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Clerk, Supreme Court of Appeals
Richmond, Va.

Record No. 4983

In the Supreme Court of Appeals of Virginia at Richmond

S. D. MAY, COMMISSIONER, ETC.

v.

FRANK B. BRADLEY

FROM THE CIRCUIT COURT OF HANOVER COUNTY

RULE 5:12—BRIEFS.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 4983

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 21st day of January, 1959.

S. D. MAY, COMMISSIONER, ETC., Appellant,

against

FRANK B. BRADLEY, Appellee.

From the Circuit Court of Hanover County

Upon the petition of S. D. May, Commissioner of Virginia Department of Highways, an appeal is awarded him from a decree entered by the Circuit Court of Hanover County on the 4th day of September, 1958, in a certain chancery cause then therein depending wherein the Commonwealth of Virginia was plaintiff and Frank B. Bradley was defendant; no bond being required.

RECORD

* * * * *

Filed Dec. 12, 1957.

Teste:

F. A. TAYLOR, Clerk
By VIRGINIA W. JOHNSON, Dep., Clerk.

BILL OF COMPLAINT.

To the Honorable Leon M. Bazile, Judge:

Your plaintiff respectfully represents:

1. That in a proposal to construct or otherwise improve a part of State Highway Route 360, Project 2342-01-02 between 0.147 mile east of Mechanicsville and 6.574 mile east of Mechanicsville in Hanover County, Virginia, the Commonwealth of Virginia entered into an option agreement with Frank B. Bradley, dated November 29, 1951, (a copy of which is filed herewith as Exhibit "A" and prayed to be read as a part of this bill), wherein the defendant Frank B. Bradley, for consideration received, covenanted and agreed to grant and convey in fee simple unto the Commonwealth of Virginia at its option, certain property in Henry District, Hanover County, Virginia, described therein as containing 0.51 acre and being more particularly described and shown in red on Plan Sheet No. 6 of the Virginia Department of Highways, which is filed herewith as Exhibit "B" and prayed to be read as a part of this bill; that the consideration to be paid by the Commonwealth of Virginia upon exercising the option was the sum of $306.00 for the land and the sum of $894.00 for decreasing the depth of the corner as a commercial site and cutting off a triangle at the corner of the property, making a total sum of $1,200.00.

page 2 } 2. That prior to June 2, 1952 a check for $1,200.00, and a deed conveying the property to the Commonwealth of Virginia was tendered Frank B. Bradley by and on behalf of the Commonwealth of Virginia, which the defendant refused to accept, and execute, respectively; that on June 16, 1952 the option agreement was recorded in Deed Book 145, Page 394, Clerk's Office, Circuit Court of Hanover County, Virginia; that prior to one year from the date of said

option agreement, the Commonwealth of Virginia commenced construction or improvement of said highway, along through or over said land; that these acts constituted an acceptance of the option agreement within one year from the date thereof as required by its terms.

3. That the Commonwealth of Virginia is and always has been willing and ready to comply with the terms of said option agreement on its part to be performed, but the defendant, Frank B. Bradley, has refused and still refuses to comply with said agreement.

Your plaintiff, therefore, prays that the defendant, Frank B. Bradley, may be decreed specifically to perform the said agreement entered into with your plaintiff as aforesaid, and to make a good and sufficient deed to your plaintiff for the said described property; your plaintiff being ready and willing, and is hereby offering specifically to perform the said agreement on its part, upon the defendant's making out a good and sufficient title to the said property and executing a proper conveyance therefor to your plaintiff, pursuant to the terms of said agreement, to pay the defendant the purchase money due.

COMMONWEALTH OF VIRGINIA
By Counsel.

LESLIE D. CAMPBELL, JR.
Attorney at Law
Ashland, Virginia.

page 3 } EXHIBIT "A."

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R. W. 10

PERMANENT FILE

THIS OPTION—AGREEMENT, Made this 29 day of Nov., 1951, by and between Frank B. Bradley and Josephine M. (wife), party of the first part, (even though more than one), hereinafter called "landowner," and COMMONWEALTH OF VIRGINIA, party of the second part, hereinafter called "Commonwealth,"

WITNESSETH: That, Whereas, It is proposed by the Commonwealth to construct or otherwise improve a part of State Highway Route 360, Project 2342-01-02, between 0.147

Mi. E. of Mechanicsville and 6.574 Mi. E. of Mechanicsville in Hanover County, Virginia, in accordance with plans and specifications thereof on file in the office of the Department of Highways, Richmond, Virginia, a copy of same having been exhibited and explained to landowner before the execution of this option-agreement;

NOW THEREFORE, For and in consideration of the premises, and of the benefits accruing or to accrue to the landowner by reason of the location and construction, or other improvement of said highway, and for the further consideration of one dollar in hand paid to the landowner, receipt of which is hereby acknowledged, the landowner doth hereby covenant and agree to grant and convey in fee simple unto the Commonwealth by deed of general warranty, properly executed, acknowledged, and delivered, and free from encumbrances, and with usual covenants of title, upon demand of the Commonwealth, and upon payment to landowner of the additional consideration as hereinbelow detailed, the land shown by a plan and survey of said highway on file in the office of the Department of Highways at Richmond, Virginia, identified as Sheet No 6, Project 2342-01, Route 360, all of said land being located in Henry Magisterial District, in Hanover County, and being a portion of the same land acquired by landowner from Hanover County School Bd., by deed, bearing date on the 2 day of Feb., 1948, recorded in Deed Book....., Page ....., Clerk's Office of the Circuit Court of said County, and described as follows:

Being as shown on plans approved August 10, 1951, and lying on the north (left) side of the plan centerline and adjacent to the existing north right of way line from the lands of John Nance opposite approximate station 98+22 to the lands of D. Grubbs being the center of connecting Route 643 opposite approximate station 101+46 and containing 0.51 acre more or less, land;

The property owner has been advised of the necessity for him to apply revenue stamps to the deed when executed and by his signature to this instrument agrees to do so.

Consideration $1,200 in full including 0.51 acre land C $600=$306 and $894 due to decreasing depth of corner commercial site and cutting off triangle at corner of property.

(on back)

In event the additional consideration hereinbefore referred to is not acceptable to the proper officials of the De-

partment of Highways, Richmond, Virginia, Commonwealth shall not be obligated by this option-agreement. This option-agreement may be accepted by the Commonwealth at any time within one year from the date hereof, or any further extensions hereof by the parties hereto, as follows:

(1) By giving notice in writing to landowner of intention of Commonwealth to accept, or by demanding deed under the provisions hereof; or,

(2) By commencing construction or improvement of said highway, along, through or over said land.

If this option-agreement is not accepted by Commonwealth in the time and manner as herein provided, the same shall become null and void and the rights of all parties shall cease and terminate.

The landowner covenants and agrees for himself, his heirs and assigns and successors, that the consideration herein mentioned shall be in lieu of any and all claims to compensation and damages by reason of the location, construction and maintenance of said highway, including such drainage facilities as may be necessary, and that the Commonwealth shall have the right to enter upon and take possession of the said land prior to the execution and delivery of said deed.

Witness the following signatures and seals:

FRANK B. BRADLEY (Seal)

State of Virginia
County of Hanover, to-wit:

I, Paul P. Gilmore, a Notary Public, in the State of Virginia at large, do certify that Frank B. Bradley, whose name is signed to the foregoing and annexed writing, bearing date on the 29 day of Nov., 1957, has acknowledged the same before me in the County aforesaid.

My Commission expires May 19, 1953.
Given under my hand this 29 day of Nov., 1951.

PAUL P. GILMORE
Notary Public.

This option-agreement was presented in the Clerk's Office of the Circuit Court of Hanover Co., Va., on the 16th day of

June, 1952, and with certificate annexed admitted to record at 2:55 P. M., in D. B. 145, page 394.

Teste:

C. W. TAYLOR, Clerk.

June 16, 1952 2:55 P. M.
Deed Book 145, page 394.

C. W. TAYLOR, Clerk.

* * * * *

page 6 }

* * * * *

Filed Dec. 26, 1957.

F. A. TAYLOR, Clerk
By HELEN M. HALL, Dep. Clerk.

ANSWER.

The respondent, Frank B. Bradley, for answer to the Bill of Complaint filed against him in this case by the Commonwealth of Virginia, or for answer to so much thereof as he deems advisable to answer, answers and says:

1. The said option contract upon which this suit is based and specific performance of which is sought, was executed and delivered to the complainant upon the express condition (precedent) that it would be effective only in the event that the said highway therein described should be constructed within six months from the date of the option; and the said Highway having not been constructed within the said six months period, the option became null and void and unenforceable.
2. The said option has never become merged into a binding bi-lateral agreement which is enforceable in equity.
3. Under the circumstances of this case it would be inequitable to specifically enforce said option agreement.
4. The said complainant is without equity.

And now having fully answered, this respondent prays that he may be hence dismissed with his costs in this behalf expended.

page 7 }

GEO E. ALLEN
(ALLEN, ALLEN, ALLEN & ALLEN)
613 Mutual Building
Richmond, Virginia
Counsel for respondent.

* * * * *

page 9 }

* * * * *

Filed July 22, '58.

L. M. B.

OPINION OF THE COURT.

This is a suit for specific performance growing out of a contract signed and acknowledged by the defendant. The contract is dated 29 November, 1951 and purports to be between Frank B. Bradley and Josephine M. (wife) and the Commonwealth; and provides for the conveyance of 0.51 acre of land described as shown on plans approved 10 August, 1951 and lying on the north (left) side of the plan center line and adjacent to the existing north right of way line from the lands of John Nance opposite approximate station 28 plus 22 to the land of D. Grubbs being the center of connecting Route 643 opposite approximate station 101 plus 46.

The consideration recited is as follows:

"Consideration $1,200 in full including 0.51 acre land at $600-$300 and $894 due to decreasing depth of corner commercial site and cutting off triangle at corner of the property."

This contract was not signed by Mrs. Bradley.

The lot of land was a former school lot which Bradley who is in the oil business bought with the idea of de-
page 10 } veloping a station for the sale of gasoline, etc. The land lay along the road.

The deed, prepared was from Frank B. Bradley and Josephine M. Bradley his wife to the Commonwealth. While this deed was never actually presented to Bradley, it was discussed with him by Mr. Simpkins who represented the High-

way Department and there is no indication that the Commonwealth would accept any other deed from him; although this suit for specific performance is against him alone.

Mr. Gilmore, the representative of the Highway Department who testified in this case testified on cross examination (R., p. 5):

"Is the Highway Department willing to take a deed to the property and pay twelve hundred dollars without the signature of his wife?

"A. No, sir."

In the case of *Haden* v. *Falls, et al.*, 115 Va. 779, 80 S. E. 576, Ann. Cas. 1915C, 1034 (1914) the holding of the Court is there stated in the Syllabus which was prepared by the late Judge Martin P Burks, who was then the Court Reporter: "In the absence of any allegation of fraud, a court of equity will not, at the instance of the vendee, decree the specific performance of a husband's contract to sell his land in which his wife has a contingent right of dower, which she refuses to release, where the purchaser demands an abatement of the purchase price or an indemnity by reason of such refusal; and where specific performance is resisted on other grounds, it is immaterial that this objection is not made in the answer. The same weight will be given to it as if it had been distinctly and formally presented. The wife page 11 } is not to be wrought upon by her love for her husband and the sympathy in his situation to do that which her judgment disapproves as contrary to her interest, nor is he to be tempted to use undue means to procure her consent."

In this connection it should be observed that when he was under cross examination, Mr. Bradley was asked (R., pp. 23-4): "Mr. Bradley, if you had signed that deed your wife would have signed it wouldn't she?

"A. I reckon I could have made her do it.

"Q. You are the boss in the family?

"A. I have been boss of it for forty years, I reckon I will continue to be."

See also *Mooers* v. *Wilson*, 183 Va. 910, 33 S. E. (2d) 791 (1945); and *Raney* v. *Barnes Lumber Company*, 195 Va. 956, 81 S. E. (2d) 578, (1954).

In the last cited case the Court said:

"Specific performance of a contract is not a matter of

absolute right; it rests in a sound judicial discretion. *Griscom* v. *Childress*, 183 Va. 42, 31 S. E. (2d) 309. In such suits courts have and exercise a wide discretion. 17 M. J., Specific Performance, §4, pp. 8, 9."

While the bill does not ask for the conveyance of Mrs. Bradley's contingent dower interest in the property; the evidence shows that the deed prepared requires her to join therein; the Commonwealth's witness says that page 12 } the Highway Department would not be willing to pay the full purchase price without her signature; and when Mr. Bradley was cross examined he was specifically interrogated as to his ability to coerce his wife into signing the deed.

Under these circumstances, the Court is of opinion that it would be inequitable to compel specific performance in this case.

In the article on Specific Performance in 26 Am. & Eng. Enc. of Law (2nd Ed.), pp. 62-64, it is said: "It is well settled that whether or not a contract will be specifically enforced is a matter of judicial discretion.

"This general principle may be said to be qualified by the statement that this so-called 'judicial discretion' in specific performance cases is never an arbitrary or capricious discretion, but is to be exercised in conformity with established rules and usages, and specific performance decreed accordingly.

* * * * *

"It is universally conceded, however, that inflexible rules by which it may be determined in any given case whether specific performance should or should not be decreed are impossible, each case resting much upon its own particular facts and peculiar circumstances."

This is the rule laid down by the cases in *this Commonwealth* many of which are cited in the notes to the above statement of the rule.

The prayer of the bill is that Frank B. Bradley page 13 } may be decreed specifically to perform the said agreement entered into with your plaintiff as aforesaid, and to make a good and sufficient deed to your plaintiff for said described property; your plaintiff being ready and willing and is hereby offering specifically to perform the said agreement on its part, upon the defendants a

good and sufficient title to said property and executing a proper conveyance therefor to your plaintiff * * *"

This prayer asks for a good and sufficient deed to the property.

What is a good and sufficient deed? It is a deed that contains a covenant of general warranty and the English covenants. In the case of a married man living with his wife such covenants would be broken on delivery of such a deed without her signature.

The result that would follow is obvious.

The prayer of the bill will be denied and this cause dismissed.

The Commonwealth can always condemn the property in question by which it can get a good title.

Counsel will prepare the proper decree carrying this opinion into effect.

LEON M. BAZILE, Judge.

17 July 1958.

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* * * * *

This cause came on this day to be heard upon the Bill of Complaint; the Answer, Depositions of witnesses taken on behalf of complainant and respondent: and was argued by counsel.

UPON CONSIDERATION WHEREOF, and for reasons stated in writing and here made a part of the record, the Court is of opinion that the complainant is not entitled to specific performance of the option contract sued on and doth accordingly ADJUDGE, ORDER and DECREE that the Bill of Complaint be, and the same is hereby dismissed.

Dated:

Enter September 4, 1958.

LEON M. BAZILE, Judge.

* * * * *

Paul P. Gilmore.

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* * * * *

NOTICE OF APPEAL AND ASSIGNMENT OF ERROR.

To: F. A. Taylor, Clerk
Circuit Court of Hanover County
Hanover, Virginia

The Commonwealth of Virginia, by its counsel, hereby gives notice, pursuant to the provisions of Section 4, Rule 5:1 of the Rules of the Supreme Court of Appeals of Virginia, of its appeal from the opinion, and final decree entered in the above styled cause on September 4, 1958, in which the bill of complaint of the Commonwealth of Virginia was dismissed.

The appellant assigns the following errors:

1. The Circuit Court erred as a matter of law in dismissing the bill of complaint filed by the Commonwealth of Virginia on the ground that it is not entitled to specific performance of the option contract sued on.
2. That the Circuit Court's opinion, dated July 17, 1958, upon which the decree of September 4, 1958 is based, is contrary to the law and the evidence in this cause.
3. That the Circuit Court erred in refusing to grant the prayers of the bill of complaint that Frank B. Bradley may be decreed specifically to perform the agreement entered into with the Commonwealth of Virginia.

COMMONWEALTH OF VIRGINIA
By LESLIE D. CAMPBELL, JR.
Counsel.

Filed Sep. 12, 1958.

Teste:

F. A. TAYLOR, Clerk.

* * * * *

page 3 } PAUL P. GILMORE,
a witness introduced in behalf of the plaintiff, first being duly sworn, deposes and states as follows:

Paul P. Gilmore.

DIRECT EXAMINATION.

By Mr. Campbell:

Q. Please state your name, occupation and residence?

A. Paul P. Gilmore, District Right-of-Way Engineer for the Highway Department. Located in Petersburg, Virginia.

Q. What is your home address?

A Home address, Richmond, Virginia, Osburne Pike.

Q. Mr. Gilmore, during the fall of 1951 in your capacity as Right-of-Way engineer for the Department of Highways, did you contact Mr. Frank B. Bradley with reference to property that you desire to get a right-of-way across?

A. Yes, sir.

Q. Did you, on November 29, 1951, tender Mr. Bradley an option agreement for approximately .51 of an acre of land on Route 360 in Hanover County?

A. Yes, sir, I did.

Q. I hand you the Court file in this case and ask you if this Exhibit A is the option agreement that was tendered him?

A. Yes, sir.

page 4 } Q. What consideration was offered Mr. Bradley for this amount of land—

A. Twelve hundred dollars.

Q. —and damages? In consideration of the fee simple interest in the land?

A. Yes, sir.

Q. Did Mr. Bradley sign this option agreement?

A. Yes, sir.

Q. Did you take his acknowledgment thereon as a Notary Public for the State of Virginia?

A. Yes, sir.

Q. Did the Highway Department within one year of November 29, 1951, go upon any portion of that property and commence any construction or improve any part of that property for highway purposes?

A. Yes, sir.

Q. Did you take any other options from other property owners along the route?

A. Yes, sir.

Q. Were they all similar to this type of option agreeement?

A. Yes, sir.

Q. Is this a standard option agreement used by the Commonwealth in acquiring right-of-way?

Paul P. Gilmore.

A. Yes, sir.

page 5 } Q. Mr. Gilmore, there are certain changes in project numbers and there is a line marked out in this option agreement, were those changes and the markings made before Mr. Bradley signed the option agreement?

A. They were made during the discussion I had with Mr. Bradley.

Q. They were made before the option agreement was signed by Mr. Bradley?

A. Yes, sir.

Mr. Campbell: All right, Mr. Allen.

CROSS EXAMINATION.

By Mr. Allen:

Q. Mr. Gilmore, I notice this option contract is not signed by Mr. Bradley's wife. Has he got a wife?

A. Yes, sir.

Q. Is the Highway Department willing to take a deed to the property and pay twelve hundred dollars without the signature of his wife?

A. No, sir.

Q. About this construction business: This option was signed on the 29th of November, 1951, when was the Highway Department supposed to commence construction on the property?

A. The construction was started on this project on April 22, 1952. It was completed on July 22, 1953.

page 6 } Q. You mean you haven't completed the road thereon?

A. The present phase of the project, yes, sir.

Q. When was it completed?

A. 1953. July.

Q. July, 1953. Did you contemplate completing it earlier than that at the time the option was signed, or not?

A. No, sir, not this phase of it.

Q. Mr. Gilmore, I do not quite understand what you mean by completing this phase of the project. Does the improved road now actually pass over this property?

A. The present lane does not.

Q. Does not?

A. No, sir.

Paul P. Gilmore.

Q. So this piece of property that is described in the option is not actually used by the traveling public today?

A. It is used in connection with the maintenance of the traveled portion today, a part of it is.

Q. I have reference though to the traveling public, the highway that they travel over, the part of the highway they travel over does the traffic pass over any part of this piece of land that is described in the option?

A. Not the main travel-way, no, sir.

Q. You have not built any roadway on it?

A. We haven't built another lane directly across page 7 } it, no, sir.

Q. What did you mean in reference to "This phase of the project being completed?"

A. The option was secured in connection with the improving and widening of the present lane, and also for the additional width for the construction, ultimate construction of a future lane.

Q. But so far as the construction of a highway to be used by the traveling public, nothing has been done along that line on this particular property?

A. Except at the intersection of the secondary road. There is one corner of the property where the travel-way does go over the property. I think I can best explain that by showing you the map.

Q. I do not know that I would understand any more about it by showing me the map. Was any construction done for the purpose of enabling people to travel over that small part of it?

A. Not traveling directly across it. No, sir.

Q. You stated that Mr. Bradley had a wife when the option was signed and has a wife now; did you know when he signed the option that he had a wife?

A. Yes, sir.

Mr. Allen: That is all.

page 8 } RE-DIRECT EXAMINATION.

By Mr. Campbell:

Q. Mr. Gilmore, you stated a moment ago on cross examination that the Highway Department would not take a deed from Mr. Bradley without his wife's signature, do you know

whether or not at this time they are willing to accept a deed from Mr. Bradley without his wife's signature?

A. I do not know.

Q. Is that within the purview of your job with the Highway Department, or is it left up to someone else?

A. It is left up to the legal division.

Q. Is it not true that the Highway Department in acquiring land, acquires land for shoulders, ditches, and future road expansion or widths that is not traveled by the public for years to come?

A. Yes, sir.

Q. But it is used for public highway purposes?

A. Yes, sir.

Q. I hand you a copy of the highway map relative to this property which is filed in the suit, and ask you if the public does not travel over a portion of the property which the option covers at this time?

A. Yes, on the primary, I mean on the secondary route they do.

Q. Which route is that?

page 9 } A. Route 643. We widened Route 643 to the left and the right as you approach the main road, and in doing that, well, we had to construct part of the flare of the travel-way on the corner of the area that we optioned.

Q. Mr. Bradley owned to the center of Route 643 at its intersection with Route 360, did he not?

A. Yes, sir.

Q. Under your option agreement you not only acquired his other property, but you also acquired the property which was included in half of that 643, did you not?

A. That is correct.

Q. He owned the fee on that and the public had an easement over it?

A. That is correct. We had, oh, thirty foot easement over Route 643. Actually, it would be fifteen feet from the center of the road over on to the Bradley property.

Mr. Campbell: That is all.

And further this deponent saith not.

Signature waived by agreement of counsel.

EDWARD P. SIMPKINS, JR.,
a witness introduced in behalf of the plaintiff, first being duly sworn, deposes and states as follows:

page 10 } DIRECT EXAMINATION.

By Mr. Campbell:

Q. Please state your name and address?

A. Edward P. Simpkins, Jr., Ellerson, Virginia; Office, State Planters Bank Building, Richmond, Virginia.

Q. Your occupation?

A. Lawyer.

Q. Mr. Simpkins, in your capacity as an attorney, did you, in the year 1951 and subsequent thereto, represent the Highway Department in acquiring right-of-way property, either by receiving deeds or condemnation suits?

A. I represented them in closing transactions that they had made, or in bringing condemnation suits, yes, for 1951 and 1952.

Q. As attorney for the Highway Department, did you receive a check in the amount of $1200.00 payable to Mr. Frank B. Bradley and a deed from Mr. Bradley to the Commonwealth of Virginia for the property described on this plat, and also described in the Bill of Complaint?

A. Yes, sir, by letter dated January 28, 1952, addressed to me by C. Champion Bowles, who was then Assistant Attorney General. I received instructions to examine the title to this property owned by Frank B. Bradley as well as property of a great number of other people, and to close the transactions if the titles were found to be in order and deliver
page 11 } the checks. The check was sent to me with that letter—check for $1200.00.

By letter of January 16, 1952, the original of which was sent to Mr. Bowles by Mr. Pettigrew, the Right of Way Engineer, copy of which was sent to me, I received the deed from Frank B. Bradley and Josephine M. Bradley to the Commonwealth of Virginia. I still have those documents except the check, which has been returned.

By Mr. Allen:

Q. What was the date of that check, did you say?

A. The check came to me in a letter dated January the 28th, 1952. The date of the check I am not positive of, Mr. Allen. It apparently was dated January 18th, because the invoice which listed all of them is dated January 18th. I do not have the check now. It was returned after sometime later.

Edward P. Simpkins, Jr.

By Mr. Campbell: (Continuing)

Q. Did you at a later date have an opportunity to present this deed and check to Mr. Bradley for his acceptance and signature?

A. Well, Mr. Campbell, I was closing a whole lot of titles on 360. In this one letter I think there were twelve, and I examined the titles and sent deeds and received signed deeds and delivered the checks. I did not ever send to Mr. Bradley

page 12 } his deed. I, at that time, saw a lot of Mr. Bradley; I still do. I stopped by the place then right much, and I still stop there. On one occasion I stopped at his place, and the conversation came up about 360. I told Mr. Bradley that I had his check and deed, and was going to examine the title and bring him the deed and the check, and the deed to sign. He replied that there wasn't any use to do it, that he wasn't going to sign it; and so I never brought him the deed or the check. I advised the Highway Department in a letter dated June 2, 1952, that Mr. Bradley had told me that he did not intend to sign the deed; consequently I didn't even examine the title with that information. That is where it stopped as far as Mr. Bradley was concerned.

I later sent the check back to the Highway Department, and some other stuff.

Q. Did you receive any instructions from the Highway Department with reference to the option agreement?

A. Yes. When I found out that Mr. Bradley wasn't going to sign it—there were two or three others that refused to sign in this same batch—I talked to Mr. Tompkins, who was with the Highway Department, and he instructed me that they would send me these option contracts to record.

In my letter dated June 2, 1952, which was to Mr. Pettigrew, I mentioned that Mr. Tompkins had told me that in such cases they would send the contracts to me to be recorded.

page 13 } He did send Mr. Bradley's contract, and several others, to me by letter from Mr. Pettigrew dated June 9, 1952, and I recorded Mr. Bradley's along with the others. Exactly when, I do not know.

Q. Will you look at the certificate of the Clerk and testify as to what date is on the option agreement?

A. This certificate of F. A. Taylor shows that the option agreement was recorded on June 16, 1952. I got it by letter dated June 9, 1952, and I later withdrew it from the Clerk's Office and returned the originals to the Attorney General much later than that.

Edward P. Simpkins, Jr.

Mr. Campbell: Your witness, Mr. Allen.

CROSS EXAMINATION.

By Mr. Allen:

Q. Mr. Simpkins, do you recall whether the check was payable to Mr. Bradley alone, or payable to both Mr. Bradley and his wife?

A. Mr. Allen, I don't recall. I may have something here that will let me answer it still.

Q. Suppose you check and see.

Note: Witness referring to file.

A. This is a Vendor's Invoice, Duplicate, from the Department of Highways which came to me with either the Department of Highways letter in Jasuary 1952, or the Attorney General's, I think with the Attorney General's, page 14 } has a list of all the checks enclosed with that letter, and it shows, it just uses Frank B. Bradley; on the deed which was sent, it has Frank B. Bradley and Josephine M. Bradley. I do not recall that. That is from this record. I cannot say I recall how the deed was made.

Q. However the deed you would have tendered, if you consider it as tendered, did include the name of Mrs. Bradley, also?

A. Yes, sir.

Q. You never wrote and tendered a deed from Mr. Bradley alone?

A. What I did I have told you. I had a conversation and I never took the deed to Mr. Bradley, or Mrs. Bradley. I was told that they would not sign, and I did not see any use in doing anything else.

Q. I understand that. I wasn't going into that. I mean, no deed except the one including both the names of Mr. and Mrs. Bradley as grantors was ever tendered or drawn?

A. No, sir. Not as far as I know.

Q. That was the deed you were talking to Mr. Bradley about?

A. Yes, sir.

Mr. Allen: That is all.

Edward P. Simpkins, Jr.

RE-DIRECT EXAMINATION.

page 15 } By Mr. Campbell:

Q. Mr. Simpkins, did Mr. Bradley see the deed that you had?

A. No, sir, because I did not have the deed with me. I am confident that I didn't. I had a conversation with him, and this matter came up. I know he said he wasn't going to sign, and I think he added, "There isn't any use bringing me the deed." I cannot quote Mr. Bradley because it has been three or four years ago, but I know the conversation took place.

Q. In this connection as attorney for the Highway Department in these transactions, if I tell you that the option agreement is signed only by Mr. Bradley, and the suit is brought by the Commonwealth of Virginia against Mr. Bradley, only, would you, as an attorney, express an attorney's opinion as to whether or not the Commonwealth is willing to accept a deed from Mr. Bradley alone?

Mr. Allen: I object to that question and any answer that may be made thereto, because the transaction must be decided according to what took place according to the time of the tender. If a deed, in accordance with the option, was not tendered he was under no obligation to accept it, and he wasn't required thereafter, at this late date, to accept a different tender.

Q. Did you at any time request Mrs. Bradley to page 16 } sign this deed?

A. I never had any conversation with Mrs. Bradley about it at all.

Q. Has the Highway Department ever accepted a deed from a married man, which his wife did not sign?

A. I do not know, Mr. Campbell, whether they have or not.

Mr. Campbell: That is all.

RE-CROSS EXAMINATION.

By Mr. Allen:

Q. So far as your practice goes, and your experience with the Commonwealth, all the deeds that you drew in representing the Commonwealth were drawn for the signature of the wife as well as the husband's, were they not?

Edward P. Simpkins, Jr.

A. I did not draw deeds for the Commonwealth. I did not draw this one. I do not draw any of them. They sent them to me already drawn, and when this was sent to me, I didn't have the option agreement. I didn't know who signed the option agreement. I knew that Frank had a wife, and I knew that I was going to examine the title. None of this discussion took place at all about who signed the option agreement, or who was going to sign the deed. I assumed both would sign it if I gave them the check, but I hadn't had any instructions about that.

page 17 } RE-RE-DIRECT EXAMINATION.

By Mr. Campbell:

Q. Did Mr. Bradley refuse to sign the deed on the basis that his wife was not bound by the option agreement?

A. No, sir.

Mr. Campbell: All right. That is all.

And further this deponent saith not.

Signature waived by agreement of counsel.

Mr. Campbell: By agreement of counsel the following articles are filed in evidence in this cause which were taken from the files of Mr. Edward P. Simpkins, Jr., relative to closing agreements of certain properties on Route 360 in Hanover County:

A Vendor's Invoice dated January 18, 1952;

A letter addressed to Mr. Simpkins from the Assistant Attorney General, C. Champion Bowles, dated January 28, 1952;

A letter addressed to Mr. Simpkins from Mr. A. H. Pettigrew, dated June 9, 1952;

A copy of a letter from Mr. Simpkins to the Department of Highways, Attention: Mr. Pettigrew, dated

page 18 } June 2, 1952;

The deed heretofore testified to by Mr. Simpkins with plat attached, dated January 16, 1952 purporting to be from Frank B. Bradley and Josephine M. Bradley, to the Commonwealth of Virginia;

A copy of a letter addressed to Mr. C. Champion Bowles, which was duly forwarded to Mr. Simpkins from the Depart-

ment of Highways, dated January 16, 1952, containing four pages.

Note: The above described six documents are now received and marked *Exhibit C.*

Mr. Campbell: That is all we have to offer.

FRANK B. BRADLEY,
the defendant, first being duly sworn, deposes and states as follows:

DIRECT EXAMINATION.

By Mr. Allen:
Q. Mr. Bradley, state your name, please?
A. My name is Frank B. Bradley.
Q. What is your age?
A. I am sixty-three.
Q. Where do you live?
A. Ellerson, Virginia.
Q. What is your occupation?
page 19 } A. Well, I think I am considered as a fertilizer manufacturer, and oil distributor.
Q. You are not a farmer?
A. Yes, I am a farmer, too.
Q. You have three occupations, then?
A. Got more than that.
Q. Mr. Bradley, it is in evidence here that you signed an option contract with the Commonwealth of Virginia, dated November 29, 1951, by which you gave them an option on a small piece of land described in the option, which option your wife did not sign. Did you have a wife at that time?
A. Yes, sir.
Q. Is your wife still living?
A. Yes, sir.
Q. When Mr. Simpkins told you that he had a deed and you told him that there wasn't any use to bring the deed, that you weren't going to sign it, did Mr. Simpkins know then that you had a wife?
A. Yes, sir.
Q. Would your wife sign the deed?
A. No, sir.
Mr. Campbell: I object to that. He cannot possibly know what his wife would do.

Frank B. Bradley.

Q. Do you know whether or not she still refuses to sign the deed?

page 20 } A. Well, the deed has never been presented to her.

Q. I know that. Will she sign the deed if it is presented to her?

A. No, sir.

Q. The option does not make any mention of your wife signing the deed, were you ever asked to sign a deed without your wife's name on it?

A. No, sir.

Q. Has any road been constructed by the Highway over this piece of property?

A. No, sir.

Q. What have they done there on this property?

A. I can't see anything they have done. Put down cement blocks there, and let the telephone line go across it.

Q. Has there been any work, or construction, or buildings, or projects of any kind put on the property by the Highway Department up to the present time?

A. No, sir.

Q. What, if anything, was said between you and Mr. Gilmore, representative of the Highway Department, with reference to when this road would be constructed?

Mr. Campbell: I object to that on the grounds that parole evidence cannot be used to alter, vary, or change

page 21 } the terms of a written agreement; and if the question is asked for the purpose of doing any one of those things I make an objection to it.

Mr. Allen: We agree that parole testimony is not admissible to vary or alter the terms of a written agreement, but parole testimony is admissible to show that a written agreement was executed and delivered upon a parole condition, and I am inquiring about whether or not there was any such condition.

Mr. Campbell: Of course the Court would have to rule on all objections.

Mr. Allen: Yes, sir. I thought I would make that statement to clarify the issue in that respect.

By Mr. Allen: (Continuing)

Q. Go ahead and tell what, if anything, was said or done by you.

A. Mr. Gilmore came to my place. He was talking to my brother in the doorway of the fertilizer mill, and I drove up.

Frank B. Bradley.

And he said, my brother says, "There he is now." So I never saw Mr. Gilmore before. So, I told him to come on in the office. We got to talking about the right of way, and he said they would pay $600.00 an acre. I said, "Well, they can't get mine for $600.00, because it cost me more money than that."

page 22 } And I figured up about what it cost me, see, because I wanted a road there. I had it for several years, and I cleaned it up to put a service station there. And I asked Mr. Gilmore how long it would be before they put the road there if I signed it, the agreement—he went to $1200.00—he says in six months.

"Well," I said, "I don't want to make any money, I want to come out. I am losing money, but I will sell it to you for $600.00, providing you put the road down in six months."

Q. Is there any doubt about that?

A. No, sir, no doubt at all.

Q. Then you delivered the option agreement?

A. On that. And I never saw all that stuff on the option. All I saw was the bottom page I signed. I never saw any of that other.

And as far as Mr. Simpkins is concerned, I don't think anything was ever said about a deed at the time. This had lapsed when Mr. Simpkins was by my place. He might have said previously to me, but I told him, "Mr. Simpkins, there is no use in searching that title to my—" We were talking about titles—"There is no use searching my title. I am not selling to them for lapse of time. He said, "All right, I will notify them I am not going to search your title."

Q. What do you mean "lapse of time?"

page 23 } A. Lapse. They promised the road being there within six months after I signed the deed. My intention was to put up a station when the high bank was taken down. I couldn't build a station there like it is. More than that, I asked him, "Can't you use that dirt somewhere," I thought that would relieve it some. He said yes, they would move it if they needed it.

Q. So you were willing, as I understand it, to sell them the property at a lesser price on condition that they build that road within six months?

A. That is correct.

Q. When Mr. Simpkins came around with the deeds, had the six months expired?

A. Yes, sir. Long past. But I told them about it before he ever said anything about the deed. That I wasn't going to sell it because the road wasn't put there. But they did give

Frank B. Bradley.

the telephone right of way to go ahead and cross it. They did. I didn't, and they put the stobs out there. But that is all they have done to it. You can go down and see for yourself.

Mr. Allen: That is all.

CROSS EXAMINATION.

By Mr. Campbell:

Q. Mr. Bradley, if you had signed that deed your wife would have signed it, wouldn't she?

page 24 } A. I reckon I could have made her do it.

Q. You are the boss in the family?

A. I have been boss of it for forty years, I reckon I will continue to be.

Q. The Highway Department has widened the ditch and shoulder of the road in front of your place, have they not?

A. If they have done anything there I will give you a hundred dollars. On that old secondary road, they put a thing out in the middle of the road so you can't run in the road, right straight in the road, that is the only thing. That is in the middle of the road.

Q. Haven't they moved the telephone lines back?

A. They didn't move it back. I just told you. They give the telephone people right of way to cross my property, see?

Q. They have had the lines moved, nevertheless, back over north of the road?

A. The telephone company moved it. They didn't have it done, I reckon. The telephone, East Coast Line did it, and they put stobs out, cement blocks out there.

Q. Don't they mow that portion of the land that is included in this option agreement in mowing operations, don't they cut the grass on that portion of it?

A. No, sir.

Q. You deny that they do that?

page 25 } A. Yes, sir. I deny they haven't cut any grass on that.

Q. And they have rounded off the corners of 643 where it intersects—

A. I don't think they have done that.

Q. —with 360?

A. They have put one of these little angle things in the middle of the road, on both sides, on the other side and that side, too, and that is all I have seen they have done.

Frank B. Bradley.

Q. In the middle, what do you mean by the middle of the road, Mr. Bradley?

A. Well, to get them—I tell you, it is some notion they got in making a turn. They set up a cement block in the middle of, 643, didn't you say? That is all I have seen they have done, and put these blocks out, and the telephone lines across it.

Q. Didn't they widen the southwest turn—

A. I don't think.

Q. —of 643?

A. They haven't widened it over 30 feet. They strung a machine up to clean up the ditch.

Q. Did they change that road and those ditches along there at all?

page 26 } A. No more than I think they hard surfaced that road over there. Haven't you all hard surfaced that road? It is still a 30 foot road there, isn't it?

Mr. Gilmore: The right of way. Yes, sir.

A. (Continuing) The right of way over there is still a 30 foot road. All they have done is just like they do all others: pull the ditches up, go ahead and throw black top on it, or gravel, and cut the banks down. They haven't cut off any banks. They are the same thing.

Q. Mr. Gilmore never told you that a third lane would be placed in there in any specific period of time, did he?

A. Yes, sir. I was interested in building my station, Mr. Campbell, and had been holding up on it a long time on account of the road, and that's the reason I offered to sell. I was in a hurry to put the station there. But now it has been six years and still there isn't any sign of when it is going to be there. I have not only lost—I lost a thousand dollars in my building besides what business I lost without it being there. I mean not a thousand, but ten thousand in building cost, what it will cost me to put one up today, and what it would have cost me to put one up then.

Q. I believe you said Mr. Gilmore guaranteed you that this construction would be completed within six months before you signed it?

page 27 } A. I said I am signing it on these conditions: That the highway will go through over here, and cleaned up there in six months, and I also asked him the question would they move that dirt for me. There is

Frank B. Bradley.

a big bank. He says if we need it we will move it. That is the words he said back to me.

Q. What date did you talk with Mr. Simpkins?

A. Well, it won't, he hadn't searched the title because—It won't very long after six months. Prior to it they hadn't check it. And when Mr. Simpkins was at the store I mentioned to Mr. Simpkins—he had been talking about searching titles—I said, "There is no use searching my title. I am not going to sell it to them." And prior to that time—

Q. What reason did you give at that time for not selling it?

A. I give a reason because they hadn't come up to the contract.

Q. Do you know the date that you talked to Mr. Simpkins?

A. Well, it wasn't over about six months after I signed for the right of way.

Q. It was over six months, or—

A. Around six months.

Q. Mr. Bradley, the checks were dated January 18, 1952, that was less than two months from the date you

page 28 } signed the option.

A. He might have had the checks, I never saw them. I don't doubt that.

Q. The deed which Mr. Simpkins had was dated January 16, 1952, that was less than—

A. I don't know.—

Q. —six months from the time that you signed the option agreement, was it not?

A. I don't know. It won't very long after I signed the option, I signed the paper, before I told Mr. Simpkins that—See, Mr. Simpkins hadn't said nothing about the deed, nothing at that time. He told me later about the deed. I don't remember him saying anything about it.

Q. As a matter of fact, Mr. Bradley, the option agreement that you signed was recorded on June 16, 1952, which was just a little over six months after you had signed it, was it not?

A. I don't doubt that.

Q. Then your reason for not signing couldn't have been the six months condition that you claim Mr. Gilmore made to you, could it?

A. Well, I don't see why not.

Q. Well, the six months had not elapsed.

Frank B. Bradley.

A. As far as when they filed the deed, I don't know anything about the deed; when they wrote the check, page 29 } or—I didn't know anything about it.

Q. The point I am trying to find out from you, you said six months had elapsed and they hadn't, what you allege Mr. Gilmore promised. I am trying to determine what date it was that Mr. Simpkins talked to you.

A. Do you remember, Mr. Simpkins, what date it was? It was six months, I know.

Mr. Simpkins: If he asked me I would give him my honest answer. That is all I can do.

Q. Then your testimony here on cross examination is you believe the six months period that you claim Mr. Gilmore mentioned had elapsed, but you do not know the date on which Mr. Simpkins talked to you?

A. No, and I don't think he does. It was more than any two months.

Q. Did I understand you on direct examination to testify that you did not read this option agreement that you signed?

A. No, sir, I did not.

Q. Was the amount of the property, the nature of the property, the description, and the size of the property to be sold explained to you?

A. No, sir. Mr. Gilmore told me how much he was taking off, and I thought that the Commonwealth's Attorney was going to—The Commonwealth of the State was page 30 } going to treat me right with it; and I took it mostly with the agreement that the road would be through there in six months.

Q. The fact you didn't look at it, you do not mean by that you feel Mr. Gilmore was guilty of any fraud or anything like that, you are not claiming now that they are getting more land than he agreed to at that time?

A. No, sir. No, sir. I am not claiming that. I am claiming —I don't say it's Mr. Gilmore's fault, see—I am claiming they didn't come up to what Mr. Gilmore said, and what they promised me.

Mr. Campbell: All right, sir. For the purpose of the record, I again renew my objection to the admissibility of testimony concerning parole evidence to vary or change terms of a written contract.

Christopher L. Dunn.

RE-DIRECT EXAMINATION.

By Mr. Allen:

Q. Mr. Bradley, one more question: Were you waiting to see whether they were going to put the road there in the six months before you intended to sign a deed, or not?

A. Yes, sir.

Q. At that time did you know whether your wife's name was on the deed or not?

A. No, sir.

Mr. Allen: That is all.

page 31 } RE-CROSS EXAMINATION.

By Mr. Campbell:

Q. Mr. Bradley, that wasn't the reason you gave Mr. Simpkins for not signing it, though, was it?

A. I told you the reason I gave Mr. Simpkins. I didn't sign it because the road wasn't there.

Q. Then you were not waiting to see anything, were you.

A. No, I won't waiting. They hadn't filled my contract like they said they were going to do.

And further this deponent saith not.

Signature waived by agreement of counsel.

CHRISTOPHER L. DUNN,

a witness introduced in behalf of the defendant, first being duly sworn, deposes and states as follows:

DIRECT EXAMINATIONt.

By Mr. Allen:

Q. Will you state your name, please?

A. Christopher L. Dunn.

Q. How old are you?

page 32 } A. Fifty-two.

Q. What is your occupation?

A. Bookkeeper for Bradley and Boswell. For Mr. Bradley.

Q. How long have you held that position?

A. Since 1929.

Christopher L. Dunn.

Q. Were you present when this transaction took place between Mr. Gilmore and Mr. Bradley about this option?
A. You mean when he signed the option?
Q. Yes.
A. Yes, sir.
Q. Will you tell us what took place then?

Mr. Campbell: Before the witness testifies, again I renew my objection, the same objection that parole evidence cannot be used to alter or change the terms of a written contract.
Mr. Allen: To clarify the issue I repeat: We are not offering it for that purpose, but we are offering it to show that the written option was delivered upon a parole condition, to be effective only in event of the performance of that condition.

Q. Go ahead, Mr. Dunn, and state what was done and said there.
A. Mr. Bradley was hesitating to sign the option until he knew when the road was going to be built. When
page 33 } he had assurance the road would be built in six months, he said, "I will go ahead and sign the option."
Q. What did Mr. Gilmore say?

Mr. Campbell: I object to—
Mr. Allen: All right. That is all.

CROSS EXAMINATION.

By Mr. Campbell:
Q. Did Mr. Gilmore make any statement as to the type of road, or construction, that was going to be made on this project?
A. No, he just said the road would be built within six months.
Q. Did he say how many laned road it would be?
A. Not that I recall.
Q. Did he say whether or not the shoulders were being widened?
A. I don't think any mention was made of the shoulder. He said the road. I understood it would be the complete road. The whole road. All the lanes.
Q. Do you recall a conversation between Mr. Simpkins and Mr. Bradley with reference to this deed and check?

Christopher L. Dunn.

A. No, I wasn't there when they—That happend out of my presence. I am sure it did.

page 34 } Q. Did Mr. Gilmore show Mr. Bradley a plat of the property that was being taken?

A. I don't remember. He had an option, I don't know whether the plat was with the option or not. I didn't examine the whole thing.

Q. Just exactly what did Mr. Gilmore say?

A. When Mr. Bradley said he would sign the option provided the road would be built in six months, Mr. Gilmore said it would be built within six months. Then he said he would go ahead and sign the option.

Q. Where were you when this conversation took place?

A. In my office.

Q. Where were they?

A. The office has a partition in it. My desk sits behind it. It is a small office, one fourth as big as this room. They were there in the lobby part, in the front of it. The whole room is about, I would say, two-thirds as big as this one here is. I have a desk, and the counter is sitting here, and my desk is right by the counter, on this side. They are sitting over on that side of it.

Q. How do you happen to recall the exact words?

A. How do I happen to recall them?

Q. Yes, sir.

A. I just remember them.

page 35 } Q. That was in November, 1951, was it not?

A. Well, I would say it was. I wouldn't say, repeat the exact words.

Q. Have you had occasion to attempt to recall what was said since that date, up until this suit was filed?

A. What do you mean by that?

Q. Have you had any reason to recall, or attempt to recall, that conversation from November, 1951, until this suit was filed against Mr. Bradley?

A. Have I had a reason?

Q. Yes, sir.

A. No, I haven't had any reason.

Q. Has anyone suggested to you what was said at that time?

A. No, sir.

Q. If you don't remember the exact words, you could be mistaken; couldn't you?

A. I don't think so.

Paul P. Gilmore.

RE-DIRECT EXAMINATION.

By Mr. Allen:

Q. Mr. Dunn, had I talked to you about this case at all until you came here today?

A. No, sir. I never saw you before in my life, I don't believe.

page 36 } Q. The first time I talked to you was out in the hall—

A. Yes, sir.

Q. —after you came here?

A. Yes, sir.

Q. When Mr. Bradley and Mr. Gilmore were talking about this matter, could you tell whether Mr. Bradley was persistent or not in his statements about signing the contract, and under what conditions he would sign?

A. Yes, sir, he was persistent.

Q. Did he say it once, or twice, or more?

A. I think several times.

Q. Did Mr. Gilmore receive the option immediately following those statements?

A. Yes, sir. He signed it. Signed it in my presence.

Q. And turned it over to Mr. Gilmore?

A. Yes, sir.

Mr. Allen: That is all.

Mr. Campbell: I have no further questions.

And further this deponent saith not.

Signature waived by agreement of counsel.

page 37 } Mr. Campbell: Inasmuch as the defendant has put on evidence to which I interposed an objection, and which the Court will not rule on until some later date in reading these depositions, and I cannot be assured how the Court will rule on my objection, I feel it encumbent on me to put on rebuttal evidence as to that testimony; but will request the Court not to consider this rebuttal evidence in the event it sustains my objection.

I would like to recall Mr. Gilmore.

PAUL P. GILMORE,

upon being recalled by Mr. Campbell, having been previously sworn, deposes and states further as follows:

Paul P. Gilmore.

DIRECT EXAMINATION.

By Mr. Campbell:

Q. Mr. Gilmore, you heard the testimony of Mr. Bradley and Mr. Dunn a moment ago, did you not?

A. Yes, sir.

Q. Mr. Gilmore, at the time you took options on this particular project on 360, did you know, in your capacity as an agent of the Highway Department, what the Highway proposed to do on 360?

page 38 } A. Yes, sir.

Q. Did you know what dates, if any, the Highway Department would use the land for which this option was signed?

A. I didn't know at what date they would use all the land, but I had been assured that they would use some of the land in connection with the present, shall we say current project, for the widening of the present road.

Q. When you say "widening of the present road," what do you mean?

A. The road that exists at the present time.

Q. In what manner has that road been widened?

A. It has been widened, the base of it has been widened approximately two feet on the side toward the Bradley, adjacent to the Bradley property, and then it has been hard surfaced, and the shoulders on both sides have been widened.

Q. You were aware that that would be done in the near future when these options were taken?

A. Yes, sir.

Q. Did you, when these options were taken, guarantee Mr. Bradley that an extra hard surfaced lane would be placed over across his property?

A. I do not recall having guaranteed any such thing to Mr. Bradley.

Q. Did you tell him that the construction that

page 39 } you just mentioned a few moments ago as having been done would be done within a specific time?

A. I think that I told Mr. Bradley that the present project would be constructed within a reasonable length of time. I don't recall whether I used the exact number of months, but I knew at that time it would be constructed because they were pressing me to get the right of way clean, so they could proceed with the construction.

Paul P. Gilmore.

Q. The construction that you speak of now was made within six months of the date that the option agreement was signed, was it not?

A. Yes, sir.

Q. That is the same construction that is presently on Route 360 at the Bradley property, is it not?

A. Yes, sir. On a portion of the property.

Q. The telephone poles that were referred to, by whose direction were they moved?

A. The Highway Department notified the telephone company to relocate their poles clear of the proposed construction and future construction.

Q. Was that done as a result of this option that you took from Mr. Bradley?

A. Yes, sir.

Q. Does the Highway Department maintain a mowing operation on a portion of the property on 360 that has

page 40 } been taken in?

A. I couldn't answer that question. I don't know whether they actually have mowed the actual width of that property or not.

Q. Have they placed the highway markers along the northern edge of 360?

A. The monuments have been placed. Yes, sir.

Q. Can you look at this map and tell whether or not there is a monument on the Bradley tract?

A. There is, unless it has been moved. There is supposed to be a monument at this particular location right here on the map.

Q. Would you define that location?

A. That location is 99 feet from the center of the present road, and it is approximately 70 feet west of the center of Route 643.

Q. That point that you are speaking of is the northern side of the property which is described in the option agreement, is it not?

A. Yes, sir.

Q. That point is between the property described in the option agreement and the remainder of Mr. Bradley's land, is it not?

A. Yes, sir.

Q. You say there is a monument there?

page 41 } A. Yes, sir, so far as I know.

Q. A monument was placed there.

Paul P. Gilmore.

A. Yes, sir.

Mr. Campbell: All right, sir.

CROSS EXAMINATION.

By Mr. Allen:

Q. Mr. Gilmore, was this property sought to be acquired for the purpose of widening 360?

A. For the purpose of widening 360, and also for the purpose of an ultimate other lane in the future.

Q. Which would be a part of 360?

A. That is correct.

Q. Has the other lane been put there?

A. No, sir, it has not.

Q. Has 360 been widened so that the main travel along 360 would be over any part of this property?

A. Not the main traveled part, no, sir.

Q. So the people are traveling 360 just as they traveled before this option was signed?

A. Yes, sir.

Q. I understood you to say something about some construction that would be had within a reasonable time, and you wouldn't say whether you mentioned six months or not, what construction was that?

page 42 } A. That was the construction that had already been completed there.

Q. Completed when, at the time of the option?

A. Shortly after the time of the option, yes, sir.

Q. What construction was that?

A. That was the re—It was the widening and reconditioning of the present Route 360.

Q. But the widening of it was not so as to cover any part of this property described in this option?

A. Only a few feet along the front, in connection with widening the shoulder area and pulling the ditch line further onto the property.

Q. The re-widening and new lane, no construction has been done on those at all?

A. No, sir.

Mr. Allen: That is all.

And further this deponent saith not.

Signature waived by agreement of counsel.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

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RULE 5:12—BRIEFS

§1. Form and Contents of Appellant's Brief. The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall be to the official Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

§2. Form and Contents of Appellee's Brief. The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate references to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this Court, giving his address.

§3. Reply Brief. The reply brief (if any) of the appellant shall contain all the authorities relied on by him not referred to in his opening brief. In other respects it shall conform to the requirements for appellee's brief.

§4. Time of Filing. As soon as the estimated cost of printing the record is paid by the appellant, the clerk shall forthwith proceed to have printed a sufficient number of copies of record or the designated parts. Upon receipt of the printed copies or of the substituted copies allowed in lieu of printed copies under Rule 5:2, the clerk shall forthwith mark the filing date on each copy and transmit three copies of the printed record to each counsel of record, or notify each counsel of record of the filing date of the substituted copies.

(a) If the petition for appeal is adopted as the opening brief, the brief of the appellee shall be filed in the clerk's office within thirty-five days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. If the petition for appeal is not so adopted, the opening brief of the appellant shall be filed in the clerk's office within thirty-five days after the date printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office, and the brief of the appellee shall be filed in the clerk's office within thirty-five days after the opening brief of the appellant is filed in the clerk's office.

(b) Within fourteen days after the brief of the appellee is filed in the clerk's office, the appellant may file a reply brief in the clerk's office. The case will be called at a session of the Court commencing after the expiration of the fourteen days unless counsel agree that it be called at a session of the Court commencing at an earlier time; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

(c) With the consent of the Chief Justice or the Court, counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

§7. Effect of Noncompliance. If neither party has filed a brief in compliance with the requirements of this rule, the Court will not hear oral argument. If one party has but the other has not filed such a brief, the party in default will not be heard orally.

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