Dorothy P. Burroughs, a Notary Public in and

for the City/County and State aforesaid, do hereby certify that Eugenia

Allison, widow, whose name is signed to the foregoing deed bearing date

on the 3rd day of July, 1972, personally appeared before me in my City/Cour

aforesaid and acknowledged the same.

Given under my hand this 17th day of August, 1972.

My commission expires 7 November 1975.

Notary Public

Dorothy P. Burroughs

NOTARY PUBLIC

VIRGINIA: In the Clerk's Office of the Circuit Court of Pulaski
County. This instrument, with the certificate of acknowledgment
thereto annexed, is admitted to record at 4:45 o'clock P.M.
August 29, 1972 A.D.D. Law 940.00

TESTE Marvin R. Gresham CLERK

A TRUE COPY—

TESTE:

GERRY J. ATKINSON, CLERK

BY: B. P. Smith, D.C.

THIS DEED made and entered into this 22nd day of August, 1964, by and between NOAH J. SIMPKINS and DORA V. HYLTON SIMPKINS, his wife, parties of the first part, and BRICE C. JOHNSTON, JR. and M. TERESA STAFFORD JOHNSTON, his wife, as tenants by the entirety with the right of survivorship as at common law, parties of the second part.

WITNESSETH

THAT FOR and in consideration of the sum of Ten Dollars (\$10.00) cash in hand paid by the parties of the second part to the parties of the first part, and other good and valuable consideration, the receipt of all of which is hereby acknowledged, the said parties of the first part do hereby bargain, sell, grant and convey, with covenants of General Warranty of Title, unto the said Brice C. Johnston, Jr. and M. Teresa Stafford Johnston, his wife, as tenants by the entirety with the right of survivorship as at common law; that is to say, that should either of the parties of the second part predecease the other, then and in that event the entire interest of every kind and description in said property shall pass to, and be vested in the survivor, all that certain tract or parcel of land lying about one mile south of Max Creek, in Pulaski County, Virginia, known as the "Irish Cabin Land", and being more particularly bounded and described as follows:

BEGINNING at a stake 7 poles 3 links from a white oak on a line of the Tipton land and a corner to the land of D. S. Horney, and with a line of the Tipton land, North $10-3/4^{\circ}$ East 116 poles to a stake on the Spencer branch, and up said branch with its meandering South 114 poles to a white pine stump; thence leaving the branch, South $12-1/2^{\circ}$ East 125 poles to a stake on Fonrey's line, and with the same South $84-1/2^{\circ}$ West 155 poles to the beginning, and containing ninety-eight (98) acres, more or less.

And being the same lot or parcel of land, a portion of which was con-

veyed to Noah J. Simpkins, one of the parties of the first part hereto, as Noah Simpkins, by deed dated the 29th day of May, 1913, from L. S. Simpkins and wife, which said deed is recorded in the Clerk's Office of the Circuit Court of Pulaski County, Virginia, in Deed Book 33, at Page 426; and the other portion thereof was conveyed to Noah J. Simpkins, one of the parties of the first part hereto, as Noah Simpkins, by deed dated the 24th day of April, 1907, from B. L. Simpkins and wife, which said deed is of record in the aforesaid Clerk's Office in Deed Book 33, at Page 428; and being the same lot or parcel of land which was conveyed to L. S. Simpkins by W. R. Cole and wife, by deed dated the 23rd day of March, 1894, and of record in the aforesaid Clerk's Office in Deed Book 21, at Page 456.

There is EXCEPTED and RESERVED, however, from this conveyance, two (2) small parcels of land which were conveyed away by the parties of the first hereto, as follows:

(1) To Wriilda Bowman, by deed dated the 25th day of March, 1936, of record in the aforesaid Clerk's Office in Deed Book 77, at Page 79; and

(2) To J. T. Trail, by deed dated the 3rd day of August, 1922, and of record in the aforesaid Clerk's Office in Deed Book 45, at Page 504.

There is further EXCEPTED and RESERVED from this conveyance, a graveyard located thereon within the boundaries as stated and agreed to between the parties hereto, ^{which is 80 feet x 80 feet} together with reasonable rights of ingress and egress thereto by any persons in interest in and to said graveyard.

There is further RESERVED from this conveyance all minerals and mining rights set forth in previous conveyances concerning the minerals under said tract above described.

The parties of the first part do further RESERVE easements of rights of way over the roads located on the property which have heretofore been granted or reserved by their predecessors in interest, and for the same consideration do grant to the parties of the second part all rights, easements and appurtenances which are owned by them in and to rights of way or other appurtenances on any other persons' lands which have been granted to them by predecessors in title or other persons.

TO HAVE AND TO HOLD said tract or parcel of land together with all the appurtenances and easements thereunto belonging, unto the parties of the second part, as tenants by the entirety with the right of survivorship as at common law, their heirs and assigns forever.

WITNESS the following signatures and seals of the said parties of the first part the day and year first above written.

Noah J. Simpkins (SEAL)
Noah J. Simpkins

Dora V. Hylton Simpkins (SEAL)
Dora V. Hylton Simpkins

STATE OF VIRGINIA,

COUNTY OF PULASKI, to-wit:

I, Noah R. Stewart, a Notary Public in and for the County and State aforesaid, do hereby certify that Noah J. Simpkins and Dora V. Hylton Simpkins, his wife, whose names are signed to the foregoing deed bearing date on the 22nd day of August, 1964, personally appeared before me in my County and State aforesaid and acknowledged the same.

Given under my hand this 22nd day of August, 1964.

My Commission expires May 23, 1966

Naomi K. Stewart

NOTARY PUBLIC

VIRGINIA: In the Clerk's Office of the Circuit Court of Pulaski
County this instrument, with the certificate of acknowledgment
thereto annexed, is admitted to record at 3:00 o'clock P.M.
September 16, 1964

TESTE Morris J. Graham CLERK

THIS DEED, made and entered into this the 3rd day of December, 1973, by and between GLENN L. SIMPKINS and MARIE E. SIMPKINS, his wife, parties of the first part, and BOB L. MIDDLETON and FRED COOK, parties of the second part.

W I T N E S S E T H

THAT for and in consideration of the sum of Ten Dollars (\$10.00), cash in hand paid by the parties of the second part to the parties of the first part, and other good and valuable considerations, the receipt of all of which is hereby expressly acknowledged by the said parties of the first part, the said parties of the first part do hereby bargain, sell, deed, grant, and convey with covenants of General Warranty of Title unto the said parties of the second part, that certain tract or parcel of land located, lying, and being in Ingles Magisterial District, Pulaski County, Virginia, and being more particularly bounded and described as follows:

BEGINNING at a point located on the Westerly line of a tract of land purchased by the parties of the second part from Thornton Allison, et als, of record in the Clerk's Office of the Circuit Court of Pulaski County, Virginia, in Deed Book 181, Page 83, said point being also located on the Southerly side of an existing roadway extending from the Southerly side of State Route 692 through the lands now owned by Brice Johnson, et als, and conveyed unto him from N. J. Simpkins, et ux, said road extending in a Southerly direction from the said State Route 692 through the said N. J. Simpkins land on to the property owned by the parties of the second part hereto; thence turning and extending in a Westerly direction to lands owned by the parties of the first part; thence from said point of beginning in a Westerly direction 1,040 feet along the Southerly side of said roadway; thence extending in a Southerly direction 1,040 feet; thence in a Westerly direction 1,040 feet; thence in a Northerly direction 1,040 feet to the point of BEGINNING, supposed to contain 5 acres, and being a portion of the land conveyed unto the parties of the first part hereto, by Deed from C. C. Abell, et als, of record in Deed Book 205, Page 52, of the Clerk's Office of the Circuit Court of Pulaski County, Virginia.

FOR THE SAME CONSIDERATION there is further conveyed unto the parties of the second part hereto, their heirs, and assigns, the right to use the aforesaid roadway leading from State Route 692, all of which is set forth more fully in the aforesaid Deed from C. C. Abell to the parties of the first part, reference to which is herewith made as if the same were herein set out in its entirety.

As part of the consideration for this conveyance, the parties of the second part do hereby further covenant and agree to construct a roadway extending from the Northerly line of the properties owned by the parties of the second part hereto through their property and curving in a Westerly direction to the lands of the parties of the first part hereto, said road to be a minimum of 12 feet in width.

IT IS UNDERSTOOD between the parties hereto that this road shall be maintained by the parties of the second part hereto to the point where the said parties of the second part have cut a new road running in a Southerly direction, and which said point is located approximately 500 feet from the Easterly line of the parties of the first part.

The parties of the second part hereto enter into this conveyance to show their express consent thereto, and more particularly to the requirement of preparing the roadway.

TO HAVE AND TO HOLD said tract or parcel of land together with all the appurtenances and easements thereunto belonging unto the said parties of the second part, their heirs and assigns forever.

WITNESS the following signatures and seals of the said parties of the first and second part hereto.

_____(SEAL)
GLENN L. SIMPKINS

_____(SEAL)
MARIE E. SIMPKINS

_____(SEAL)
BOB L. MIDDLETON

_____(SEAL)
FRED COOK

STATE OF VIRGINIA

COUNTY OF PULASKI, to-wit:

I, _____, a Notary Public in and for the County and State aforesaid, do hereby certify that GLENN L. SIMPKINS and MARIE E. SIMPKINS, his wife, whose names are signed to the foregoing Deed bearing date on the 3rd day of December, 1973, this day personally appeared before me in my County and State aforesaid and acknowledged the same.

Given under my hand this _____ day of _____.

My commission expires _____.

Notary Public

VIRGINIA, IN THE CIRCUIT COURT OF PULASKI COUNTY:

BRICE JOHNSTON, JR ET AL	)	APPELLEES EXHIBIT #5-A
)	
V.	)	<u>Motion For Bill</u>
	)	<u>Of Particulars</u>
)	
ROBERT MIDDLETON ET ALS)	

TO THE HONORABLE R. WILLIAM ARTHUR, JUDGE OF SAID COURT:

Comes now the complainants by counsel and respectfully moves the Court that the respondents be required to provide the particulars of their alleged defenses, to-wit: The specific deeds and deed references upon which they rely in contending they acquired easements and rights of way over lands owned by the complainants; and in addition thereto, the details by which they allege to have acquired a right of way by usage.

BRICE JOHNSTON, JR. ET AL

By _____
Of Counsel

Craft & McGhee, p. q.
Attorneys at Law
P. O. Box 240
Christiansburg, Virginia 24073

CERTIFICATE

I, _____, do hereby certify that a copy of the foregoing motion was this day delivered in person to A. Dow Owens, attorney for the respondents.

Dated: December 11, 1973.

VIRGINIA, IN THE CIRCUIT COURT OF PULASKI COUNTY:

BRICE JOHNSTON, JR. ET AL	)	APPELLEES EXHIBIT #5-B
)	
V.	)	<u>ORDER</u>
)	
ROBERT MIDDLETON ET ALS)	

This cause came this day to be heard on complainants' motion for bill of particulars.

Upon consideration of all of which, it is ADJUDGED, ORDERED and DECREED that the respondents provide a bill of particulars setting forth the specific deeds and where recorded by which they acquired rights of way or easements over the lands described in said bill of complaint as owned by the complainants; and the details by which they allege to have acquired any rights by usage.

I ask for this Order.

Counsel for Complainants

Enter this Order on this the 11 day
of December, 1973#

Judge