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Record No. 5048

In the Supreme Court of Appeals of Virginia at Richmond

S. D. MAY, STATE HIGHWAY COMMISSIONER OF VIRGINIA

v.

BERNARD W. DEWEY, ET AL.

FROM THE CIRCUIT COURT OF ARLINGTON 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.

NOTICE TO COUNSEL

This case probably will be called at the session of court to be held.

JAN 1960

You will be advised later more definitely as to the date.

Print names of counsel on front cover of briefs.

Howard G. Turner, Clerk

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 5048

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 18th day of June, 1959.

S. D. MAY, STATE HIGHWAY COMMISSIONER OF VIRGINIA, Appellant,

against

BERNARD W. DEWEY, ET AL., Appellees.

From the Circuit Court of Arlington County

Upon the petition of S. D. May, State Highway Commissioner of Virginia, an appeal is awarded him from a decree entered by the Circuit Court of Arlington County on the 29th day of December, 1958, in a certain proceeding then therein depending wherein Bernard W. Dewey and another were plaintiffs and Virginia State Highway Commissioner was defendant; no bond being required.

RECORD

* * * * *

Filed in the Clerk's Office the 12th day of December, 1956.

Teste:

H. BRUCE GREEN, Clerk
FREDA S. WOODYARD, D. C.

PETITION.

To the Honorable Judges of said Court:

Your petitioner, Bernard W. Dewey, files this petition in accordance with Title 33, Chapter 1, Article 5 (Section 33-70) of the Code of Virginia, as amended, and alleges as follows:

1. That he is the owner in fee simple of a tract of land located on Lee Highway west of Glebe Road, Arlington County, Virginia.

2. That pursuant to Section 33-70 and Section 33-74 of the Code of Virginia, as amended, the defendant filed with the Clerk of the Circuit Court of Arlington County, Virginia, a certificate of deposit numbered 5599 for Project 2400-07, in which the defendant certifies that $12,000.00 is the fair value of the land of the petitioner and of a permanent easement over certain other land of the petitioner, for the execution and maintenance of the work, and for damages to the property of your petitioner.

3. That the defendant has entered into possession of the property described in said certificate.

4. Your petitioner denies that $12,000.00 is the fair value of the land and easement taken and damage to his residue, and without prejudice to his right to claim an amount in excess of $12,000.00, this petition is brought for the purpose of obtaining 90% of said sum at the present time pursuant to Section 33-70 of the Code of Virginia, as amended.

5. That no agreement has been made between page 2 } your petitioner and the defendant as to the compensation for the property taken and damages to the residue.

WHEREFORE, your petitioner prays that this Court enter an order pursuant to Section 33-70 and Section 33-74 of the Code of Virginia, as amended, directing the defendant to pay

the petitioner the sum of $10,800.00 against said certificate without prejudice to the rights of the petitioner to claim additional amounts for compensation and damages; and for such other and general relief as the nature of the case may require.

BERNARD W. DEWEY
Petitioner.

SIMMONDS AND CULLER
1500 North Court House Road
Arlington, Virginia
By JAMES H. SIMMONDS
Counsel for Petitioner.

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Filed Jun. 27, 1957.

H. BRUCE GREEN, Clerk
Circuit Court, Arlington County, Va.
By V. LONG, Deputy Clerk.

ANSWER.

Now comes James A. Anderson, State Highway Commissioner of Virginia, by counsel, and files this its answer to the petition heretofore filed herein, respectfully stating and alleging as follows:

1. Defendant admits the allegations contained in paragraph number one of the said petition.
2. Defendant denies each and every allegation contained in paragraph number two of the said petition.
3. Defendant admits the allegations contained in paragraph number three of the said petition.
4. Defendant admits the allegations contained in paragraph number four of the said petition.
5. Defendant, for further answer to the said petition, alleges that it was necessary, for the construction, reconstruction, alteration, maintenance and repair of a portion of highways embraced in the State of Virginia Highway System, known as Routes 120 and 211, to acquire in fee simple a

certain parcel of real property, the record title to which is vested in the Commonwealth of Virginia by reason of the recordation of a certain certificate A-651, recorded in Deed Book 1288 at page 497, among the land records of Arlington County, Virginia, and which was theretofore vested in Bernard W. Dewey, in fee simple, subject to certain encumbrances. The parcel of land so acquired is more particularly known and described as:

Being as shown on plans approved December 19, 1949, and lying on the southeast (left) side of the construction centerline and adjacent to the existing southeast right of way line of present Route 211 from the lands of Sarah E. Summer and Howard C. Summer opposite approximate Station 159+38 to the lands of Jeannette G. Luchs opposite approximate Station 161+78, and containing 0.067 acre, more or less, land; together with the right and easement to use
page 21 } the additional areas shown as being required for the proper execution and maintenance of the work;
and being a part of the lands acquired by Bernard W. Dewey by deed recorded in Deed Book 597 at page 101, and by deed recorded in Deed Book 427 at page 257 all among the land records of said County,

the said parcel of real property being shown upon a plat attached hereto and asked to be read as a part hereof, designated as Sheet No. 16 RW, Project No. 2400-07, Route 120, said plat being attached hereto as defendant's exhibit 1. The portion of the said property taken in fee simple is outlined in red upon the said plat and the portion taken as an easement is outlined in green thereon.

6. Defendant is advised and alleges on information and belief that no portion of the area taken in fee simple is improved by any structure, dwelling or building.

7. Defendant alleges that he has attempted to purchase the said property from the owners thereof before the filing of the said certificate, but that he has been unable to reach any agreement as to a proper amount to be paid therefor.

8. Defendant alleges upon information and belief that the condemnation of the land hereinabove described will not result in any damage to adjacent or other property of the said former owner, nor of any other person.

9. Defendant alleges upon information and belief that, prior to the recording of the aforesaid certificate, the petitioners had conveyed a part of the above-described property to S. W. Hauser, W. T. Leith and Robert N. Taylor, Trustees, by deed of trust recorded in Deed Book 916 at page 424, among the

said land records, to secure a certain indebtedness due to Peoples Life Insurance Company, and that they had conveyed part of the same unto Alfred W. Trueax and John Locke Green, Trustees, by deed of trust recorded in Deed Book 1157 at page 211, among said land records, to secure a certain indebtedness due unto First National Bank of Arlington, and that they had conveyed a part of the same again unto the said Hauser, Leith and Taylor, Trustees, securing a further indebtedness due unto the Peoples Life Insurance Company, by deed of trust recorded in Deed Book 1215 at page 377, among said land records, all of which parties may have an interest in any condemnation award made herein.

10. That prior to the filing of the petition herein, defendant had determined to institute condemnation proceedings as to the land hereinabove described, and to that end had authorized the undersigned attorney for the defendant to bring and conduct the same. There is attached hereto as page 22 } defendant's Exhibit 2, authority to the undersigned attorney for defendant to bring and conduct such condemnation proceedings.

11. Defendant hereby expressly requests a reply as to paragraphs number five, six, seven, eight and nine of this answer, from the petitioners.

WHEREFORE, having answered to the said petition, defendant joins in the prayers thereof except as to the allowance of interest, and prays that this answer be deemed to be a petition for condemnation pursuant to Section 33-60, Code of Virginia, and that the requirement of the notice provided by the said section be waived by order of this Court, that the petitioners be required to file a reply to paragraphs number five, six, seven, eight and nine hereof, within 10 days from the filing of this answer, which shall be deemed to comply with the requirements of Section 33-62, Code of Virginia, and which reply shall be required to contain the information required by said section to be required in grounds of defense, and that future proceedings may be conducted in this cause pursuant to Sections 33-63 to 33-67, inclusive, Code of Virginia.

/s/ JAMES A. ANDERSON
State Highway Commissioner
By Counsel.

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DECREE.

This cause came on this 27th day of June, 1957, to be again heard upon the papers formerly read, upon the petition of Bernard W. Dewey and wife for the appointment of Commissioners to ascertain the just compensation for the land taken by the defendant and for damages to the residue of their property, upon the answer of the defendant, State Highway Commissioner of Virginia, and upon argument of counsel.

Upon consideration whereof, it is ADJUDGED, ORDERED and DECREED:

1. That S. W. Hauser, W. T. Leith and Robert M. Taylor, Trustees under a deed of trust recorded in Deed Book 916 at page 424 among the land records of Arlington County, Virginia, and also Trustees under a further deed of trust recorded in Deed Book 1215 at page 377 of said land records and People's Life Insurance Company, holder of notes secured thereby; and Alfred W. Trueax, surviving Trustee under deed of trust recorded in Deed Book 1157 at page 211 among the said land records and First National Bank of Arlington, holder of notes secured thereby; be and the same hereby are, made parties defendant to this condemnation proceeding; and the Clerk of this Court is directed forthwith to issue subpoenas in chancery against each of the aforesaid parties, attached to copies of the petition filed herein on June 5, 1957, the answer of the State Highway Commissioner thereto, and this order, and to place the same in the hands of counsel or appropriate officers for service.

2. That in order to determine the land of the petitioners' actually taken, and to resolve the discrepancy in the description in the petition and in the answer, this cause is continued to July 29, 1957, for hearing on said issue, to which action of the Court the petitioners excepted on the ground that they had been ousted from possession by the defendant and that the petitioners do not have to show legal title in themselves in order to recover of the defendant for the land

page 24 } in dispute.

3. That the defendant, State Highway Commissioner of Virginia, shall furnish to counsel for petitioners within ten days from the entry of this order, an exact copy of Exhibit 1 attached to its answer.

4. That within twenty-one days from the date of this order the petitioners herein shall reply to the allegations of paragraphs 5, 6, 7, 8 and 9 of the answer filed by the defendant, which reply shall contain the information required by law

to be furnished in grounds of defense to petitions for condemnation.

Entered this 11th day of July, 1957.

WALTER T. McCARTHY, Judge.

SIMMONDS & CULLER
By JAMES H. SIMMONDS
Counsel for Petitioners.

JESSE, PHILLIPS, KLINGE & KENDRICK
By CHARLES STEVENS RUSSELL
Jesse Bldg., Arl., Va.
Counsel for Defendant.

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Filed Jul. 29, 1957.

H. BRUCE GREEN, Clerk
Circuit Court Arlington County, Va.
By R. H. WHITE, Deputy Clerk.

ANSWER.

Now come Bernard W. Dewey and Mary Lou G. Dewey, his wife, by counsel, and file their reply to the answer heretofore filed herein by the defendant, respectfully stating and alleging as follows:

1. In reply to Paragraph 5 of the defendant's Answer, the Petitioners admit the allegations except that they deny that the property taken is accurately described, but on the contrary say that the land actually taken is described with substantial accuracy in Paragraph 2 of the Petition.

2. For reply to Paragraph 6 of the Answer, the Petitioners say that the area taken was improved by a macadamized parking area furnished by them for the customers of the Dewey Hardware and Garden Store.

3. For reply to Paragraph 7 of the Answer the Petitioners

deny that the Defendant ever attempted to purchase all of the land taken, but admit that an inadequate sum was offered for part of the land taken.

4. Your Petitioners deny the allegations of Paragraph 8 of the Answer.

5. Your Petitioners admit the allegations of Paragraph 9 of the Answer.

6. Your Petitioners, in further reply to said Answer, state that the valuation of the property taken by the Defendant is Twenty-four Thousand Five Hundred Dollars page 44 } ($24,500.00).

7. Your Petitioners state further that the damage to the residue of their property amounts to Fifty Thousand Dollars ($50,000.00).

BERNARD W. DEWEY
MARY LOU G. DEWEY
Petitioners,
By Counsel.

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* * * * *

ORDER.

This cause came on to be heard upon the papers formerly read, upon the question of the amount of property taken by the defendant to which the petitioners may be entitled to compensation, a dispute having arisen as to a strip of land hereinafter described, pursuant to decree entered herein on June 27, 1957, and, both parties having waived a jury, the Court proceeded to take testimony and receive in evidence exhibits offered by both parties; and upon arguments of counsel;

Upon consideration whereof, the Court being of the opinion that B. W. Dewey, also known of record as Bernard W. Dewey, acquired title to the strip of land in dispute herein by deed from John Scott, widower, executed on the 22nd day of August, 1957, and recorded among the land records of Arlington County, Virginia in Deed Book 1302 at page 338 on August 27, 1957;

WHEREUPON it is

ADJUDGED, ORDERED and DECREED that B. W.

Dewey, also known of record as Bernard W. Dewey, is the owner, in fee simple, of the strip of land in Arlington County, Virginia, described as:

All of that strip of land approximately 10 feet in width, lying between the old southern boundary of the Fairfax and Georgetown Pike (now called Lee Highway) and the north line of the property conveyed by John Scott to B. W. Dewey, by deed dated January 3 1938, recorded in Deed Book 427, at page 257, among the land records of Arlington County, Virginia, said 10 foot strip being bounded by the easterly line of the property deeded to said B. W. Dewey from Virginia White, widow, in Deed Book 579, at page 107, among the land records of said County, the southerly side of Fair-
page 53 } fax and Georgetown Pike (now Lee Highway), the westerly line of the property acquired by the Commonwealth of Virginia from John Scott, et ux., recorded in Deed Book 306, at page 432, among said land records, and the northerly line of the property acquired by Bernard W. Dewey from John Scott, et ux., recorded in Deed Book 427, at page 257, among said land records.

And it is further

ORDERED that the Commissioners to be appointed herein for the ascertainment of the fair compensation for the property taken by the defendant herein, and damage, if any, to the residue of the petitioners property, shall consider the property hereinabove described and, in addition, the property described in the answer of the defendant, State Highway Commissioner. The defendant, by counsel, duly excepted to the foregoing rulings. The petitioners, by counsel, excepted to the Court's language limiting the finding of title in the petitioners, to the deed of August 22, 1957.

AND THIS CAUSE IS CONTINUED.

Entered this 2nd day of December, 1957.

EMERY N. HOSMER, Judge.

Seen:

SIMMONDS & CULLER
By JAMES M. SIMMONDS
Counsel for Petitioners
and certain defendants.

JESSE, PHILLIPS, KLINGE &
KENDRICK
By C. S. RUSSELL
Jesse Bldg., Arl., Va.
Counsel for State Highway Commissioner.

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COME NOW Bayard D. Evans and Ruth N. Evans, his wife, pursuant to notice from James H. Simmonds, attorney for B. W. Dewey, received on April 1, 1958, and ask leave to intervene in the above-styled matter pursuant to Section 25-42 of the Code of Virginia.

1. Your petitioners state that they are the owners of a leasehold interest in 4770 Lee Highway, Arlington, Virginia, by virtue of a written lease with B. W. Dewey, the defendant in the above-styled matter.

2. That they have approximately eight years remaining under said lease, together with two five-year options; that they are conducting a business on said premises known as Evans Coffee Shop; and that the State Highway Commission proposes to take a strip of land included in their leasehold approximately twenty feet wide by the full width thereon, containing approximately 3,500 square feet of land.

3. That said land is now being used by your petitioners as a substantial portion of their parking lot, which is a necessary adjunct to their restaurant business.

4. Your petitioners further allege that the taking of the said land and the building of the highway adjacent thereto will materially and substantially damage the residue of their leasehold.

WHEREFORE, your petitioners allege that they will be materially damaged by reason of the taking of the aforesaid land for the widening and improving of Lee Highway, and that the residue of their leasehold will be materially damaged as a result thereof; and pray that they may be allowed to intervene in these proceedings and have their rights passed upon by the Commissioners and their damages ascertained,

allowed, and paid, as is provided for in Section 25-42 of the Code of Virginia.

BAYARD D. EVANS
By Counsel.

RUTH N. EVANS
By Counsel.

Filed Apr. 8th 1958.

H. BRUCE GREEN, Clerk.

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MOTION TO STRIKE.

Now comes F. A. Davis, State Highway Commissioner, by counsel, and moves the Court to strike the intervening petition of Bayard D. Evans and Ruth N. Evans filed herein on April 8, 1958, and for grounds therefor states and alleges as follows:

1. Intervening petitioners have no interest of record in the property which is the subject matter of this suit, and have never had any such interest.
2. Title to the property mentioned in the intervening petition was duly vested in the Commonwealth of Virginia by recordation of a Certificate No. A651 duly recorded among the land records of Arlington County, Virginia, on April 17, 1957, in Deed Book 1288 at page 497.
3. Any claim which the intervening petitioners may have, would be a civil action on contract against the landlord, Bernard W. Dewey.
4. Code, Section 25-42 is not applicable to this proceeding.

/s/ F. A. DAVIS
By Counsel.

Filed May 16, 1958.

H. BRUCE GREEN, Clerk
Circuit Court, Arlington County, Va.
By F. WOODYARD, Deputy Clerk.

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ORDER.

This matter came on the 6th day of June, 1958 to be heard upon the Petition of Bayard D. Evans and Ruth N. Evans for leave to intervene in this matter pursuant to Section 25-42 of the Code of Virginia, 1950, and upon motion of the State Highway Commissioner of Virginia to strike said intervening petition of Bayard D. Evans and Ruth N. Evans filed herein on April 19, 1958, and was argued by counsel; and

It appearing to the Court that it is proper for said Bayard D. Evans and Ruth N. Evans to intervene herein as Lessee of part of the property sought to be condemned,

It is ADJUDGED and ORDERED that the said motion to strike filed by the said State Highway Commissioner of Virginia be, and the same is, hereby denied, and leave is granted to said Bayard D. Evans and Ruth N. Evans to intervene in this cause, and said petition heretofore filed shall be treated as their petition in intervention.

The other prayers of said petition to intervene are not passed upon at this time but decision thereon will be reserved until the hearing before the Commissioners.

To the action of the Court in denying the motion to strike filed by the State Highway Commission of Virginia, counsel for said Commissioner excepted.

Entered this 11th day of June, 1958.

WILLIAM D. MEDLEY, Judge.

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REPORT OF COMMISSIONERS.

We, W. S. Hoge, III, John J. Loflin, John Balster, Ernest D. Wilt and David R. Collins, Commissioners duly appointed and qualified, hereby certify that on the day of July, 1958, we met together on the land of Bernard W. Dewey and wife,

which has been taken by the Commonwealth of Virginia for its purposes, and then and there described as follows:

Parcel 1. The northerly 19.85 feet by the full width of 67.19 feet (containing 1,389 square feet of land) of the premises known as 4720 Lee Highway, Arlington, Virginia, known in these proceedings as the Dewey Hardware and Garden Store;

Parcel 2. The northern 19.85 feet by the full width of 174.61 feet (containing 3,507 square feet of land) of the premises known as 4770 Lee Highway, Arlington, Virginia, known in these proceedings as the Evans Coffee Shop;

and upon a view of the land aforesaid, and of the adjacent and other property of the owner which may be damaged by the construction and operation of the Commonwealth's works, and upon such evidence as was before us, we ascertain that for the part of the land so taken from Parcel 1, $4,861.50 will be a just compensation, and the damages to the remainder of said premises known as Dewey Hardware, 4720 Lee Highway will be $3,000.00, beyond any enhancement in value that will accrue to said property by reason of the construction of said highway; and for the part of the land taken from said Parcel 2 $11,397.75 will be a just compensation, and dam-
page 74 } ages to the remainder of the premises known as Evans Coffee Shop, 4770 Lee Highway will be $5,000.00 beyond any enhancement in value that will accrue to said property and by reason of the construction of said highway.

Given under our hands this 30th day of July, 1958.

W. S. HOGE, III
JOHN J. LOFLIN
JOHN BALSTER
ERNEST D. WILT
DAVID R. COLLINS

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ORDER.

This cause came on to be heard on the 21st day of July, 1958, upon all the papers formerly filed and read herein, and upon the appearance before the court of W. S. Hoge, III,

John J. Loflin, John Balster, E. D. Wilt, and David R. Collins, Commissioners heretofore appointed herein, whereupon the Commissioners were duly sworn, entered into their duties and viewed the land described in the answer of the defendant State Highway Commission and, in addition, the land described in the order entered by the Court in this proceeding on the 2nd day of December, 1957, but not including the easement described in the said answer, the same having been excluded from this proceeding by stipulation of the parties, the said view having been taken in the presence of the Court, whereupon the said Commissioners heard the sworn testimony of witnesses and received other evidence, the proceeding being continued from day to day until all evidence had been received, whereupon the case was argued by counsel; and

IN APPEARING TO THE COURT that the said Commissioners upon the viewing and evidence aforesaid, have found the sum of $4,861.50 to be a just compensation for that part of the lands of Bernard W. Dewey which was taken in fee simple from Parcel 1, known as the Dewey Hardware Tract at 4720 Lee Highway, Arlington County, Virginia, and that the sum of $3,000.00 will be a just compensation for any and all damages suffered by the remainder of the said tract beyond any enhancement in value that will accrue to the said property by reason of the construction of the said highway; and

IT FURTHER APPEARING TO THE COURT that the said Commissioners, upon the viewing and evidence, have found the sum of $11,397.75 to be a just compensation for that part of the lands of Bernard W. Dewey which was taken in see simple from Parcel 2, known as the Evans page 76 } Coffee Shop Tract, at 4770 Lee Highway, Arlington County, Virginia, and that the sum of $5,000.00 will be a just compensation for any and all damages which may be sustained by the remainder of the said tract beyond any enhancement in value that will accrue to such property by reason of the construction of the said highway; and

IT FURTHER APPEARING TO THE COURT that Bernard W. Dewey and the State Highway Commissioner have each, by counsel, moved the Court for leave to file written exceptions to the said Commissioner's report; it is

ADJUDGED, ORDERED AND DECREED that leave be and the same hereby is, granted to each of the *aforsaid* parties to file written exceptions herein to the aforesaid Commis-

sioner's report, provided the same be filed within 10 days after the 30th day of July, 1958; and it is further

ADJUDGED, ORDERED AND DECREED that the State Highway Commissioner shall pay to W. S. Hoge, III, John J. Loflin, John Balster, E. D. Wilt, and David R. Collins, Commissioners herein, the sum of $50.00 each for their services in this cause on the 21st, 22nd, 23rd, 24th, and 30th days of July, 1958, and that receipts evidencing payment of such sums be filed with the Clerk of the Court; and it is further

ORDERED that this cause be left open for the entry of such orders as the court shall make hereafter.

Entered: 8/5/58.

WALTER T. McCARTHY, Judge.

SIMMONDS, CULLER, DAMM & COLEBURN
By JAMES H. SIMMONDS
Counsel for Petitioners and
certain Defendants.

JESSE, PHILLIPS, KLINGE &
KENDRICK
By C. S. RUSSELL
Jesse Bldg., Arl., Va.
Counsel for Defendant State
Highway Commissioner.

LEWIS & TOLBERT
By OREN R. LEWIS
Counsel for Bayard Evans, et ux.

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Filed Aug. 7, 1958.

BRUCE GREEN, Clerk
Circuit Court, Arlington County, Va.
By V. LONG, Deputy Clerk.

EXCEPTIONS TO COMMISSIONERS' REPORT.

Now comes F. A. Davis, State Highway Commissioner of

Virginia, by counsel, and, by leave of Court, excepts to the report of the commissioners filed herein on the 30th day of July, 1958, on the ground that the commissioners proceeded upon erroneous principles of law, due to the following rulings of the court, resulting in a grossly excessive award:

1. The commissioners were required to consider a strip of land 10 feet in width and over 200 feet in length, described in the court's order entered herein on December 2, 1957, as having been the property of B. W. Dewey at the time of taking, August 20, 1956, notwithstanding the court's own ruling, in its said order, that the said Dewey acquired the said land by deed on August 22, 1957. The commissioners awarded compensation to the said owners for the taking of the said land, and damage to the residue of the owner's property because of its taking, notwithstanding the fact that the owner had not owned the said land at the time of taking, but had been using it without authority. It is the position of this defendant that the title to the said strip had, at all times pertinent to this cause, been vested in the Commonwealth of Virginia.

2. This defendant was not permitted to show the time or manner of the attempted acquisition of the aforesaid strip by the said Dewey, nor the amount of the consideration paid therefor.

3. Tenants of the property owner, Bayard Evans, et ux., were permitted to intervene in the proceeding and appear before the commissioners, represented by counsel. Their counsel was permitted to cross examine all witnesses offered by this defendant and by the owner, including the owner himself, and to make a separate opening statement and a separate final argument, in which he was permitted to describe the tenant's position in the case and mention the fact that any award by the commissioners would have to be partially alloted to the tenant, by the court, in a subsequent
page 78 } hearing.

4. Evidence was admitted as to changes in gross sales, and consequent business losses, before, during and after construction of the highway improvement, by the tenant as well as by the owner, which gross sales figures necessarily depended upon matters extraneous to the proceeding, which would not have been compensable or admissable if introduced directly, and were too remote and speculative to furnish evidence of damage.

5. Evidence was admitted as to a consideration paid by the Commonwealth of Virginia to a neighboring owner, two years

after the time of taking in settlement of a pending condemnation suit growing out of the same highway improvement project, which evidence was given by an expert witness as a comparable sale furnishing a guide to the value of the land condemned, notwithstanding the fact that the sale was not contemporaneous, was made to settle pending litigation and would not meet the test of fair market value laid down by the court in its instruction on that subject.

6. Evidence was admitted as to price paid by the owner of a neighboring gasoline station, when losing land by the same highway widening, to acquire an adjoining strip of land improved by a valuable office building which must be torn down, in an effort to restore itself to its original area, notwithstanding the fact that such a price did not meet the aforesaid test of fair market value.

7. The court's refusal of instruction "L" enabled the owner to contend for, and recover, the value of the land as enhanced by the general anticipation in the neighborhood, at the time of taking, of the forthcoming highway improvement, notwithstanding the fact that such enhancement was caused by this defendant, and thus compelling the taxpayers to pay an inflated price for the land, caused by the construction of the very improvement which necessitated this condemnation.

8. Although the commissioners were instructed to offset general enhancement by reason of the highway improvement against any damage to the residue, the court's amendment of instruction "J" told the commissioners to reduce such enhancement by any loss in value occasioned by the lawful exercise of the police power by the State Highway Commissioner, such as the construction of median strips in the highway and a limitation of access to the owner's property by the construction of curbs and entrances, notwithstanding the fact that such items are not compensable in a condemnation proceeding.

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9. The court's requirement that the commissioners make separate awards of damages as to each parcel of land (that occupied by the owner himself being "parcel 1," and that occupied by the tenants Evans being "parcel 2") placed an undue emphasis upon the tenant's claim for damages, and caused the commissioners to consider the case as though there were two separate parties to be made whole by the proceeding, and made it impossible to consider the overall change in the value of the owner's property, as a whole, by reason of the taking.

Wherefore this defendant prays that the report of the commissioners be forthwith set aside.

/s/ F. O. DAVIS, ETC.
By Counsel.

* * * * *

page 88 } INSTRUCTION NO. 1.

The Commissioners are instructed that damage to the residue is any loss in value of the property caused by the taking in excess of the value of the land actually taken.

You may use the following formula to ascertain any damage to the residue:

1. Ascertain the fair market value of the entire property immediately before the taking, considering all factors which would have influenced a prospective purchaser at that time.
2. Ascertain the fair market value of the land taken.
3. Ascertain the fair market value of the property remaining to the owners after the taking, considering all factors which would have influenced a prospective purchaser at that time, and also considering any enhancement in value accruing or to accrue to the remaining property, or any portion of it, as a result of the construction work done by the State Highway Commissioner on Glebe Road.
4. Subtract (2) from (1), above. You have obtained a result which is the value of the residue before the taking. Subtract (3) from this result, if (3) is a lesser figure. This difference, if any, is the damage to the residue. If (3) is equal to or greater than the result, then there is no damage to the residue.

You shall make determination as to the hardware store and coffee shop properties separately.

W. T. M.

page 89 } INSTRUCTION NO. A.

The Commissioners are instructed that the only question you are called upon to determine upon the oaths you have taken is the just compensation which the Commonwealth should pay to Bernard W. Dewey in respect of the land taken in fee and the severance damages, if any, to the residue of Bernard W. Dewey's property. Actually there are two separate properties, one occupied by the Dewey Hardware

Store and the other occupied by Evans Coffee Shop. You shall return awards as to each property separately. The land taken from the Dewey Hardware tract is 1,389 square feet and that taken from the Evans Coffee Shop tract is 3,507 square feet.

I further instruct you that since the Commonwealth, and in its behalf the State Highway Commissioner, had the right to appropriate portions of Bernard W. Dewey's properties for highway purposes as has been done, and to widen and generally improve Lee Highway as has been done, you are not authorized to allow Bernard W. Dewey compensation on any theory of unrightful seizure, or merely because the land was taken against his will or over his objection. The just compensation to be determined and awarded by you shall be the fair market value of the land taken, as you shall determine such fair market value, together with the amount of any damages resulting to the residue of Bernard W. Dewey's land by reason of the taking of the portion of land and the use made of it by the State Highway Commissioner.

W. T. M.

page 90 } INSTRUCTION NO. C.

The Commissioners are instructed that the right to compensation for land taken by condemnation, and for severance damage as a result of such taking, became vested in the owner as of the date of taking of the land.

The Commissioners are accordingly instructed that the time at which the right to just compensation accrued to Bernard W. Dewey on account of this condemnation, is August 20, 1956, and it is only with reference to this time, August 20, 1956, that the fair market value of the land taken, and furthermore the amount of severance damages to the residue property are to be determined.

W. T. M.

* * * * *

page 92 } INSTRUCTION NO. G.

The Court instructs the Commissioners that the award need not be unanimous but that the majority of the Commissioners may make an award.

W. T. M.

page 96 } INSTRUCTION NO. K.

The Court instructs the Commissioners that any loss of business, or profits from the business conducted on the subject premises, is not compensable in this proceeding as an item of damage. You may, however, consider a loss of income from the property as it relates to a decline in the overall value of the residue after the taking, if you find that it was caused by the taking. In assessing damages to the residue, you should be concerned only with its overall change in fair market value as a result of the taking, if any, and not with individual items of damage.

W. T. M.

page 94 } INSTRUCTION NO. I.

The Court instructs the Commissioners that although Bayard Evans, and wife are parties to this proceeding as tenants of B. W. Dewey, that no award is to be made to them for their leasehold interest in this case. The Commissioners shall make their award as though B. W. Dewey had an undivided ownership. The Court will then make a division of the award, in another proceeding, among any parties who may be found to have an interest therein.

W. T. M.

page 95 } INSTRUCTION NO. J.

The Court instructs the Commissioners that the channeling of traffic by the erection of median strips in the highway, and the limitations placed upon the ingress and egress of traffic by reason of the erection of curbs and entrances are matters within the lawful exercise of the police power by the State Highway Commissioner. These matters are executed by the Commissioner for the public safety, and are not compensable in this proceeding. You shall not take them into consideration in arriving at a figure representing damages to the residue of the land of Bernard W. Dewey, but you may take it into consideration in determining whether or not there has been any enhancement in the value of such residue by reason of such construction.

W. T. M.

page 96 } INSTRUCTION NO. K.

The Court instructs the Commissioners that the burden is upon the owner of the property condemned to prove by a preponderance of the evidence that there has been damage to the residue of his property. Accordingly, if you find that the evidence weighs in Mr. Dewey's favor in this respect, you shall assess such damages to the residue, less any enhancement, pursuant to the Court's instructions on that subject, but if you find that the evidence weights in favor of the State Highway Commissioner in this respect, or if you find that the evidence is equally balanced, then you shall find no damages to the residue.

W. T. M.

page 97 } INSTRUCTION NO. C.

The Commissioners are instructed that the right to compensation for land taken by condemnation, and for severance damage as a result of such taking, became vested in the owner as of the date of taking of the land.

The Commissioners are accordingly instructed that the time at which the right to just compensation accrued to Bernard W. Dewey on account of this condemnation, is August 20, 1956, and it is only with reference to this time, August 20, 1956, that the fair market value of the land taken, and furthermore the amount of severance damages to the residue property are to be determined.

Amended.

W. T. M.

page 98 } INSTRUCTION NO. D.

The Commissioners are instructed that "fair market value," whenever referred to or mentioned in these instructions, means simply the price in ready cash that a designated piece of property, at a particular time, would presumably bring in a completely voluntary sale, under normal conditions, between a seller willing but not obliged to sell and a buyer willing and able but not obliged to purchase. When I say "price in ready cash" I mean the amount that the property would sell for if the whole price were paid at once, and any different possible price involving credit or time payments

were not taken into consideration. You shall not consider a price which would be paid by a party under a compulsion to purchase, or a price which would be accepted by a seller under a compulsion to sell.

Amended.

W. T. M.

page 99 } INSTRUCTION NO. H.

The Court instructs the Commissioners that any loss of business, or profits from the business conducted on the subject premises, is not compensable in this proceeding as an item of damage. You may, however, consider a loss of income from the property as it relates to a decline in the overall value of the residue after the taking, if you find that it was caused by the taking. In assessing damages to the residue, you should be concerned only with its overall change in fair market value as a result of the taking, if any, and not with individual items of damage.

Amended.

W. T. M.

page 100 } INSTRUCTION NO. I.

The Court instructs the Commissioners that although Bayard Evans, and wife are parties to this proceeding as tenants of B. W. Dewey, that no award is to be made to them for their leasehold interest in this case. The Commissioners shall make their award as though B. W. Dewey had an undivided ownership. The Court will then make a division of the award, in another proceeding, among any parties who may be found to have an interest therein.

Amended.

W. T. M.

page 101 } INSTRUCTION NO. J.

The Court instructs the Commissioners that the channeling of traffic by the erection of median strips in the highway, and the limitations placed upon the ingress and egress of traffic by reason of the erection of curbs and entrances are

matters within the lawful exercise of the police power by the State Highway Commissioner. These matters are executed by the Commissioner for the public safety, and are not compensable in this proceeding. You shall not take them into consideration in arriving at a figure representing damages to the residue of the land of Bernard W. Dewey, but you may take it into consideration in determining whether or not there has been any enhancement in the value of such residue by reason of such construction.

Amended.

W. T. M.

page 102 } INSTRUCTION NO. L.

The Court instructs the Commissioners that in fixing the fair market value of the property taken from Mr. Dewey on August 20, 1956, they must exclude from their estimate of the then fair market value any enhancement in property value which had then been brought about in anticipation of the proposed construction of the highway improvements.

In other words, Mr. Dewey is not entitled to compensation for any increase in the value of his land which may have been brought about, at the time of taking, by anticipation or speculation concerning the proposed highway improvement.

R.

W. T. M.

On behalf of the State Highway Commissioner, exception is hereby noted to the court's refusal of this instruction on the ground that, as tendered, it correctly states the law applicable to this case. It is our position that the condemnor should not be compelled to pay for added value accruing to the condemned property by reason of the very construction project, or the anticipation thereof, which necessitated the taking.

C. S. RUSSELL, p. q.

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DECREE.

This cause came on to be heard this 29th day of December, 1958 upon the papers formerly filed and read herein, upon the report of the Commissioners heretofore filed herein, and upon the written exceptions to the said Commissioners' report filed herein on behalf of Bernard W. Dewey and the State Highway Commissioner whereupon the said exceptions were argued by counsel; and

IT APPEARING TO THE COURT that each of the said exceptions should be overruled and that an order should be entered directing payment of the award and vesting title to the lands involved in this proceeding; it is

ADJUDGED, ORDERED and DECREED that each of the exceptions to the Commissioners' report heretofore filed herein on behalf of Bernard W. Dewey and on behalf of the State Highway Commissioner, be, and the same hereby is overruled; and it is further

ADJUDGED, ORDERED and DECREED that fee simple title in and to the parcel of real property described as:

All of that strip of land approximately 10 feet in width, lying between the old southern boundary of the Fairfax and Georgetown Pike (now called Lee Highway) and the north line of the property conveyed by John Scott to B. W. Dewey, by deed dated January 3, 1938, recorded in Deed Book 427, at page 257, among the land records of Arlington County, Virginia, said 10 foot strip being bounded by the easterly line of the property deeded to said B. W. Dewey from Virginia White, widow, in Deed Book 579, at page 107, among the land records of said County, the southerly side of Fairfax and Georgetown Pike (now called Lee Highway), the westerly line of the property acquired by the Commonwealth of Virginia from John Scott, et ux., recorded in Deed Book 306, at page 432, among said land records, and the northerly line of the property acquired by Bernard W. Dewey from John Scott, et ux., recorded in Deed Book 427, at page 257, among said records,

and decreed by the Court to have been acquired by Bernard W. Dewey from John Scott by deed recorded on July 21, 1957, by decree entered herein on December 2, 1957, and now owned by Bernard W. Dewey, shall be considered to have been condemned in this proceeding, and shall be indefeasibly vested in the Commonwealth of Vir-

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ginia at the time of the payment of the balance of the award in this cause to the persons ultimately entitled thereto; and it is further

ADJUDGED, ORDERED and DECREED that the report of the Commissioners filed herein on the 30th day of July 1958, be, and the same hereby is, confirmed; and it is further

ADJUDGED, ORDERED and DECREED that the State Highway Commissioner pay and deliver to the Clerk of this Court the sum of $13,459.25, that being the difference between the award of the Commissioners and the amount previously paid to the owner pursuant to Consent Decree entered in this proceeding on the 26th day of April, 1957, together with interest on the sum of $12,259.25 (that being the difference between the amount of the original certificate filed by the State Highway Commissioner pursuant to Code Section 33-74, and the total award of the Commissioners herein) at the rate of 5% per annum from October 7, 1955 (the date of the filing of said Commissioner's original certificate) until such payment to the Clerk of this Court. The exceptions of the State Highway Commissioner and of Bernard W. Dewey to the foregoing actions and rulings having been duly noted, such payment to the Clerk, and the acceptance thereof, shall be without prejudice to those and other exceptions duly reserved by the parties herein.

The Court reserves for future determination the respective rights of the parties to this proceeding to share in the aforesaid award after the same shall have been paid to the Clerk of this Court, and reserves for future determination the question of right of certain parties herein to interest on the amount of the award in excess of the amount of the said certificate after such payment to the Clerk of this Court. The State Highway Commissioner, by counsel, duly excepted to the Court's allowance of interest on such excess prior to April 17, 1957, on the ground that interest should not run on sums awarded in excess of certificates filed under former sections 33-70 and 33-74 of the Code of Virginia, prior to the 1956 amendments thereto. The State Highway Commissioner further contends that interest should not run on such excess after payment to the Clerk of this Court, and excepts to the Court's reservation of this question for future determination.

The State Highway Commissioner, by counsel, having indicated his intention to file a Petition for Appeal or writ of error, the Court shall withhold such determinations, and shall

make no distribution of the balance of the award
page 112 } until the final determination of such appeal or
writ of error by the Supreme Court of Appeals,
or until the expiration of the time for perfecting such an appeal, in the event that it be not perfected.

Entered: 12/29/58.

WALTER T. McCARTHY, Judge.

SIMMONDS, CULLER, DAMM & COLEBURN
By JAMES H. SIMMONDS
Counsel for Petitioners
and certain defendants.

JESSE, PHILLIPS, KLINGE &
KENDRICK
By CHARLES STEVENS RUSSELL
Counsel for State Highway Commissioner.

LEWIS AND TOLBERT
By OREN R. LEWIS
Counsel for Bayard Evans, et ux.

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Filed Feb. 25, 1959.

H. BRUCE GREEN, Clerk
Circuit Court, Arlington County, Va.
By V. LONG, Deputy Clerk.

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

NOTICE OF APPEAL.

Pursuant to the provisions of Rule 5:1, Section 4, of the Rules of the Supreme Court of Appeals of Virginia, notice of appeal from the decisions of the Circuit Court of Arlington County in the above-styled cause is hereby given by the defendant State Highway Commissioner of Virginia.

ASSIGNMENTS OF ERROR.

The State Highway Commissioner, pursuant to Rule 5:1, Section 4, of the Supreme Court of Appeals of Virginia, assigns the following errors to the rulings of the Circuit Court of Arlington County in the above-styled cause:

1. The Court erred in requiring the commissioners to consider a strip of land 10 feet in width and over 200 feet in length, described in the Court's order entered herein on December 2, 1957, as having been the property of B. W. Dewey at the time of taking, August 20, 1956, notwithstanding the Court's own ruling, in its said order, that the said Dewey acquired the said land by deed on August 22, 1957. The commissioners awarded compensation to the said owners for the taking of the said land, and damage to the residue of the owner's property because of its taking, notwithstanding the fact that the owner had not owned the said land at the time of taking, but had been using it without authority. It is the position of this defendant that the title to the said strip had, at all times pertinent to this cause, been vested in the Commonwealth of Virginia. (See order entered December 2, 1957, decree entered December 29, 1958, and page 112 of the transcript of testimony taken on October 3, 1957.)

page 115 } 2. The Court erred in failing to hold that the aforesaid strip of land had been impliedly dedicated to public use by a predecessor in title of Bernard W. Dewey. (See transcript of testimony taken October 3, 1957, page 112.)

3. The Court erred in not permitting this defendant to show the time or manner of the attempted acquisition of the aforesaid strip by the said Dewey from John Scott, nor the amount of the consideration paid therefor. (Exceptions to Commissioners report, number 2, filed August 7, 1958.)

4. The Court erred in refusing to allow defendant's exhibit 1 (a plat attached to this defendant's answer filed June 27, 1957) to be introduced into evidence or shown to the commissioners at the trial.

5. The Court erred in refusing to permit any reference to be made to the aforesaid strip of land during the trial, or permitting the commissioners to consider it as a separate piece of property, apart from the other lands of Bernard W. Dewey.

6. The Court erred in denying the motion to strike the intervening petition of certain tenants of the owner filed April 8, 1958. (See order entered June 11, 1958.)

7. The Court erred in permitting Bayard Evans, et ux., tenants of part of the land condemned to intervene in the proceeding and appear before the commissioners, represented by counsel. Their counsel was permitted to cross examine all witnesses offered by this defendant and by the owner, including the owner himself, and to make a separate opening statement and a separate final argument, in which he was permitted to describe the tenant's position in the case and mention the fact that any award by the commissioners would have to be partially allotted to the tenant, by the court, in a subsequent hearing. (Exceptions to Commissioners report, number 3, filed August 7, 1958.)

8. The Court erred in requiring that the commissioners make separate awards of damages as to each parcel of land (that occupied by the owner himself being "parcel 1," and that occupied by the tenants Evans being "parcel 2"), placing an undue emphasis upon the tenant's claim for damages, and causing the commissioners to consider the case as though there were two separate parties to be made whole by the proceeding, and making it impossible to consider the overall change in the value of the owner's property, as a whole, by reason of the taking. (Exceptions to Commissioners report, page 116 } number 9, filed August 7, 1958.)

9. The Court erred in permitting the owner, on cross examination, to introduce evidence of sales of nearby properties made more than two years after the taking, after the completion of the highway improvements which were the subject of this proceeding, which sales reflected the enhancement of values in the neighborhood by reason of such construction, as "comparable sales" tending to show the value of the subject property at the time of taking. (See transcript of testimony taken July 23, 1958, pages 153 and 154.)

10. The Court erred in permitting this defendant's expert witness to be cross examined on the subject of the general knowledge of forthcoming highway improvements in the neighborhood prior to the time of taking, in an argumentative manner tending to show that no enhancement was possible at the time of the taking since such knowledge had become widespread prior thereto. (See transcript of testimony taken July 23, 1958, page 203.)

11. The Court erred in refusing to grant this defendant's instruction "L," which refusal enabled the owner to contend for, and recover, the value of the land as enhanced by the general anticipation in the neighborhood, at the time of taking, of the forthcoming highway improvement, notwithstanding the fact that such enhancement was caused by this defendant, and thus compelling this defendant to pay an inflated price for the

land, caused by the construction of the very improvement which necessitated this condemnation. (Exceptions to Commissioners report, number 7, filed August 7, 1958.)

12. The Court erred in amending this defendant's instruction "J" by the insertion of the final clause thereof (that is, the words following the name: Bernard W. Dewey.) Although the commissioners were instructed to offset general enhancement by reason of the highway improvement against any damage to the residue, the court's amendment of instruction "J" told the commissioners to reduce such enhancement by any loss in value occasioned by the lawful exercise of the police power by the State Highway Commissioner, such as the construction of median strips in the highway and a limitation of access to the owner's property by the construction of curbs and entrances, notwithstanding the fact that such items are not compensable in a condemnation proceeding. (Exceptions to Commissioners report, number 8, filed August 7, 1958.)

13. The Court erred in admitting evidence as to gross proceeds received by the owner from the business personally conducted by him on a part of the subject property, before, during and after the construction of the highway improvement, which gross sales figures necessarily depended upon matters extraneous to this proceeding, which would not have been compensable as a separate item of damage, and were too remote and speculative to furnish evidence of damage or of property value. (See transcript of testimony taken July 24, 1958, page 322.)

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14. The Court erred in admitting evidence as to gross proceeds received by the owner from the business personally conducted by the tenant on a part of the subject property, before, during and after the construction of the highway improvement, which gross sales figures necessarily depended upon matters extraneous to this proceeding, which would not have been compensable as a separate item of damage, and were too remote and speculative to furnish evidence of damage or of property value. (See transcript of testimony taken July 24, 1958, pages 305 and 309.)

15. The Court erred in admitting evidence as to a consideration paid by the Commonwealth of Virginia to a neighboring owner, two years after the time of taking, in settlement of a pending condemnation suit growing out of the same highway improvement project, which evidence was given by an expert witness as a comparable sale furnishing a guide to the value of the land condemned, notwithstanding the fact that the sale was not contemporaneous, was made to settle pending litigation and would not meet the test of fair market value laid down by the court in its instruction on that subject.

(See transcript of testimony taken July 24, 1958, page 349.)

16. The Court erred in overruling the exceptions filed by this defendant on August 7, 1958. (See decree entered December 29, 1958.)

17. The Court erred in confirming the commissioner's report filed on July 30, 1958. (See decree entered December 29, 1958.)

18. The Court erred in requiring this defendant to pay interest on the difference between the amount of the original certificate filed by this defendant pursuant to former Code Section 33-74, and the total award of the commissioners herein, from October 7, 1955, the date of such filing, until payment of the award into court. It is the position of this defendant that interest should not run on sums awarded in excess of Certificates of Deposit filed under former Sections 33-70 and 33-74 of the Code of Virginia, prior to the 1956 amendments thereto, and that interest should not have run on page 118 } such excess amount in this cause except after April 17, 1957, when a new certificate was filed pursuant to the said 1956 amendments. (See decree entered December 29, 1958.)

19. The Court erred in reserving for future determination the question of the rights of the other parties herein to interest on the amount of the award after payment of the same to the Clerk of the said court (which was made on January 7, 1959). This defendant contends that interest should not run on any part of an award after payment thereof to the Clerk of the trial court. (See decree entered December 29, 1958.)

Given under my hand this 25th day of February, 1959.

CHARLES S. RUSSELL
Counsel for State Highway
Commissioner.

JESSE, PHILLIPS, KLINGE &
KENDRICK
By C. S. RUSSELL
Jesse Bldg., Arl., Va.
Counsel for Defendant
State Highway Commissioner.

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Whereupon,

JOHN L. CULLER,

was called as a witness and being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Simmonds:

Q. Mr. Culler, will you please state your name, address and occupation?

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A. John L. Culler, Attorney, Court House Square, Arlington.

Q. Have you made an investigation of the title to the property of B. W. Dewey which is shown on the plat that is now before His Honor?

I think this plat probably ought to be identified, marked Petitioner's Exhibit No. 1.

The Court: All right. It will be so marked.

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

By Mr. Simmonds:

Q. Would you please state, as of the present time, how title to the property on the top of the map designated, "Area to be acquired by the State Highway Department" is held?

A. It is held in the name of the State Highway Commissioner of Virginia by virtue of a certificate of taking, recorded on April 17, 1957, in Deed Book 1288, at page 497.

Q. Prior to the time of recordation of that instrument, who was the owner of that tract of land?

A. Mr. Bernard W. Dewey, by virtue of two acquisitions, one from John Scott in Deed Book 427 at page 257, and the other from Virginia White in Deed Book 579 at page 107.

Q. Do you have the date there?

A. The Virginia White deed was recorded on May 5, 1942. The John Scott and Wife deed was recorded on January 6, 1938.

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John L. Culler.

Mr. Simmonds: Just so we are straight. The only issue before the Court today is the northerly 10 feet of the Scott property, isn't it?

Mr. Russell: That's correct.

Mr. Simmonds: The Commonwealth has actually taken, by a certificate of taking, that northerly ten feet of the White property.

Oct., 1957 page 13 } Mr. Russell: That's right. I was asked to concede that Mr. Dewey had previously owned that. However, I cannot do that. I will concede that he owned all of the rest except for the northern ten feet of the White property which may or may not have been in the Commonwealth at the time it was taken by certificate.

Mr. Simmonds: Well, all right. I won't argue about that.

By Mr. Simmonds:

Q. Mr. Culler, I call your attention to the area lying between the property you have just described and what is shown here as Lee Highway, being a strip of approximately ten feet wide and approximately 185 feet long. Have you made an examination of the land records of Arlington County with respect to that land?

A. Yes, I have.

Q. In whose name is that strip of land at the present time?

A. In my opinion, as a matter of record, it is in the name of Bernard W. Dewey; also known of record as B. W. Dewey.

Q. By what instrument did he acquire that?

A. By virtue of a deed dated August 22, 1957, and recorded in Deed Book 1302 at page 338, on August 22, 1957 from John Scott, widower.

Oct., 1957 page 14 } Mr. Simmonds: At this time, Your Honor, I would like to introduce in evidence as Petitioner's Exhibit No. 2 a certified copy of the deed just referred to by Mr. Culler.

The Court: Petitioner's Exhibit No. 2.

(The document referred to was marked Petitioner's Exhibit No. 2 and received in evidence.)

By Mr. Simmonds:

Q. Prior to that conveyance, Mr. Culler, in whose name was record title to that strip of land?

A. In John Scott as surviving tenant by the entirety.

Q. When did he acquire the property?

John L. Culler.

A. For the last time, he conveyed it—I mean, he acquired it from Helen N. Sandifer on July 20, 1936, in Deed Book 393 at page 378.

Q. From that date until the date of the recordation of the deed marked as Petitioner's Exhibit No. 2, was there any conveyance or dedication of record of that ten feet to the Commonwealth of Virginia?

A. I found no recorded dedication of that area.

Q. Did you find a dedication to anyone?

A. Of that area, no dedication whatsoever.

Q. Now, prior to 1936, you say the property was in the name of Sandifer?

A. Helen M. Sandifer.

Q. When did she acquire it? And from whom?

Oct., 1957 page 15 } A. That is why I used the term "for the last time."

Actually going back, in 1925, in Deed Book 230 at page 405, E. L. Conwell, et al., conveyed the property, including this property, to John Scott and his wife, who, in turn, conveyed it, the same property, or property including this area, to Helen Sandifer in 1930, in Deed Book 309 at 373.

Then, as I stated, Helen Sandifer reconveyed to John Scott and his wife.

Q. Did you find any conveyance or dedication of record of a strip of land in question by Helen Sandifer while she owned it?

A. No.

Q. Did you find any conveyance or dedication of record of the strip in question during the period from 1924 to 1936, when John Scott then owned the property?

A. No, I did not.

Q. Do I understand that, in your opinion, the record title to that strip now is in B. W. Dewey, or Bernard W. Dewey?

A. That's correct, subject to any physical use that the Highway may have made of the property.

Q. But as far as record title is concerned?

A. It is now in the name of B. W. Dewey.

Mr. Simmonds: I think that is all the questions I have.

CROSS EXAMINATION.

By Mr. Russell:

Oct., 1957 page 16 } Q. Mr. Culler, I show you the deed which was introduced as Petitioner's Exhibit 2 and ask you if that is a quit claim or a deed of bargain and sale.

Bernard W. Dewey.

A. In my opinion, it is a deed of bargain and sale in that it uses the words, "of grant."

Q. Does it restrict in its granting clause the interest conveyed to whatever interest is owned by the grantor?

A. If what you are getting at, does it use the words, "all right, title and interest," it does, yes.

Q. Would you read that portion of the words into the record?

A. "Party of the first part does hereby grant, bargain, sell, convey, release, relinquish, with special warranty unto the party of the second part, all of his right, title, interest and claim, either at law or in equity."

Q. What, if any, Federal stamps are shown on this deed?

A. Fifty-five cents.

Q. Can you state what consideration that would import—first, let me ask you if you are familiar with the laws for the apportionment of revenue stamps to value?

A. Yes, I am.

Q. What range of value would that import?

A. That could go to $499.

Q. It would be $499 or less?

A. That's correct.

Q. Consideration for this strip?

Oct., 1957 page 17 } A. You said it differently.

Q. As a matter of fact, Mr. Culler, do you know what the consideration was that was paid for this?

A. Actually, I do not know.

Mr. Simmonds: We will be glad to stipulate it was $50.

The Witness: It was handled in the office but I actually do not know it.

Mr. Simmonds: That's all, thank you.

The Court: You may step down.

(Witness steps down.)

Oct., 1957 page 18 } Mr. Simmonds: Mr. Dewey, will you take the stand?

Whereupon,

BERNARD W. DEWEY,

was called as a witness and, having been previously duly sworn, was examined and testified on his oath as follows:

Bernard W. Dewey.

DIRECT EXAMINATION.

By Mr. Simmonds:

Q. Please state your name and address.

A. Bernard W. Dewey; business address, 4756 Lee Highway, Arlington.

Q. In what business are you engaged?

A. Hardware merchant.

Q. How long have you been engaged in that business at that location?

A. Since March of '38.

Q. Do you own the property at that address?

A. Yes, sir.

Q. When did you acquire it?

A. Well, the settlement date was the second of January, '38.

Q. Was there a store building on it at the time you bought it or not?

Oct., 1957 page 19 } A. No, sir.

Q. Did you build a store building there?

A. Yes, sir.

Q. What was there when you first purchased that property, sir?

A. Well, it was occupied by a trucker. He stored dump trucks and there was probably twelve oak trees on the property.

Q. Now, from whom did you buy that property?

A. John Scott.

Q. Do you know where he was living then?

A. Florida.

Q. Do you know where he is living now?

A. Florida, so far as—

Q. Do you know whether he has lived any place other than Florida?

A. That is the only place I have ever heard of him living.

Q. All right. Mr. Dewey, did you later acquire some additional land west of the property you acquired from Scott?

A. Yes, sir.

Q. From whom did you acquire that?

A. Virginia White.

Q. Do you know about when that was?

A. No, I think it was about '41.

Bernard W. Dewey.

Q. That is not too important here. At the time
Oct., 1957 you erected your store, what improvements did you
page 20 } make other than the store building itself?

A. Well, of course we had to provide parking.

Q. Where did you provide parking?

A. In front of the store to the highway, and some to the west of the store.

Q. Mr. Dewey, I show you a photograph purported to have been taken on March 2, 1956, by Douglas Photographers and ask you if that is a picture of your place of business?

A. Yes, sir.

Q. Is that photograph fairly representative—does that photograph fairly represent the condition of the appearance of your property and adjoining property and the parking lot as of that date?

A. Yes, sir.

Q. Now, would you point out to the Court your hardware store, please?

A. It is the two-story building with the marquee and porch in front of it.

Mr. Simmonds: I would like to offer that in evidence as Petitioner's Exhibit No. 3.

The Court: Petitioner's Exhibit No. 3.

(The document referred to was offered and received as Petitioner's Exhibit No. 3.)

By Mr. Simmonds:

Oct., 1957 Q. Will you describe exactly where this parking
page 21 } area that you constructed was located?

A. Well, it extended from the porch pavement to the hard surface highway.

Q. Will you describe the materials used in that parking area?

A. Well, we graded it at first and put down six inches of bank gravel and top surfaced it with the liquid treatment and gravel, or ground stone, rather.

Q. In what year was that done?

A. That was done immediately after the construction of the building.

Q. In what year was that?

A. '38.

Q. Now, how far down did that extend to the east, toward Glebe Road?

Bernard W. Dewey.

A. It extended a few feet beyond my property line there, the eastern boundary.

Q. Now, referring to that picture, would the eastern boundary of your property be at that store right to the east of your hardware store?

A. That's right.

Q. You say it extended just a few feet beyond that?

A. Yes, sir.

Q. Where did it extend to the west?

Oct., 1957 page 22 } A. Well, as I recall, the first was probably 25 or 30 feet to the west, because we had a line, provided for a line of cars to the west of the building, right.

Q. Now, do I understand that this hard surface which you have described extended all the way to the then-hard surface of Lee Highway?

A. Yes, sir.

Q. Did there come a time when you built a building to the west of your property on the same property you had acquired from Scott?

A. Yes.

Q. What was that called?

A. Evans Coffee Shop.

Q. When was that built?

A. In '39.

Q. And was parking provided in connection with that building?

A. Yes, sir.

Q. Where was that parking provided?

A. To the front and to the west.

Q. What type of parking was provided?

A. Similar to the parking in front of my building. First graded about six inches of gravel and then the treatment on top, ground stone treatment.

Q. Did that parking extend to the hard surface of Lee Highway?

Oct., 1957 page 23 } A. Yes, sir.

Q. Now, how long was the area that you have described used as a parking area?

A. Well, from the time we opened up until the State took it over.

Q. That was in—

A. In connection with the widening of the highway.

Q. Was that the last year?

A. Last year, yes.

Q. I ask you if, after the erection of the Evans Coffee Shop

Bernard W. Dewey.

in 1939, if the parking was done in the manner as shown in Petitioner's Exhibit 3, substantially from that time until the time that the State actually moved in and improved the road in 1956?

A. Yes, except that we had to repair it each year, each Spring—big holes in it—had to repair it and then possibly two times we had to rebuild the whole thing, resurface it, and finally we got to the hard surface treatment.

Q. What do you mean by that? Rather than the macadam you used asphalt on it?

A. That's right.

Q. Who paid for that resurfacing?

A. I did.

Q. Did you pay for the original surfacing?

Oct., 1957 page 24 } A. Yes, sir.

Q. Has the State of Virginia or the County of Arlington ever paid for any part of it?

A. No, sir.

Q. Now, what barrier, if any, did you put up between your parking lot and the hard surface of Lee Highway when you built it?

A. A row of logs pinned down with iron stakes.

Q. How long did they remain there?

A. Oh, several years. I don't know the exact date. Several, five or six years at least.

Q. Were they ever replaced?

A. Yes, sir.

Q. By what?

A. One of the highway crew, whether it was Highway or County, I don't know which—

Q. State Highway or County?

A. That's right.

Q. What did they do?

A. Installed a row of posts.

Q. Are they the row of posts shown in this picture, Petitioner's No. 3?

A. Yes, sir.

Q. Did you request that that be done?

A. No, sir.

Oct., 1957 page 25 } Q. You said you put in a parking lot. For whom was that parking area provided?

A. For my own use, or customers', our own customers.

Q. Was it for the public generally?

A. No, sir.

Bernard W. Dewey.

Q. Has it ever been open to the public generally?
A. No, sir.
Q. Is the Evans Coffee Shop owned by you?
A. Yes, sir.
Q. And it is operated by Mr. Bayard Evans, is it not?
A. Yes.
Q. As a lessee?
A. Yes.
Q. Have you always claimed ownership of the land up to the hard surface of Lee Highway?
A. Yes, sir.
Q. Did you think you owned it?
A. I thought I owned it.
Q. Did anyone else ever make an adverse claim against the property until the State man came in to see you?
A. That was the first I ever heard of it, that ten-foot strip was, had been claimed by the State.
Q. When was that, what year was that?
A. It must have been '55.

Oct., 1957 page 26

Q. What did you do after that claim was made?
A. I immediately began to dig out plats and check on it and see what basis they had for making the claim.
Q. Did any plats that you have show that your property fell short of Lee Highway?
A. No, sir.
Q. And did you have a further plat made after this information was called to your attention?
A. Yes, sir.
Q. Is the plat which has been marked Petitioner's Exhibit No. 1 the plat that was made?
A. Yes, sir.
Q. Thereafter, did you make any efforts to acquire legal title from Mr. Scott to that property?
A. Yes, sir. Well, we checked on it to see since it was a new thing for me, I thought we had better check on it and see who did own it and of course we acquired it.
Q. Did you find that the metes and bounds description of your property came to the line that the gentlman claimed?
A. Yes, sir.
Q. It was after that that you made efforts to acquire the record title to the rest?
A. Yes, sir.
Q. Were you successful in doing so?
A. Yes, sir.

Bernard W. Dewey.

Q. When did you get that?

A. That was in, about six months ago.

Oct., 1957 page 27 } Q. That is the deed that has been referred to by Mr. Scott here recently?

A. Yes, sir.

Q. How much did you have to pay to get it done?

A. Fifty dollars.

Q. Did the State of Virginia or the Highway Department of Virginia ever do anything with respect to that ten-foot of land that is in question until they started the improvements in 1956 to widen Lee Highway?

A. No, sir.

Q. You don't recall anything having been done on that ten-foot strip by the State?

A. First thing was the posts.

Q. But that was at the edge of the hard surface, was it not?

A. That's right.

Q. Mr. Dewey, I show you two other photographs bearing date of March 2, 1956 on the back, and ask you to look at this one and tell me which direction the camera is facing.

A. East.

Q. From what point on this map would that be taken? Would that be the left-hand edge of the map here?

A. Yes, sir.

Q. At the westerly, nearly the westerly corner of your property?

Oct., 1957 page 28 } A. That's right.

Q. All right, sir. Does that photograph fairly represent the condition of the property in 1956, March of 1956?

A. Yes, sir.

Mr. Simmonds: I ask that that be admitted in evidence as Petitioner's 4.

Mr. Russell: I have no objection to the admission of this picture but this objection goes to all of them, as showing the improvements to which Mr. Dewey has testified. I certainly do not want these pictures to be considered as showing where the ten-foot strip which is in dispute is located. They are not surveys and there is no way that the area can be shown from those pictures.

The Court: No. 4.

Bernard W. Dewey.

(The photograph referred to was offered and received as Petitioner's Exhibit No. 4)

By Mr. Simmonds:

Q. Mr. Dewey, I show you Petitioner's Exhibit 4 and ask you if the cars have parked substantially in that fashion since you built the Evans Coffee Shop?

Q. Now, the cars in the foreground of that picture are located on the property you got from Virginia White, are they not?

A. Yes, sir.

Oct., 1957 page 29 } Q. Then, are the cars that are located immediately in front of the Evans Coffee Shop, are they located on property that you got from John Scott or thought you got from John Scott?

A. Yes, sir.

Q. Have cars parked substantially in that fashion since the parking lot was built?

A. Yes, sir.

Mr. Simmonds: I believe that is all the questions I have. Your Honor, I would like to have this deed from John Scott to Bernard W. Dewey, dated January 3, 1938, admitted evidence as Petitioner's Exhibit No. 5.

Mr. Russell: No objection.

The Court: No. 5.

(The document referred to was offered and received as Petitioner's Exhibit No. 5.)

Mr. Simmonds: That is all.

Mr. Russell: Off the record.

(Discussion off the record).

CROSS EXAMINATION.

By Mr. Russell:

Q. Mr. Dewey, you say that the State erected the row of guard posts that you mentioned?

A. It was either the State crew or County. I never—

Oct., 1957 page 30 } Q. It was some public authority?

A. That's right.

Bernard W. Dewey.

Q. That is on this disputed ten-foot strip, is it not, that row of posts?

A. It is on the edge of it, the outer edge next to the hard surface.

Q. Right. But it was, they did not break into the old surface of Lee Highway, didn't put it out in the highway? They put it—

A. Right on the edge.

Q. On the edge of your parking lot?

A. That's right.

Q. As to the parking area which you have described, will you tell us how cars got in and out of that?

A. Well, we provided an entrance on the—well, on the western side of the property where the store is. That is just immediately to the west of the store.

Q. Between the store property and the coffee shop property?

A. That's right.

Q. Could cars get from the store parking area to the coffee shop parking area without going back out into Lee Highway?

A. Only two or three of them. We provided another entrance for the coffee shop to the west of the coffee shop.

Oct., 1957
page 31 } Q. Really, their parking lot was separate from the store parking area, was it not?

A. It was tied in because originally and for many years there was front parking by straight drive-in. That was immediately in front of the coffee shop. Those cars backed out into the highway when they left the parking lot.

Q. Well, directing your attention back to the parking lot in front of the store, isn't it true that that parking lot had an entrance at the westerly end of it and exit at the easterly end?

A. Not an exit on my property. That was on adjoining property.

Q. That's correct. That parking lot actually served the adjoining property as well, did it not?

A. That's right.

Q. It was parking in common for all of the merchants in that block of stores, is that not right?

A. Yes, private parking for the customers.

Q. And was it not necessary for cars to enter at the westerly end and to leave at the easterly end? Wasn't one denominated an entrance and the other an exit?

A. That's right, sir.

Bernard W. Dewey.

Q. So that a car which came in, a car bringing a customer to your store would enter at the westerly end and park somewhere in that lot and he would then leave down at the easterly end on a point which was property of the adjoining owner, is that right?

Oct., 1957
page 32

A. That's right.

Q. Did you and the adjoining property owners cooperate in the construction of these improvements?

A. Only to the extent that we each took care of our own and tried to have it uniform.

Q. However, isn't it true that whenever a resurfacing was done it was not limited to the lot in front of a particular store, it was done in front of all the stores at the same time?

A. No, sir.

Q. You would do it in front of one store at a time?

A. I did it several times when my neighbors didn't.

Q. In the initial surfacing was that not done at the same time in front of all the stores?

A. The original?

Q. Yes.

A. No, because the stores to the east were not built until a year or so later.

Q. Did there ever come a time when you did surface in common with the others, all at one time?

A. I think at one time.

Q. Now, was there any regulation that an automobile bringing a customer to your store had to park on your property?

Oct., 1957
page 33

A. No, sir.

Q. It was satisfactory to your abutting owners that he park in front of the one of the adjoining stores if he couldn't get in front of your store, and *vice versa?*

A. It would be physically impossible to control them.

Q. It was for the common use of all the merchants in that block of stores?

A. Yes, sir.

Q. For the customers of those merchants. Was there any attempt made to prevent parking in that area of people going to other stores, say across the street?

A. No, sir.

Q. As an actual matter, any casual passer-by could pull in there and park, as reprehensible as that might be he still might have used it?

A. For a limited time.

Q. Until someone found him out?

Bernard W. Dewey.

A. Of course, we are watching all the time.

Q. You did not have any sort of guard out there for that purpose, did you?

A. No more than what we did ourselves.

Q. You would have no doubt, would you, that there were occasions on which people did use your parking lot who were not going into any of the stores in that block?

A. Many, many times. We find it once in a while, you know.

Oct., 1957
page 34 } Q. Do you know, Mr. Dewey, if there are any gas or water mains under this parking lot?

A. Only to the stores, no public lines.

Q. I understand that. But these utility mains do in fact pass under that lot, don't they?

Mr. Simmonds: I would like to make it clear. Do you have reference to mains running parallel with Lee Highway or those laterally running into the stores. You mentioned those going into the stores. Are you talking about those or the ones that are running parallel to Lee Highway?

Mr. Russell: I will ask him to make that distinction, then.

By Mr. Russell:

Q. Are there any mains that parallel the highway which lie at the area which is disputed here?

A. Not that I know of.

Q. You have described, have you not, a row of posts which initially was erected by some public authority to separate the parking area from the then-used part of the highway?

A. That's right. They put those on the same line that we had had logs previously.

Q. Now, did that row of posts not continue on past your property on down into the property of the adjoin-

Oct., 1957
page 35 } ing owners?

A Yes, sir.

Q. In other words, it separated the whole parking lot from one end to the other from the then-traveled part of the highway?

A. Yes, sir. It was all on one line.

Q. Were those posts painted or unpainted?

A. Painted.

Q. How were they painted?

A. White with a black cap, I think.

Bernard W. Dewey.

Q. Was it not reflective type of paint that is ordinarily used for highway posts, like the posts that support stop signs?
A. That I could not state. It was white paint.
Q. They were safety posts to keep cars from, for instance at night, driving through your lot thinking it was part of the highway?
A. Yes, sir.
Q. The type of structure that you commonly consider a guard rail along the road in the country?
A. Similar to that, yes, sir.
Q. Were they connected by a cable or any such?
A. No, sir.

Mr. Russell: That's all.

RE-DIRECT EXAMINATION.

Oct., 1957 By Mr. Simmonds:
page 36 } Q. Let me ask you one question. Did you do anything about persons other than the customers of the stores parking there?
A. Yes, sir.
Q. What did you do?
A. We were after them all the time to prevent them from parking there.
Q. In other words, you tried to limit it to the customers of the stores as far as you could?
A. We called them violators, of course.
Q. What specific acts did you do as far as they were concerned?
A. Well, after several attempts at different types of notes put on their windshield, you know, courteous notes seemed to get best results so we used that, a request for them not to park.
Q. What was the nature of the notice that you put on the cars?
A. We pointed out the fact that it was provided for customers, our private customers, and we would appreciate them abiding by that rule.

Mr. Simmonds: That is all the questions.

(Witness steps down.)

Thereupon,

FRED A. GOSNELL,

Oct., 1957
page 37 } was called as a witness and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Simmonds:

Q. Will you please state your name and address?

A. Fred A. Gosnell, Sr., 5106 Columbia Pike is my home address.

Q. What business are you engaged in?

A. Part-time realtor.

Q. How long have you been engaged in the real estate business in Arlington County?

A. Thirty-two years.

Q. Mr. Gosnell, are you familiar with the properties in the area of Glebe Road and Lee Highway, Arlington, Virginia?

A. Yes, I am.

Q. Did you ever own any property in this area?

A. Yes, in 1930 or 1931, Mr. Mace and I bought 200 feet along Lee Highway and 120 feet along Glebe Road where the Gulf Station is now, and the People's Drug Store.

Q. Would that property be the property immediately east of the property that Mr. B. W. Dewey acquired from John Scott?

A. It is.

Q. I show you this map or plat which is in evidence as Petitioner's Exhibit No. 1 and ask you if the area you just described is partly shown on the right-hand side of the map.

Oct., 1957
page 38 } A. Is this Lee Highway?

Q. Up here at the top.

A. It was this property in here (indicating).

Q. Now, Mr. Gosnell, at the time you bought that property, was there any, were there any improvements on the property to the west which Mr. Dewey bought from Mr. Scott?

A. Not that I remember of.

Q. Would you recall the time when a store, hardware store, was erected by Mr. Dewey on his property?

A. I do.

Q. I show you Petitioner's Exhibit No. 3 and ask you if that is shown in that picture? If so, which store is it?

Fred A. Gosnell.

A. Two-story store.

Q. With a portico in front of it?

A. With a portico in the front, that's right.

Q. Now, at the time that that store was built, do you recall whether there was any parking area provided with it, or built?

A. There was at the time the store was built, as I remember it, yes, sir.

Q. Would you describe the area that that parking area included?

A. It included a strip, I would say, somewhere from 40 to 50 feet wide in front of the stores and extending out to the paved line of Lee Highway.

Oct., 1957 page 39 } Q. Will you describe how the cars used that area?

A. I believe that at that time they started, entered the parking area from the west, traveling east on Lee Highway and came out on the east end of the other property.

Q. Do you know whether there was one or two lanes of parking?

A. Part of the way there was two lanes, as I recall it, and part of the way only one.

Q. Again referring to Petitioner's Exhibit No. 3, which is a photograph taken in 1956, I ask you if that is substantially the manner in which cars have parked there since the buildings were built?

A. Yes, it is.

Q. Do you know how long after Dewey's Hardware Store was built that the stores shown to the east of it were built?

A. Probably two or three years, not more than that, with the exception of the Gulf Station there. That was built early in 1930, I think, or '31.

Q. Now, I show you Petitioner's Exhibit No. 4 which is a view looking east from the westerly end of Mr. Dewey's property on which the Evans Coffee Shop and parking lot are located, and ask you if that is the cars shown there, have been parked substantially in the same manner as far as you can recall, since they were built.

A. I believe so, yes.

Q. Have you kept in touch with the properties in that area, Mr. Gosnell?

Oct., 1957 page 40 } A. Yes, I have. I have been familiar with it for many, many years.

William H. Preston.

Q. Do you know of any improvements made along the south side of Lee Highway up until the time that this widening of Lee Highway took place last year?
A. You mean the highway improvements or—
Q. Yes, sir.
A. I don't recall of any whatsoever, no.
Q. All right, sir. I think that is all. Incidentally, do you know Mr. John Scott?
A. Yes, I do.
Q. Do you know where he lives?
A. He lived in Florida the last I heard about him, which was about 1933 to '35.
Q. Was that his permanent residence as far as you know?
A. It was at that time, yes.
Q. He was living there when you bought your property from him?
A. That was in 1930, I believe.

Mr. Simmonds: No further question.
Mr. Russell: No further questions.
Mr. Simmonds: Thank you, Mr. Gosnell.

(Witness steps down.)

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Oct., 1957
page 41 } Whereupon,

WILLIAM H. PRESTON,
was called as a witness and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Simmonds:
Q. Will you please state your name and address?
A. William H. Preston, 4740 Lee Highway.
Q. What is your occupation?
A. Retail pharmacist.
Q. Do you have a drug store in the area of Lee Highway and Glebe Road?
A. Yes, sir.
Q. How long have you been operating a drug store in that area?

William H. Preston.

A. Since December '35.

Q. Where were you first located in that general area?

A. I was first located opposite this property known as the Bakery, I believe.

Q. You were in the property that is now occupied by a bakery?

A. Directly opposite this property in question.

Q. All right. How long did you stay there?

A. Approximately two years.

Oct., 1957 page 42 } Q. Then where did you go?

A. Moved to 2213 North Glebe Road. That is at the corner, northeast corner of Glebe Road.

Q. In the northeast corner of Glebe Road and Lee Highway?

A. That's correct.

Q. About how far is that from the property in question?

A. Probably half a block.

Q. Then did you move to another location from there?

A. In '44 I moved to the southeast corner of Glebe Road and Lee Highway.

Q. You are still there, are you not?

A. Still there.

Q. So you have been engaged in the drug business within half a block of the property in question continuously since 1935?

A. That's correct.

Q. Do you recall when Dewey's Hardware Store was built?

A. Yes, I do.

Q. And do you recall whether or not a parking area was built at that time?

A. Yes, there was.

Q. And where did that parking area extend?

A. Well, it extended from a porch and store out to Lee Highway, the cement Lee Highway.

Oct., 1957 page 43 } Q. Hard surface?

A. Hard surface, right.

Q. Do you know whether it has been continuously used as a parking area since that time until a road was built in 1956?

A. It has been.

Q. Do you know who parked there?

A. Well, of course, it was for stores, Mr. Dewey's customers?

Q. In the stores that you have had, the last two stores, did you provide parking?

William H. Preston.

A. Yes.
Q. Was that regarded as parking for your customers?
A. Yes, sir.
Q. Now, do you recall when Evans Coffee Shop was built immediately west of Mr. Dewey's store?
A. To my recollection it was probably a year or so after the hardware store.
Q. Do you know whether any parking area was provided in connection with that?
A. Yes, sir, there was.
Q. Where was that parking area?
A. It was to the west and on the front.
Q. Was there a parking area in front of Evans Coffee Shop, also?
Oct., 1957 page 44 } A. At least room for one row of cars in front.
Q. Did cars park in front of Evans Coffee Shop as well as on the side from the time it was erected?
A. As I recall it, yes.
Q. I show you Petitioner's Exhibit No. 4 which is a photograph looking east, taken from near the westerly corner of the Coffee Shop property, and ask you if that shows substantially the manner in which cars have parked there since the Coffee Shop was built.
A. It does.

Mr. Simmonds: I think that is all the questions I have.
The Court: When did you say that the Evans Coffee Shop was built?
The Witness: Soon after the hardware store, within a year or so, to the best of my recollection.

CROSS EXAMINATION.

By Mr. Russell:
Q. Dr. Preston, you occupy property which was affected at the same time by this widening of Lee Highway; is that not correct?
A. Yes, sir.
Q. Can you tell us the approximate date when that physical work was done, when it began?
A. You mean at the corner I occupy?
Oct., 1957 page 45 } Q. Really I am thinking of in front of Mr. Dewey's property, if you can recall. It should have been about the same time.
A. To the best of my memory, it seems to me

that work started around the corner in June of '56, early July, about that time, at least.

Q. During the summer of '56, it would be true that this parking area was completely covered by highway, the Commonwealth moved in over it?

A. Yes, that's true.

Mr. Russell: That's all; thank you.

Mr. Simmonds: If Your Honor please, I thought I asked Mr. Dewey when Evans Coffee Shop was built. If I didn't I would like him to state it for the record.

The Court: You may step down.

(Witness steps down.)

Whereupon,

BERNARD W. DEWEY,

resumed the stand, and, having been previously duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION.

By Mr. Simmonds:

Q. Mr. Dewey, will you state when Evans Coffee Shop was built?

A. First section of 1939, November.

Oct., 1957 page 46

Q. When was the parking area built in connection with the first unit of Evans Coffee Shop?

A. Immediately when it was finished.

Mr. Simmonds: Thank you, sir.

(Witness steps down.)

The Court: Next witness.

Mr. Simmonds: Mr. Armstrong.

Whereupon,

ADAM ARMSTRONG,

was called as a witness and being first duly sworn, was examined and testified as follows:

Adam Armstrong.

DIRECT EXAMINATION.

By Mr. Simmonds:

Q. Will you please state your name and address?

A. Adam Armstrong, 2251 North Burlington Street, Arlington.

Q. Mr. Armstrong, were you formerly employed by Mr. Dewey?

A. Yes, sir.

Q. In what capacity?

A. Clerk-bookkeeper.

Q. Did you work at his hardware store located on Lee Highway?

A. I did.

Q. When did you first start working there?

A. In June 1938.

Q. Now, at that time, would you tell the Court whether or not there was a parking lot in front of Dewey's Hardware Store?

Oct., 1957 page 47

A. Yes, sir.

Q. Where did that extend?

A. From the porch to the edge of the highway.

Q. How did the cars park in there?

A. Well, there was two rows of cars, two lines; one in front of the store and one immediately, directly, in front of Lee Highway.

Q. How long did you work for Mr. Dewey?

A. From June 1938 until December 1, 1950.

Q. During that period of time did cars continue to park in that area as you have described?

A. They did.

Q. Have you been by there since that time?

A. I have, yes, sir.

Q. Do you know whether or not they continued to park in that manner until the State widened the highway in 1956?

A. They did, yes, sir.

Q. Do you recall when Evans Coffee Shop was built, first unit?

A. First unit was built in 1939.

Q. Do you know whether the parking area was provided for that?

A. In front of the store, in front of the Coffee Shop, and also west of the Coffee Shop.

Oct., 1957 page 48

Q. Where did the area in front of the shop extend?

A. You mean to Lee Highway?

Q. Yes, sir. Does it extend to the hard surface of Lee Highway?
A. Yes, sir.
Q. And then, I think it was later, was it not, that additional parking was acquired on the west side?
A. That's right.
Q. Of Evans?
A. Yes.
Q. Do you know who maintained the parking lot in front of Mr. Dewey's property?
A. Who kept it up?
Q. Who paid to take care of it?
A. Mr. Dewey.
Q. You were bookkeeper there?
A. That's right.
Q. You know that he paid the bills?
A. Well, he paid his bills; that was more or less his private—let's see, that come out of his store bill, that's right.

Mr. Simmonds: I have no further questions.
Mr. Russell: No questions.
The Court: You may step down.

(Witness steps down.)

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page 49

* * * * *

Whereupon,

HENRY S. CLAY, JR.,
was called as a witness and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Russell:
Q. Would you state your name, please?
A. Henry S. Clay, Jr.
Q. Profession?
A. Attorney, title examiner.

Mr. Russell: May we have a stipulation that Mr. Clay

is a qualified expert in the field of real estate law and title examination?

Mr. Simmonds: Yes.

By Mr. Russell:

Q. Mr. Clay, have you had an opportunity to examine the deeds and the chain of title to the property now owned by Mr. B. W. Dewey on Lee Highway in Arlington County, Virginia?

A. I have.

Q. Have you had occasion to make a plat of the descriptions as given in those deeds to scale?

Oct., 1957 A. I have.

page 50 } Q. I show you a plat and ask you if you made this?

A. I did.

Q. Would you tell the Court how you made it? What did you use as the basis for your information in making it?

A. I used, secured, the description in the deed to Mr. Scott. I have made this from the recorded descriptions in the deed in to Mr. Scott, the various deeds out of Mr. Scott and including the one into Mr. Dewey. The deed from Mrs. Virginia White into Mr. Dewey and the several deeds of trust that Mr. Dewey has placed on this property since he has owned it.

Q. Then the land shown on this plat is a projection to scale of the descriptions in deeds rather than result of a physical survey of the land: is that correct?

A. Absolutely. Right.

Q. And what is the scale of this property?

A. 25 feet to the inch.

Mr. Russell: I would like to introduce this, Your Honor. We have other copies that counsel can refer to for convenience.

The Court: Defendant's A.

(The document referred to was received Defendant's Exhibit A.)

Mr. Simmonds: I take it that you will have him testify as to the various notations on that plat, will you not?

Mr. Russell: Yes, we will. We have four copies; they are identical.

Oct., 1957
page 51 } By Mr. Russell:

Q. Mr. Clay, would you begin with the deed into Mr. Scott from which you started this plat and give any information from that which is pertinent to the plat?

A. By deed dated October 29, 1924, E. L. Cockrell, unmarried, and Allee D. Smith, widow, conveyed to John Scott and Rachel J. Scott, as joint tenants with right of survivorship, a tract of land in Arlington County containing 8.646 acres, and that is the land within the entire—that is the entire boundary of the land on this map with the exception of the parcel marked Virginia White at the upper left-hand corner.

In this deed there is only one course that I say shows any light on this particular property.

If you will note on the plat, at the southeasterly corner of the Virginia White parcel, you will see a stone. The description coming into that point says: thence north 79 degrees 28-1/4 minutes east, 284.28 feet to a point distant easterly 1.37 feet from a stone.

Thence north, 49 degrees, 12 minutes west, 152.3 feet to a point in the south line of the Georgetown-Fairfax Road; thence with the line of said road north 65 degrees 19 minutes east, 397.89 feet to the point of beginning.

This description began at the intersection of the west line of Chain Bridge and Alexandria Road, now known
Oct., 1957 as Glebe Road, and south line of the Georgetown
page 52 } and Fairfax Road, now known as Lee Highway.

Q. This deed showed the boundary of the John Scott conveyance as being 1.37 feet east of a stone, which stone is shown on your plat?

A. That's right.

Mr. Russell: I should like to introduce in evidence this deed which appears of record in Deed Book—

The Witness: I think Mr. Culler has already testified to that deed.

Mr. Russell: I don't have that deed book reference, Your Honor, by the page, but the date of the deed is October 29, 1925, and it was duly recorded among the land records as shown by the Certificate of the Clerk, bearing the signature of Judge H. R. Thomas, 12/14/25.

Mr. Simmonds: I think it is 230, page 405.

Mr. Russell: The page is right.

Mr. Simmonds: Your Honor, I would like to reserve any

exceptions that we might have as to declarations in the deed, but for the time being it might as well go in evidence.

The Court: It will be marked Exhibit B.

(The document referred to was marked Defendant's Exhibit B and received.)

By Mr. Russell:

Q. Mr. Clay, that deed shows as its courses, the outside boundaries of the tract on this plat all the way

Oct., 1957 around with the exception of the Virginia White

page 53 } parcel; is that right?

A. That's correct.

Mr. Russell: Does Your Honor understand what we mean by the Virginia White parcel on this plat? That is this (indicating).

The Court: Starting point at this point here (indicating).

Mr. Russell: Actually, it started at this point at the corner but it came back to that point 1.37 feet distant from the stone.

Mr. Simmonds: Your Honor, just so we may have it in the record with respect to Exhibit A, in not objecting to its being put in evidence, I want it clearly understood that I am not admitting to the correctness of the legends that have been placed on there by Mr. Clay, and I have particular reference to something he called the south line of Lee Highway.

By Mr. Russell:

Q. Would you proceed with the next deed in the chain?

A. The next deed which I have platted on here, the next, is a deed from Mr. John Scott and wife to the Commonwealth of Virginia, dated December 31, 1929, recorded in Deed Book 306 at page 432 among the land records. That deed conveyed parcel indicated as being substantially 10 feet in width around the corner from the northeast corner of the prop-

Oct., 1957 erty.

page 54 } Shall I read that description?

Q. Does that convey a strip of land of the approximate width of 10 feet along Lee Highway and also along Glebe Road?

A. That does.

Q. It extends along Lee Highway from the corner of Glebe Road and Lee Highway, westerly to the tract later conveyed to John Scott; is that correct?

Henry S. Clay, Jr.

A. The description runs in a clockwise direction, beginning at a point in the south line of the Fairfax-Georgetown road, now Lee Highway, where the line of said road is intersected by the original west line of Glebe Road, thence with the west line of said original Glebe Road south 34 degrees and 58 minutes 30 seconds east, 129.23 feet to a point; thence south 55 degrees, 0 minute and 30 seconds west 9.88 feet to a point in the west line of Glebe Road as the same has been marked by monuments which had been placed by the State; Deed Book 306, page 432, 12-31-29.

Q. Thence—

A. Thence with said established line, north, 34 degrees, 52 minutes west, 120.80 feet to a point to the new south line of Lee Highway as the same is hereby established, having passed north 34 degrees, 52 minutes west, 24.3 feet from one of the State Highway Commissioner's monuments.

Oct., 1957
page 55 } I did not show that on this plat.

Thence with the south widened line of Lee Highway, south 65 degrees, 8 minutes, 30 seconds west, 200 feet to an iron pipe; thence north 34 degrees, 58 minutes, 30 seconds west, 10.16 feet to a point in the south line of the original Fairfax and Georgetown Road; thence with a part of said south line of Fairfax-Georgetown Road north 65 degrees, 08 minutes, 30 seconds east, 209.82 feet to a point of beginning and containing 3,269 square feet.

The above conveyance is made for the purpose of dedicating the above strip of land for, and shall be used only for, public highway purposes.

Mr. Russell: I should like to introduce that.

Mr. Simmonds: If Your Honor please, I object to that deed in so far as the declarations contained in that deed are concerned because it is not in the chain of title to the Dewey property and the declarations and the inferences drawn from those declarations, from the emphasis placed by Mr. Clay, by stating widened Lee Highway and newly-established line of Lee Highway. I don't have any objection to the conveyance itself, but, as I say, I will call to Your Honor's attention that in so far as there are any declarations concerned in there, we are not bound by such declarations.

Mr. Russell: If the Court please, we are at-

Oct., 1957
page 56 } tempting to show an implied dedication of adjoining land to this by Mr. Scott. It is true this is not in the chain of title. However, the implied

dedication can only be shown by a showing of Mr. Scott's intent. The words that he uses in this, his deed, we think are indicative of his intent at that time and it is offered primarily for that purpose and to show the general history of the surrounding land.

Mr. Simmonds: If Your Honor please, of course, it is hearsay as far as Mr. Scott is concerned, and I don't believe that, unless it is in this chain of title, it comes within the exceptions to the hearsay rule of declarations in a deed binding subsequent purchasers.

Mr. Russell: Irrespective of whether Mr. Dewey is bound by this deed, this deed would be admissible in spite of its hearsay element because of the statute which makes deeds duly certified as generally admissible for statements which they contain.

Mr. Simmonds: I don't think it is for the statements they contain, Mr. Russell. I think it is all right for the conveyance itself and maybe we can argue that later, if Your Honor please. I think the deed ought to go in subject to later ruling by the Court.

The Court: It will be marked Exhibit C.

(The document referred to was marked Defendant's Exhibit C and received.)

Oct., 1957 page 57 } The Witness: The next deed which is platted on this, shown on this plat, is a deed from John Scott and wife to Mervin A. Mace, dated January 1, 1930, and recorded in Deed Book 306 at page 434, one day later than the last-mentioned deed.

This was a corner *pierce* shown on the plat, upper right-hand corner beginning at a point where the west line of the Glebe Road, as said line has been established by monuments set by the State Highway Commission of Virginia, is intersected by the south widened line of the Lee Highway, said point of beginning being north 34 degrees 52 minutes west, 24.33 feet from one of said monuments, thence following along said west line of said Glebe Road, south 34 degrees 52 minutes east 120.80 feet to an iron pipe in the north line of a proposed alley which is 15.00 feet wide; thence following along the north line of said proposed alley, south 55 degrees 01 minutes 30 seconds west 196.68 feet to an iron pipe; thence departing from said proposed alley, north 34 degrees 58 minutes 30 seconds west 155.93 feet to a point in the south widened line of the Lee Highway and in a line which is ten

feet south of the south line of the original Fairfax and Georgetown Road; thence parallel with said Fairfax and Georgetown Road but following along the south widened line of said Lee Highway, north 65 degrees 08 minutes 30 seconds east 200.00 feet to a point of beginning, containing 27,231 square feet and being a part of the land which by deed dated
Oct., 1957 October 29, 1925, and recorded in Deed Book 230
page 58 } page 405 of the land records of Arlington County, Virginia, was conveyed by E. L. Cockrell, et al., to John Scott, the land herein conveyed being indicated on the plat hereto attached and made a part of this deed.

Q. The plat which is made a part of that deed shows, does it not, that the Lee Highway had been widened by ten feet at the time of this conveyance?

A. That's right.

Mr. Russell: I would like to introduce this.

Mr. Simmonds: I would like to make the same objection that I did to the other.

The Court: Exhibit D.

(The document referred to was received, Defendant's Exhibit D.)

By Mr. Russell:

Q. That last deed conveyed the area which is now the filling station at that corner, did it not?

A. That would be the filling station and the stores, including the grocery store to the east of Mr. Dewey's property, the block of stores between his hardware store and the filling station.

Q. All right, sir.

Would you pass on to the next deed?

A. The next deed, I think, is already in evidence,
Oct., 1957 but we may put it in evidence again, dated January
page 59 } 3, 1938, from John Scott and wife to Bernard W. Dewey. Recorded in Deed Book 427 at page 257.

Q. That deed is in evidence, I believe, as an exhibit for the Petitioner, Petitioner's 5. We will not introduce this deed but merely refer to it. If you would go along with the description in that deed, it would be helpful.

A. Beginning at an iron pipe in the south line of the Lee Highway, distant south 65 degrees, 17 minutes, 30 seconds west, 200 feet from the southerly intersection of Lee Highway and Glebe Road; thence departing from the south line of

Henry S. Clay, Jr.

Lee Highway and running with the west line of a tract of land conveyed to Mervin A. Mace, south 34 degrees, 45 minutes, 30 seconds, east, 155.93 feet to an iron pipe in the north line of a 15-foot alley; thence along the north line of said alley, south 74 degrees, 37 minutes, 30 seconds, west, 157.75 feet to a stone; thence departing from said alley north 49 degrees, 0 minutes, 30 seconds west, 140.57 feet to an iron pipe in the south line of Lee highway.

Q. Now, at that point, Mr. Clay, in scaling off that distance from the stone, 140.57 feet—in scaling that off from the stone, do you come out to the northernmost line of the plat or the line which you have marked in red on the plat?

A. That would fall some 13 feet short of the former call on that line of 153.67 feet.

Oct., 1957 page 60 } In other words, when Mr. Scott purchased the property, that line was 153.67 feet long and his deed to Mr. Dewey, the call is 140.57.

So that falls to the second line along Lee Highway. That is the southernmost one of those two lines.

Q. Which is the one you have marked in red; is that correct?

A. That is correct.

Q. Now, projecting the distance between those two lines on a perpendicular dropped between the two, what would be the approximate distance between them?

A. I have a scale here. That is approximately 10 feet.

Q. All right, sir.

Would you then continue with the description?

A. Right.

Thence along the south line of Lee Highway, north 65 degrees, 17 minutes, 30 seconds east, 185.31 feet to the point of beginning.

Subject to taxes for the year 1958, also to revisions on record, also subject to any conveyance to the Commonwealth for highway purposes.

Q. Now, that last course which ran from the point which was 10 feet south of the original boundary of the Scott property back to the point of beginning, is that course not described, that final course not described as the south

Oct., 1957 page 61 } line of Lee Highway; is that not what you said in that deed?

A. Thence along the south line of Lee Highway.

Q. Thank you.

That being already introduced as an exhibit, we will not introduce it.

Henry S. Clay, Jr.

Would you proceed with the next deed in the chain?

A. Then from examination of Mr. Dewey's land, it appears to have been subdivided by deeds of trust, if I may say so, this parcel of land, into three parts. In other words, there are three sets of deeds of trust on record, each one of which describes the same, each deed of trust and each set describing the same, parcel of land.

The first of these is a deed of trust dated April 15, 1938, recorded in deed book 432 at page 378, from Mr. Bernard Dewey and wife to J. D. Eason and R. E. Ankers, trustees, given to secure indebtedness in the sum of $16,000, and this deed of trust evidently has been satisfied as it is now released of record on the margin.

The description used in this deed of trust is the interesting point. It conveys all that certain property, all that certain piece, parcel, lot or tract of land, situate, lying and being in Arlington County, Virginia, particularly known and described by metes and bounds as:

"Beginning at a point in the new south line of Lee Highway, said point being south 65 degrees, 17 minutes, 30 seconds west, 200 feet from a point determined by the intersection of the new south line of Lee Highway, and the new west line of Glebe Road; thence departing from the new south line of Lee Highway south 34 degrees, 45 minutes, 30 seconds east, 155.93 feet to an angle point in the north line of a 15-foot alley; thence with the north line of said alley, south 74 degrees, 37 minutes, 30 seconds west, 63.24 feet to a point; thence departing from said alley, north 24 degrees 42 minutes, 30 seconds west, 143.1 feet to a point in the new south line of Lee Highway; thence with the new south line of Lee Highway north 65 degrees, 17 minutes, 30 seconds east, 63.19 feet to the point of beginning, and being, a part of the property conveyed to said Bernard W. Dewey by deed dated January 3, 1938, Deed Book 427, page 257 of said land records."

Oct., 1957 page 62

Q. In platting that description, Mr. Clay, does that describe the parcel which is shown on your plat abutting the Mace property?

A. Yes, that would be the first on the right; that would be the first parcel outlined in red.

Q. And the description which you have just read plats out, does it not, to the southerly of the two lines along Lee Highway, namely, the same line as acquired by Mr. Dewey, which

is 10 feet south of the line which was formerly owned by Mr. Scott?

Oct., 1957 page 63 } A. That's correct.

Q. This deed is signed by Mr. Dewey, is it not?

A. Yes. I don't think at that time they had photostating of the land records but that is duly admitted to record as the deed of Mr. B. W. Dewey.

There was another deed of trust put on the same—

The Court: That is marked Exhibit E.

(The document referred to was received, Defendant's Exhibit E.)

The Witness: There was another deed of trust put on by Mr. Dewey which has also been released of record. It was originally recorded in Deed Book 494, page 87, which I do not have a copy of, which described the same exact parcel of land, using the same description, and then there is at the present time an unreleased deed of trust which is the next one here pertaining to that same property.

This is a deed of trust dated July 8, 1954, recorded in Deed Book 1157, page 211 from Bernard W. Dewey and wife to John Locke Green, trustee, and that is to secure the sum of $30,000 to the First National Bank of Arlington.

Mr. Simmonds: Excuse me, Mr. Clay. Where did you say it was recorded?

The Witness: Deed Book 1157, page 211.

Mr. Simmonds: Is that shown on your plat?

The Witness: Yes, it is.

Oct., 1957 page 64 } Mr. Simmonds: It says, "not released."

The Witness: Shall I read this one?

By Mr. Russell:

Q. Yes, sir, if you will go around with the description.

A. Beginning at a point in the new south line of Lee Highway, said point being south 65 degrees 17 minutes 30 seconds, 200 feet from a point determined by the intersection of the new south line of Lee Highway and a new west line of Glebe Road; thence departing from the new south line of Lee Highway, south 34 degrees, 45 minutes, 30 seconds east, 155.93 feet to an angle point in the north line of a 15-foot alley; thence with the north line of said alley south 74 degrees, 37 minutes,

30 seconds west, 64.24 feet to a point; thence departing from said alley north 24 degrees, 42 minutes, 30 seconds west, 143.11 feet to a point in the new south line of Lee Highway; thence with the new south line of Lee Highway, north 65 degrees, 17 minutes, 30 seconds east, 36.19 feet to the point of beginning. Subject to any conveyance to the Commonwealth of Virginia for highway purposes.

Q. Mr. Clay, does that final course, running along, what is called in that deed the new south line of Lee Highway, does that also bind with the line on your plat which you have marked with red, 10 feet south of the original line of Lee Highway?

A. Yes.

Q. That is signed by Mr. Dewey?

Oct., 1957 page 65 } A. Yes. I am not familiar with Mr. Dewey's signature but—

Q. That trust appears to be still alive, of record; is that correct?

A. Yes, as of about three days ago. I haven't checked the records since then.

Mr. Simmonds: May I see the last two deeds of trust that were admitted?

The Court: Exhibit F.

(The document referred to was received, Defendant's Exhibit F.)

The Witness: Now, the next parcel of land, taking them in their geographical order, would be the parcel immediately to the west of the one with which we have been dealing.

Mr. Simmonds: Excuse me, Mr. Clay. Before you go ahead, have you given all three of the deeds of trust in the easterly most part?

The Witness: No, I did not bring in an abstract of that trust because it was—

Mr. Russell: The one in the middle.

The Witness: Deed book 494, page 87 contains exactly the same description.

Mr. Simmonds: 494-87.

The Court: That was not introduced.

Oct., 1957 page 66 } Mr. Simmonds: I have reference to the plat that Mr. Clay prepared looking to the easterly-most property, the middle of the deed of trust—you don't have any?

Henry S. Clay, Jr.

The Court: No exhibit.
Mr. Simmonds: No exhibit on that.
The Witness: I do not have any exhibit on that.
Mr. Russell: It was identical to the first one.

By Mr. Russell:

Q. Would you proceed with the next description?

A. The next deed of trust which I will read refers to the parcel lying immediately to the west of the one last mentioned. It is deed of trust dated April 22, 1949, recorded in Deed Book 875 at page 532 of the land records.

Mr. Bernard W. Dewey and wife to Robert N. Taylor, Paul C. Tyke and Samuel W. Hauser, securing indebtedness in the sum of $8,000 to the People's Life Insurance Company. This deed of trust has been released of record.

However, the description in it is as follows:

"Beginning at a point in the south line of Lee Highway, as now used, said point of beginning marks the northeast corner of the property being described, and is south 65 degrees, 17 minutes, 30 seconds west, 236.19 feet from the intersection made by the south line of Lee Highway, as now used, and the west line of Glebe Road; thence with the easterly line of the property being described, south 24 degrees, 42 minutes, 30 seconds east, 143.11 feet to a point in the southerly line of Bernard W. Dewey property; thence with the southerly line of said property south 74 degrees, 37 minutes, 30 seconds west, 32.43 feet to a point marking the southerly corner of the property described in deed of trust recorded in the Deed Book 864, page 173; thence with the easterly line of said property, and with the westerly line of the property being described, north 24 degrees, 42 minutes, 30 seconds west, 137.85 feet to a point in the south line of Lee Highway as now used; thence with the said south line of Lee Highway north 65 degrees, 17 minutes, 30 seconds east, 32.0 feet to a point and place of beginning containing 4495 square feet of ground, as shown upon plat of said property prepared by P. R. Rupert, certified surveyor, dated April 8, 1949, being a part of the same property conveyed to Bernard W. Dewey by deed recorded in Deed Book 427, page 257.

Oct., 1957 page 67

Mr. Russell: Your Honor, I did ask counsel for the petitioner to please produce any copies of *thse* plats which are

referred to in these deeds which I believe were prepared in his office and he has kindly done that.

I would like, with his agreement, to introduce this plat which he produced.

Mr. Simmonds: I have no objection to that.

By Mr. Russell:

Q. I show you a photostatic copy of plat signed by P. R. Rupert, April 8, 1949, and ask you if that appears
Oct., 1957 to be the plat which conforms to the description in
page 68 } the deed?

A. I shall be very happy to check it.

Yes, sir.

Mr. Russell: I would like to introduce this with this deed as one exhibit.

The Court: It will be marked Exhibit G.

(The document referred to was marked and received in evidence as Petitioner's Exhibit G.)

By Mr. Russell:

Q. Mr. Clay, does the northerly line of the parcel which was described in that last deed of trust, which I believe spoke of the line of Lee Highway as now used, does that plat out to the same line which you have shown on your plat in red ten feet south of the original John Scott line?

A. Right; it does.

Q. That deed is signed by Mr. Dewey?

A. Yes.

Q. All right, sir. Would you proceed to the next deed?

A. There is an existing current deed of trust which is not released, on this same parcel of land, dated February 14, 1950, recorded in Deed Book 916 at page 424, from Bernard W. Dewey and wife to Robert N. Taylor, S. W. Hauser, and William T. Leith, trustees, to secure $11,000 to the Peoples Life Insurance Company and uses again the same description.

Q. Does it refer to the same plat?

Oct., 1957 A. Plat dated April, made by P. R. Rupert,
page 69 } dated April 8, 1949.

Q. That description is identical to the one which you previously read?

A. Yes, beginning at a point in the south line of Lee Highway as now used, the point of beginning, and around the

same courses and distances, back to a point in the south line of Lee Highway as now used, thence with south line of Lee Highway to point of beginning.

The Court: Exhibit H.

(The document referred to was marked and received in evidence as Petitioner's Exhibit H.)

By Mr. Russell:

Q. Would you proceed to the next one, sir?

A. Since the next two deeds of trust which I have copies of here include the Virginia White property, I have a copy of the deed conveying the Virginia White property to Mr. Dewey. This is a deed dated May 5, 1942, recorded in Deed Book 578 at page 107, from Virginia White, widow, to Bernard W. Dewey. Conveys two parcels of land, one in High View Park, which is not part of this property shown on this plat, but Parcel 1 is described as part of Lot 3, on plat showing the estate of Quilley Walker recorded attached to a decree in the case of *Thomas, et al.*, v. *Walker, et al.*, recorded in Deed Book 152 at page 527 among the land records of said county and more particularly described as follows beginning at a set stone at the southeast corner of the whole tract, thence with the original line north 43 degrees, 15 minutes west, 153.67 feet to the south side of the Fairfax and Georgetown Pike; thence westerly with the south side of said Pike, 50 feet to a point, thence departing from said pike in a southerly direction, through said Lot 3, to a cedar tree in the south line of the original tract.

Oct., 1957 page 70

That, I might add, is the blue line shown in this plat.

Thence easterly with said south line 110 feet to the point of beginning; and being the easterly part of Lot 3, being the same property conveyed to Virginia White, widow, by deed from James Franklin Williams. Dated February 3, 1922, and recorded in Deed Book 180 at page 65 of the said land records.

Mr. Simmonds: May I see that just a second?

Mr. Russell: Unlike the Scott tract—

Mr. Simmonds: Thank you.

By Mr. Russell:

Q. Unlike the Scott tract, Mr. Clay, this Virginia White

tract runs, plats out to the original line of Lee Highway, does it not?

A. Yes, the distance, the deed into John Scott, the original call on that line, on the John Scott side of the line,
Oct., 1957 was 152.23 feet. The call in the Virginia White
page 71 } deed, on the other side of the line, is 153.67, a difference of 1.3 feet, but they both go to the original line of the Fairfax and Georgetown Road.

The Court: Exhibit I.

(The document referred to was marked and received in evidence as Petitioner's Exhibit I.)

The Witness: Now, a portion of this property, together with the, I might say, the remainder of the property which Mr. Dewey got from Mr. Scott, have been included in three subsequent deeds of trust, two of which I have copies of here.

* * * * *

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page 72 }

* * * * *

The Witness: This is a deed dated June 14, 1948, recorded in Deed Book 833, page 280. It is from B. W. Dewey, also known of record as Bernard W. Dewey, and wife, to Samuel W. Hauser, Robert N. Taylor, and Paul C. Tight,
Oct., 1957 trustees. It secures an indebtedness in the sum
page 73 } of $55,000 to the Peoples Life Insurance Company, this deed of trust has been released of record.

However, the description of property conveyed reads, beginning at a pipe, and angle point in the south side of the property being described, and north line of a 15-foot alley, which pipe and point of beginning also marks the southeast corner of the Quilley Walker estate. Thence with the south line of the Quilley Walker estate and the property being described, and also the north line of a 15-foot alley, south 79 degrees, 19 minutes, 20 seconds west, 119.98 feet to a pipe and cedar stump found.

At that point, you will recall the deed from Virginia White only called for 110 feet but it did call for a cedar stake.

Henry S. Clay, Jr.

By Mr. Russell:

Q. So this description goes beyond that out to the place where you have drawn a red line, but that is apparently where the surveyor actually found the cedar stump, is that correct?

A. Right. Southeast corner of subdivision of James Franklin Williams property as shown on plat recorded among the land records of said county in Deed Book 202 at page 233; thence with the eastern line of James Franklin Williams property recorded as aforesaid and the west line of Parcel No. 1 acquired by B. W. Dewey in Deed Book 579, page Oct., 1957 107, western line, north 22 degrees, 44 minutes west, page 74 } 99.08 feet to a pipe in the south line of Lee Highway as now used.

Q. Now, in scaling that off, Mr. Clay, is that the red line at the extreme left-hand side of your plat?

A. Right.

Q. Does that scale out to the old line of the Georgetown and Fairfax Pike, or does it scale out to the new line of Lee Highway as described in the deeds from Mr. Scott and Mr. Dewey and extended on across the White parcel?

A. That goes out to the, I say the new south line of Lee Highway as extended through the Virginia White property.

Q. Would you then proceed with the description?

A. Thence with the south line of said Lee Highway and the north line of the property being described, north 65 degrees, 17 minutes 30 seconds east, 172.27 feet to a point; thence departing from said Lee Highway with the east line of the property being described, south 24 degrees, 42 minutes, 30 seconds east, 137.85 feet to a point in the north line of a 15-foot alley; thence with the north line of a 15-foot alley and the south line of the property being described, south 74 degrees, 37 minutes, 30 seconds west, 60.08 feet to a pipe and place of beginning containing 20,933 square feet of land.

Also shown upon plat of the B. W. Dewey property prepared by P. R. Rupert, certified surveyor, dated May 20, 1948, and being a part of the same property con- Oct., 1957 veyed to B. W. Dewey, Deed Book 579, page 107, page 75 } and being also part of the same property conveyed to Bernard W. Dewey by deed, Deed Book 427, page 257, among the land records of said county.

Q. Mr. Clay, I show you a plat which was produced by the counsel for the petitioners in response to our request which is a photostatic copy signed by P. R. Rupert, dated May 20, 1948, purporting to describe the B. W. Dewey prop-

erty, and ask you if that appears to be the plat which conforms to the description in the deed which you have just read.

A. Yes. Same date, May 20, 1948.

Q. Mr. Clay, in the description which you have just read, does the entire line of Lee Highway as called in that description, the south line of Lee Highway as now used, does that entire line conform to an extension of the line of Lee Highway as given in the earlier deeds from Mr. Dewey being ten feet south of the old line of Lee Highway?

A. Yes.

Mr. Simmonds: What is that group of plats dated there?

Mr. Russell: May 20, 1948.

I would like to introduce deed and plat together as one exhibit.

Mr. Simmonds: Did you introduce the other?

Mr. Russell: Yes, I did, as the deed which referred to it.

The Court: Exhibit J.

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page 76 } (The document referred to was marked and received in evidence as Petitioner's Exhibit J.)

By Mr. Russell:

Q. Mr. Clay, to recapitulate, the picture as shown on that Rupert plat which was just introduced, that plat shows the line of Lee Highway as being a straight line without any jog in it, all the way across the northern side of the property, on that plat, is that not correct?

A. That's right. I would like, if I may, to check one distance on here that is—

(Discussion off the record).

I note on the plat that the distance given of the northeast corner of the property being described, from that corner to the intersection of Glebe Road and Lee Highway checks with the calls, with the total sum of the calls in the former deeds—that is, 200 feet, plus 36.19 feet plus 32 feet, to make a total of 268.19 feet. And that plus the distance given with the north line of the property which is the subject of this survey of 172.27 makes a total as shown here of 440.46 feet.

Q. So that this plat shows a perfectly straight line along

Henry S. Clay, Jr.

Lee Highway from the westernmost corner of Mr. Dewey's property all the way to Glebe Road, is that right?

A. That's right.

Oct., 1957 page 77 } Q. And it shows all north of that line as being simply Lee Highway, is that not correct?

A. Mr. Russell, I think you handed His Honor a deed I have not yet read.

Mr. Simmonds: Don't you think we ought to make those J-1 and G-1 so you won't get them mixed up?

Mr. Russell: I have no objection to that. I just wanted to—

The Court: They are attached together and marked "G" as one exhibit, deed and plat, and "J," deed and plat.

Mr. Simmonds: Are they together?

All right.

By Mr. Russell:

Q. Will you proceed?

A. There was another deed of trust using exactly the same description which was recorded in Deed Book 864 at page 173, which has been released on the margin and which is not, a copy of has not been produced here. But there is a current deed of trust dated August 18, 1955 recorded in Deed Book 1215 at page 374, from B. W. Dewey and wife to Samuel W. Hauser, Robert N. Taylor, William T. Leith, trustees, securing an indebtedness in the sum of $55,000, and which uses the same description as the last one that was handed to me.

That deed of trust is not released of record and refers specifically to going north 22 degrees, 44 minutes; west 99.08 feet to a point in the south line of Lee Highway as now used. Thence with the south line of said Lee Highway in north line of property being described, north 65 degrees, 17 minutes, 30 seconds east, 172.72 feet to a point; thence departing Lee Highway and with the east line of the property being described, south 24 degrees, 42 minutes, 30 seconds east 137.85 feet to a point in the north line of the 15-foot alley, and referring to it as, all as shown upon plat of the B. W. Dewey property prepared by P. R. Rupert, certified surveyor, dated May 20, 1948.

Oct., 1957 page 78 }

Mr. Russell: I should like to introduce this.

The Court: Exhibit K.

Henry S. Clay, Jr.

(The document referred to was marked and received in evidence as Petitioner's Exhibit K.)

By Mr. Russell:

Q. Mr. Clay, would you say that the south line of this entire Dewey property is monumented in the descriptions? Are there monuments to which it can be tied?

A. It refers to the, in most every instance, I believe, to the north line of a 15-foot alley. Prior to the time that this land was conveyed by Mr. Scott to Mr. Dewey, the remainder of the property to the south here had been conveyed to Mace Properties, Inc., by deed recorded in Deed Book 415 at page 596.

Oct., 1957 page 79 } I might say that now constitutes subdivision of Glebewood Village, so that I think you can assume that Mr. Dewey was running to the south line of his property and to the line of the Mace conveyance.

Q. Then there are also such monuments in that line as the old stone and the cedar stump which are described in certain descriptions, is that not correct?

A. I would assume that they are. I am not a surveyor. I have not gone on the ground.

Q. The descriptions in the deeds refer to such monuments, do they not?

A. I don't know whether they referred to any pipe or just a point. I would have to go back and reread the description. The deeds speak for themselves as to whether they do.

Q. Assuming the south line of this Dewey property to be fixed, is it not true that in all deeds signed by Mr. Dewey all said lines which run north from his south line to Lee Highway stop ten feet short of the original line of the Georgetown-Fairfax Turnpike?

A. Yes. In preparing this plat we have first the conveyance off to the Commonwealth of Virginia for a ten-foot strip widening Lee Highway. Then we have a conveyance to Mr. Merwin Mace, which fixes a distance between the south line of the highway conveyance and the north line of the alley to

Oct., 1957 page 80 } 155.93 feet. Then we have a deed to Mr. Dewey which uses that same distance.

Then, following that, we have the first, the deeds of trust on the first lot as we shall call it, the first parcel, all use that same distance, 155.93 feet, and go back and they plat back to a point which is an extension of that

ten-foot line, call it, and also uses same course along the highway there, back to the point of beginning, the same course that was used in the deed to Mr. Dewey and which admittedly falls short ten feet.

Also I notice that the dividing line between these parcels are at a right angle to the Lee Highway and each parcel fits right in with the other one next to it.

In other words, you start with the parcel, the easternmost parcel, which fits right next to the Mace property, using the same distance, and comes out to the same ten-foot line; the next parcel fits right to it, and the third parcel fits right to it, and falls short of the original Virginia—falls short of the old Fairfax and Georgetown Road by some ten feet scaled on the western end and comes back on the same course as all of the other deeds along the new south line of Lee Highway as referred to in this deed calls for. They all call for the same course along the highway. So the whole thing just—

Oct., 1957 page 81

Q. Now, have you referred to all of the deeds in Mr. Dewey's chain of title from his acquisition by John Scott? By that I mean, are there any deeds outstanding to which you have not referred which may use a different description?

A. No. These are the only deeds of record in Mr. Dewey's name which affect the property, this property. There are some other deeds affecting other properties which he owns which are nowhere near here which would not be of any—the only other deed to which I have not referred is the deed he acquired this summer which is already in evidence of when John Scott conveyed whatever he had in that ten-foot strip.

Mr. Russell: That's all, sir.
The Court: Are you through?
Let's recess until a quarter to two.

(Whereupon, the noon recess was taken.)

The Court: Let us resume.
Mr. Simmonds: Had you finished, Mr. Russell?
Mr. Russell: Yes. Your witness.

Whereupon,

HENRY CLAY,

resumed the stand and testified further as follows:

Henry S. Clay, Jr.

CROSS EXAMINATION.

By Mr. Simmonds:

Q. Mr. Clay, referring to the plat that you prepared, which I believe is Exhibit A, I think you testified that this parcel on the extreme right was conveyed by John Scott to Merwin Mace?

Oct., 1957 page 82

A. That's right.

Q. Immediately before that there was a deed from Scott to the Commonwealth conveying approximately ten feet along Lee Highway, or Georgetown-Fairfax Road, and ten feet along Glebe Road?

A. That's correct.

Q. Now, in your examination, in the metes and bounds description from Scott to the Commonwealth, limited the amount of land given to 200 feet along the old line of Lee Highway? That is, from Glebe Road, didn't it?

A. 209 feet along the old line of Lee Highway.

Q. And 200 feet on the inside?

A. On the inside line, that's correct.

Q. And at the time that conveyance was made to the Commonwealth, isn't it true that John Scott and his wife owned the remainder of the land out to the Lee Highway, which is west of the land conveyed to Mace?

A. If I understand your question correctly, they owned all the land between the Mace parcel and the Virginia White parcel and running all the way out to the old line of the Georgetown-Fairfax and Georgetown Road (sic).

Q. Yes. So, if then at that time John Scott had intended to convey to the Commonwealth ten feet along the north side of his property for the widening of Lee Highway, he did not accomplish it by that deed, did he?

Oct., 1957 page 83

A. No, that was some 121 deed books before the deed to Mr. Dewey.

Q. That's right. But my point is, Mr. Clay, at the time that Scott executed the deed to the Commonwealth of Virginia for the easterly two hundred feet, he at that time owned all of the land up to the Virginia White property?

A. That's right. He did not convey any land other than that call it 200-foot frontage in front of the Mace property. That was the only thing that was conveyed to the Commonwealth at that time.

Q. Did you find anything of record to indicate any deed by Scott to the additional ten feet, to the Commonwealth?

Henry S. Clay, Jr.

A. No, except the recitals contained in the deed—well, the recital in the deed to Mr. Dewey says, subject to any conveyance to the Commonwealth, like there might have been some question in his mind.

Q. That is what I am getting at.

A. I think the exact language of the deed, I think that was one we did not put in evidence, Mr. Russell.

Q. I think it said, subject to any conveyances to the Commonwealth?

A. Subject to any conveyance to the Commonwealth for highway purpose.

Oct., 1957 page 84 } Q. Now, what I am getting at, you did not find any conveyance of record from Scott to the Commonwealth, did you?

A. No; to answer your question, there is no conveyance from Scott to the Commonwealth since that time, no, sir.

Q. So that there is nothing of record to indicate any conveyances to which this property might be subject? Isn't that right—as far as the records are concerned?

Let me word that a little differently. You have pointed out that in the deed from Scott to Dewey it was made subject to restrictions and 1938 taxes, and subject to any conveyance to the Commonwealth of Virginia for highway purpose. Now, my question is: Did you find any conveyance to the Commonwealth?

A. No.

Q. Now, did you, in your examination of the records or the preparation of this case, in conjunction with Mr. Russell, did you find any conveyance from Scott to the Commonwealth that is not of record?

In other words, have you run into any unrecorded conveyance of that piece of property?

A. No, sir. The only other conveyance from Mr. Scott, and I think it was Mr. Scott and Mrs. Sandifer both joined in for conveyance of widening Glebe Road but which would not affect this property here.

Q. That was by recorded deed, was it not?

Oct., 1957 page 85 } A. That was by recorded deed.

Q. So, so far as we know, all the conveyances made by either Scott or Sandifer to the Commonwealth were by instruments which set forth the boundaries of the property conveyed and were recorded instruments, isn't that right?

A. Right.

Q. Now, I think you answered my question that you find

nothing that Scott did to indicate a conveyance or dedication of the northerly ten feet of the property subsequently conveyed to Dewey unless it can be spelled out of the language in the deed from Scott to Dewey? Am I correct in that?

A. That's correct, plus the recognition by Mr. Dewey in subsequent instruments that he executed, recognizing such a line.

Q. As far as any action by Scott is concerned?

A. No, sir.

Q. That is the only thing that you base it on, is the language of the deed from Scott to Dewey.

Now, Mr. Clay, don't you know as a long resident of Arlington County, and maybe I had better ask some questions about that first.

How long have you been living in Arlington County?

A. Since the first of May, 1930.

Q. Prior to 1956, when Lee Highway was widened under this project now in condemnation, isn't it true that Oct., 1957 the hard surface of Lee Highway was widened page 86 } prior to that time?

A. I don't know about the hard surface. I will answer your question this way, Mr. Simmonds, that along in a period between, say, 1930 and 1935 the State Highway obtained conveyances from a number of owners up and down Lee Highway as well as up and down Glebe Road, conveying strips either from the north or south side or right or left side of the new center line of the highway, usually 25 feet in width, at various parcels, but there is no definite, continued pattern. In other words, it skips some.

Q. And gets some conveyances from some owners and not from others?

A. That's correct.

Q. In some instances where the old line prevailed, is what I was getting to. In that connection, didn't the State Highway Commission widen Lee Highway from in effect two lanes to a three-lane paved highway from Cherrydale west to Falls Church?

A. My answer to that is: I would hesitate to say at what time it was widened or to what extent it was widened. I think there has been a gradual widening of the highway over a period of years. It has gradually grown wider. Better road.

Q. At some time the road was widened from an old, two-lane macadam road to a three-lane highway, was it not?

Henry S. Clay, Jr.

A. Very likely was. When I fisst recall that
Oct., 1957 corner, I think the only thing on it was one Gulf
page 87 } filling station which had two pumps and maybe a
shed there. Nothing at all like the elaborate setup there is now and there was nothing on the other three corners. I remember very well there was a fence post in the corner where Moskey's Drug Store was or Dr. Preston's now.

Q. What I am getting at, Mr. Clay: you referred to descriptions in the deeds of trust to the new line of Lee Highway, I believe it said, that was in the deed of trust in the property immediately adjoining the Mace conveyance. Couldn't that language just as well refer to the new Lee Highway which we have indicated was widened as it could to a right-of-way lane granted by Scott to the Commonwealth further to the east?

A. Except for this: that when you plat everything it all fits in with the ten-foot strip that was conveyed to the Commonwealth.

In other words, when you plat it, using that as a beginning point, everything falls right together.

Q. That's right. Now, Mr. Clay, isn't it true that when deeds of trust are put on by a lending institution that they usually indicate or at least approve the attorneys that are to examine title to the strip of land and have those attorneys prepare the papers?

A. That's right.

Oct., 1957 Q. And if an attorney preparing a deed of trust
page 88 } on a piece of property certainly would not include
in that deed of trust a greater amount of land than was included in the deed to Mr. Dewey, say, would he?

A. Usually, attorneys preparing deeds of trust where you are using metes and bounds description use the description furnished by the surveyor.

Q. That's right.

A. And rely on his calls and distances, course and distances which he has put in there.

Q. But even if the surveyor's calls exceeded the metes and bounds there might be some question raised as to the land that was not within the metes and bounds description to the owner?

A. My answer to you that way if it was over, you would look twice to see what you are doing, to be sure that you were able to—in the first place, you do not want to put any land in a deed of trust to which you cannot certify good title be-

Henry S. Clay, Jr.

cause the loan companies do not like exemptions in their policies. They would like to have a good deal of trust on a little bit less land than a little bit more land with a question as to some small part of it. And the title examiner, or any person preparing a paper, any attorney preparing paper for a loan company, he does not go beyond what he can sustain.

Oct., 1957 page 89 } Q. Well now, I think it is conceded by everyone that the calls in the deed from Scott to Dewey fell ten feet short of coming to what we will say was the Georgetown-Fairfax south line?

A. If I may say a little bit more in answer to your last question, if I may, Mr. Simmonds.

Q. All right.

A. That on the other hand anyone preparing a paper for a deed of trust would not want to leave any strip of land lying between the property described and the highway because in that case you might wake up some time with a landlocked piece of land there, dead man's strip between you and the road. So you would be equally careful both ways.

Q. That's right. I think in this case, I believe everyone concedes that the metes and bounds in the deed from Scott to Dewey fell ten feet short of the south line of the Georgetown-Fairfax Pike?

A. That's right.

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By Mr. Simmonds:

Q. Mr. Clay, do you happen to have a copy of the Scott-Mace deed to which there was a plat attached?

A. It is in evidence.

Q. Scott to Mace?

A. Scott to Mace.

Mr. Russell: Probably "C."

Mr. Simmonds: "D."

Mr. Russell: The plat was first, the Commonwealth second; isn't that third?

The Witness: No.

Henry S. Clay, Jr.

By Mr. Simmonds:

Q. Now I hand you Exhibit D which is the deed from Scott to Mace, to which, on which there is a plat.

A. Correct.

Q. I ask you if that plat does not show that west of the conveyance to Mace the line of Lee Highway jogs north approximately ten feet?

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A. That's correct.

Q. Mr. Clay, isn't it true that in your dealings with the property as you have shown on your Plat A or Exhibit A, indicated the north line of Lee Highway to be a straight line from the west end of the Dewey property all the way to Glebe Road?

A. Yes, the same thing is also true of the plat that was put in, was attached or referred to in the first deed, I think the first deed of trust on the Coffee Shop; that also shows it the same way.

Q. As a straight line?

A. That is Rupert's plat.

Mr. Simmonds: All right; I think that is all the questions I have.

RE-DIRECT EXAMINATION.

By Mr. Russell:

Q. Mr. Clay, may I ask you to read the language in the deed from Scott to Dewey, the deed which is really the root of this thing? One has been already introduced for the petitioner. If you will read what mention is made of Lee Highway, that is called Lee Highway as now used, or—

A. Beginning with iron pipe in the south line of Lee Highway distant south 65 degrees 17 minutes 30 seconds west 200 feet from the southwesterly intersection of said Lee Highway and Glebe Road; thence departing from the south line of Lee Highway and running with the west line of a tract of land conveyed to Merwin A. Mace, south 34 degrees 45 minutes 30 seconds east 155.93 feet to an iron pipe in the north line of a 15-foot alley; thence along the north line of said alley south 74 degrees 37 minutes 30 seconds west 156.75 feet to a stone; thence departing from said alley north 49 degrees zero minutes 30 seconds west 140.57 feet to an iron pipe in the south line of Lee Highway; thence along the south line of

Oct., 1957 page 104

Lee Highway north 65 degrees 17 minutes 30 seconds east 185.31 feet to the point of beginning.

Q. That was the original deed of acquisition by Mr. Dewey, is that right?

A. That's right, and ran with the south line of Lee Highway.

Mr. Russell: No further questions.

RE-CROSS EXAMINATION.

By Mr. Simmonds:

Q. That didn't say anything about a new south line of Lee Highway, did it? Just said south line of Lee Highway.

A. That's right.

Q. Mr. Clay, I am just trying to—while I appreciate that you are not a layman, but you are an expert, I am trying to find out just how would a layman understand from anything that you have found of record or any of the plats that you have seen that his north line did not in fact go to the used part of Lee Highway or the part used as a highway. Wouldn't he have to find his real line himself and measure it off himself to ascertain that it didn't come out there?

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Mr. Russell: I would have to object on the same ground. This is just the same question. I don't think Mr. Clay can tell you what a layman would do or what a layman would think.

Mr. Simmonds: Don't call him a layman; just say a person.

Mr. Russell: "A rose by any other name"—

By Mr. Simmonds:

Q. There is nothing in the record to indicate a distance of ten feet between the north line of the Dewey property and the part that was used as a highway, isn't that correct?

A. Yes, sir; it is quite a bit in the record.

Q. All right, sir. I would like to know what it was that let an individual know, without actually measuring it off himself from the rear line.

A. In the first place, I think it is conceded that a ten-foot strip prior to the conveyance out to either Mr. Mace or to Mr. Scott, I mean to Mr. Dewey, that Mr. Scott conveyed a

ten-foot strip along Lee Highway to the Commonwealth and then he conveyed immediately following that, or
Oct., 1957 the next day, deeds recorded in—he conveyed a
page 106 } piece of land to Mr. Mace which has a depth of 155.93 feet back from the highway, Lee Highway, as was established by the previous deed.

Then some years later, in his deed to Mr. Scott, he runs along the Mace line exactly the same distance; that he had started at that point, from the record, that he started from the old line of the Fairfax and Georgetown Road and gone 155 feet, he would not have gone to the southwest corner of the Mace property. He would not have gone to the line of the 15-foot alley. So he must have started ten feet short of where the old line of Lee Highway was, namely, in the new line of it, and gone along the Mace line, and then you fit it in that fashion and it all falls in place.

Q. Well now, Mr. Clay, of course you have got a plat in front of you, which is Exhibit A, which I imagine took you quite a long time to assemble from the land records.

Now, I am talking about a person who is the owner of a property and not a title examiner, is there anything in the deed to Mace—I mean to Dewey—to indicate that there was a difference of ten feet between his north line and that part of Lee Highway used as a highway?

A. I don't think I am qualified to answer your question.

Q. I won't push that. But is there anything on the plats of the surveyor, P. R. Rupert, that would indicate to an owner of the property that there was a ten-foot strip of
Oct., 1957 land between his north line and the part of Lee
page 107 } Highway that was used as a highway?

A. Yes.

Q. What?

A. The plats of P. R. Rupert show a straight line running in front of this property and what was formerly the Mace property, to the east of there, show it all one continuous straight line.

Q. That's right; and Lee Highway is used as a continuous straight line, isn't it?

A. Wait a minute. Yes. Lee Highway was used as a continuous straight line, but there was no—Mr. Dewey certainly had notice of the previous conveyance of this property for the widening in front of the stores there.

Q. Why do you say that?

A. Because Mr. Scott had made that conveyance prior, Mr.

Scott had only owned the tract and he had conveyed that piece out of the larger tract to Mr. Scott.

Q. You are not implying *hat* Mr. Dewey would know that as a fact, are you?

A. I don't know how well Mr. Dewey was advised by the people he employed to examine the records when he bought the property.

Q. Even the person who examined the records wouldn't necessarily run the title out on the adjoining

Oct., 1957 page 108 } property, would he?

A. I can't see how he can escape it.

Q. Suppose the same man owned 50 pieces of land spread out throughout the county. He wouldn't examine and report on each particular piece of property that the man owned, would he?

A. No.

Q. Except to satisfy himself it wasn't his own property he was dealing with?

A. Mr. Scott originally acquired eight-acre tract out of which this piece of land came so he would certainly want to check out all prior conveyances to see that they did not, that this piece of land, that this was part of a larger tract, it would check out or plat out all prior conveyances to see what effect it had on this conveyance.

Q. There wouldn't be any reason in the world for a title examiner to convey that information to Mr. Dewey, would there, in connection with buying the property unless he was specifically asked about it?

A. I don't know how fully he examined it. I think in a case like that he might very well have told Mr. Dewey that while there has been no strip along in front of your property dedicated, but nevertheless this description has been furnished you does call for that: do you want a deed for all the way out to the old line of the highway or do you want

Oct., 1957 page 109 } a deed that recognizes this new line?

Q. Mr. Clay, I am going to ask you to take a look at this certificate of title in District Title Insurance Company, issued to Bernard W. Dewey, dated January 6, 1938, and ask you to look at it and tell the court whether there is anything in there that would put Mr. Dewey on notice that there was a ten-foot strip between his north line and the part of Lee Highway that was used as a highway?

A. This is title opinion by Mr. Robert A. Ryland?

Q. Yes.

Bernard W. Dewey.

A. And I have to read it through to see what there is in here before I can say there is not in here—

I see nothing in here that would tell Mr. Dewey that there was any strip of land at all within his property and Lee Highway, but it very definitely tells him that he gets a depth of 155.93 feet.

Q. Unless he went out there and ran a tape from the back line to the front line, he would never realize that he didn't come to Lee Highway, would he? Isn't that true?

A. You mean as to whether Mr. Deewey could stand on the ground and tell within ten feet of what his depth was?

Q. Yes, sir.

A. I don't know whether Mr. Dewey could stand on the ground and tell within ten feet what the depth was or not. I couldn't.

Oct., 1957 page 110 } Q. From this certificate of title, wouldn't you say that it appeared that his north line coincided with the south line of Lee Highway?

A. Yes.

Mr. Simmonds: All right, sir. I think that is all the questions I have.

Let me put this in evidence. Do you have any objection to its going in evidence?

Mr. Russell: I don't believe so.

The Court: Petitioner's No. 6.

(The document referred to was marked and received in evidence as Petitioners Exhibit No. 6.)

Mr. Simmonds: I have no further questions, if Your Honor please.

Mr. Russell: I have no further questions.

(Witness steps down).

Mr. Simmonds: I would like to ask Mr. Dewey a few more questions.

Whereupon,

BERNARD W. DEWEY,

resumed the stand and testified further as follows:

Bernard W. Dewey.

DIRECT EXAMINATION.

By Mr. Simmonds:

Q. Mr. Dewey, did you at any time after you acquired the property intend to dedicate any part of your property for the widening of Lee Highway?

Oct., 1957
page 111 } A. No, sir.

Q. I believe you previously stated that you did not realize that you did not own to the then-paved part of Lee Highway until 1955?

A. That's right.

Q. I don't know whether you have seen these documents that have gone in the record, but do you know of anything that ever came to your attention that would indicate to you that your north line did not extend to the used part of Lee Highway?

A. No, sir, not until the State Highway man approached me about settlement, or offer, rather.

Q. I believe you have already said that the state never did use that property?

A. That's right.

Q. Up until the time that they actually started construction in 1956.

A. Yes.

Mr. Simmonds: Thank you; that's all.

Mr. Russell: No questions.

The Court: Do you have any further evidence?

Mr. Russell: That's our case, Your Honor.

The Court: Take a ten-minute recess. I would like to hear argument.

(Short recess.)

Oct., 1957
page 112 } The Court: It seems to me that the cases that you have cited have been based largely upon long-continued use of the street, coupled with the proposition that the facts demonstrated an offer and acceptance in so far as the dedication is concerned.

On the whole evidence, it seems to me that the state is assuming the position of converting what could well be under the circumstances and appears to me to be a secret and un-

disclosed intention on the part of Scott at some time in the future to possibly dedicate, but that this intention has never ripened under the circumstances into such a definite offer that it could be accepted by the state.

The use by Dewey has been not for the purposes of a highway but for his own private purposes, for parking, and of course use by the public under those circumstances is not a user of the highway.

The Court has concluded that under the circumstances title remains in Dewey.

Mr. Russell: May I ask if the Court finds that as a result of adverse possession or by the deed from Scott?

The Court: By the deed from Scott.

Mr. Russell: May I save an exception for the record, please?

The Court: Yes.

(Whereupon, at 4:28 o'clock p. m. the hearing was concluded.)

July, 1958
page 3 }

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Whereupon,

ROBERT M. SANDRIDGE,

was called as a witness and having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Russell:

Q. Would you state your full name and occupa-
July, 1958 tion, please?
page 4 } A. Robert M. Sandridge, District Right-of-Way Appraiser, Virginia Department of Highways, Culpeper, Virginia.

Q. How long have you been in that position, Mr. Sandridge?

A. I have been in that position approximately two years.

Q. What was your position before that?

A. Immediately prior to that, I was assigned to the Right-of-Way Division of the Virginia Department of Highways as a right-of-way agent, since 1947.

Robert M. Sandridge.

Q. You have been with the Highway Department continuously since 1947?

A. Yes, sir. I was with the Highway Department prior to that time, also.

Q. Have you had any special education or training in highway engineering?

A. Yes, sir. I attended a course in mechanical engineering, drafting, at the University of Virginia in 1941; was employed by the Highway Department immediately thereafter as a draftsman in an engineering capacity and under an on-the-job training program that they have instituted. I have since then completed highway engineering course and as a part of the on-the-job training course, I have completed a highway engineering training course through International Correspondence Schools.

July, 1958 page 5 } Q. Have you done appraisal work for the State as a part of your job with the Highway Department?

A. Yes, sir.

Q. How long have you been engaged in that type of work?

A. Since 1947.

Q. Have you done appraisal work in Arlington County during that period?

A. Yes, sir.

Q. Throughout that entire period, have you had occasion to work in Arlington County?

A. With the exception of 18 months in 1950 and '51 during the Korean War, when I was in the service during that period of time.

Q. Mr. Sandridge, have you had personal cognizance of the taking by the Highway Department, which is the subject of this suit, the property in front of Mr. B. W. Dewey's land on Lee Highway in Arlington County?

A. Yes, sir.

Q. Will you tell what date, according to the records of the Highway Department, was the time of taking in this case?

A. August 20, 1956.

Q. Will you state what area has been taken in this case altogether, and, if you have it, a breakdown of

July, 1958 page 6 } that between the parcel which is described as the Dewey Hardware parcel and the other which is known as the Evans Coffee Shop parcel?

A. The total area taken from both parcels is a strip of land approximately 20 feet in width and contains 4895.9 square feet. That is further divided up into two parcels of land,

Robert M. Sandridge.

the first parcel being the easterly end of the taking, which is the hardware store property. That contains 1388.9 square feet, which has been rounded to 1389 square feet. And the westerly portion, which is the Evans Coffee Shop part, contains 3507 square feet.

Q. Were you familiar with the condition of the property prior to the taking?

A. Yes, I was.

Q. Will you state what entrances were available for automobiles on to the properties before the taking?

A. There were two entrances. The entrance to the easterly parcel of land, which is the hardware property, was located in approximately the same position that the present entrance is located; and there has been no change in the entrances to the westerly portion of the property. There has been no improvement to that piece of property as yet and the entrance was where it is now.

Q. So that the entrance situation is now roughly the same as it was before the taking, is that correct?

July, 1958 page 7 } A. Yes.

Q. Now, the area taken from the Dewey parcel has already been improved; has it not?

A. Yes.

Q. And the State work there is pretty much in its final form, is it not?

A. It is in its final form.

Q. Prior to the taking, then, what use was made of that area which has now been taken in front of the Dewey property?

A. All of it was used for parking purposes with the exception of maybe the back three or four feet of it which would have been used as a travel-way between the two parking areas.

Q. The back three or four feet—you mean the southerly three or four feet?

A. Yes.

Q. Now, was that parking area used exclusively by Mr. Dewey or by others?

A. I don't know. I wouldn't have any way of knowing whether it was or not. It is a joint parking lot between two pieces of property and there is no barrier between the two, and the assumption would have to be that the other properties also used it.

Q. At least, as to physical appearance, it was a parking lot

in common for the use of the merchants along this row of stores; was it not?

July, 1958 page 8 } A. Yes.

Q. Did you have occasion to have the title examined or to examine it when you began to negotiate for this project?

A. Yes.

Q. Did you ascertain whether or not Mr. Dewey had any easement over the land adjoining him on the east, that is to say, the land of Sumner who owns the store next door?

A. We could find none of record.

Q. What was the condition of the traveled part of the highway in front of the property prior to the taking? I refer to its physical condition.

A. Prior to the taking, the pavement on 29 and 211 was 30 feet in width and it was accommodated on a 40-foot right-of-way. There were some sidewalks in the area. However, all of those sidewalks were located on private properties; there wasn't any curb and gutter. It was what was considered by the Highway Department as being a rural section.

Q. There was just a natural dirt shoulder?

A. No—

Mr. Simmonds: Are you referring to in front of this property or what?

Mr. Russell: I am speaking in front of this property.

July, 1958 page 9 } The Witness: No, immediately in front of this property, throughout the entire property, what was equivalent to the shoulder area was surface-treated by macadam.

By Mr. Russell:

Q. Would it be fair to say that the property looked in front of the Dewey store roughly as it now looks in front of the Evans Parking Lot where the work has not yet been done by the State?

Mr. Simmonds: If Your Honor please, we have some photographs that have been admitted in evidence which were taken prior to the time that the State took the property and I believe that that would better describe the existence or the conditions prior to the taking than this gentleman's verbal description.

The Court: I don't think there is any question at all that

we frequently have one witness who can do better than another, but we don't keep him off the stand on that account.

Objection overruled.

Mr. Simmonds: Let me make a further objection:

I don't think it is a proper question for Mr. Russell to ask as to comparison, if it is the same as the other property.

The Court: The objection to the form of the question is sustained.

By Mr. Russell:

July, 1958 page 10 } Q. Will you describe the appearance of the surface *of the surface* of the road where it abutted the Dewey Hardware parcel before the taking?

A. Well, the road itself was approximately the same level as the parking area, and instead of dirt section, as you normally see on a rural, typical section, this section was macadamized into a very shallow swale ditch and that was done to accommodate the drainage that would have to proceed in a westerly direction, and then it was tied in with the macadam area of the parking lot.

Q. Was there any curb and gutter there?

A. There was no curb and gutter as such. The drainage area itself was accommodated by this surface-treated area which acted as a gutter down the front of the property.

Q. Was there any sidewalk there?

A. There was no sidewalk in front of the property. However, there is a sidewalk back against the building.

The Court: Mr. Simmonds, did you bring those exhibits over here this morning?

Mr. Simmonds: I took them back to the Clerk's office yesterday afternoon.

(Discussion off the record.)

By Mr. Russell:

Q. The sidewalk against the building is the one which the Commissioners saw at the view. It has been unchanged?

July, 1958 page 11 } A. That's right.

Q. But would you describe how a pedestrian seeking to enter that property from the east, prior to the taking, would have had to do so?

A. He could have walked across the parking lot. However, I don't see how any pedestrian would enter that prop-

erty unless he was going into the property itself because there is no continuation of the sidewalk after you get to the entrance to the Dewey property. So he would either have to walk along the parking lot or walk along the east property line of the Sumner property and walk up the sidewalk.

Q. There was no sidewalk in front of—let me ask that differently.

Was there any sidewalk in front of the Sumner property before the taking?

A. Yes, sir, continuation of the same sidewalk that is adjacent to the buildings on the Dewey property.

Q. But there was none out against the street prior to the taking?

A. No, sir

Q. What was the condition of the traffic flow in the street prior to the taking?

A. Well, of course, there was no channelization of the traffic at all and with 30 feet of pavement, it is possible to accommodate three lanes of traffic. That would mean two lanes, one flowing east, and one flowing in a west-
July, 1958 erly direction, and providing for either a right
page 12 } turn or left turn lane at the intersection of Glebe Road, and it was a very congested situation, especially during the peak hours, early in the morning and late in the afternoon.

Q. Did the State Highway Department have occasion to make any traffic counts before and after the taking at this point?

A. Yes, sir.

Q. Will you state what they were daily?

Mr. Simmonds: Would he please explain where the count was taken?

Mr. Russell: I will lay more foundation for this.

By Mr. Russell:

Q. Would you first explain how these traffic counts are made?

A. Just how this particular traffic count was made, I do not know, whether it was visual or whether it was by indicators. However, they are made over a 24-hour period and an average traffic count for that particular period is determined from the figures that are secured at that time.

Q. Is a 24-hour average of all vehicles passing in all directions; is that correct?

Robert M. Sandridge.

A. Yes.

Q. Do you have a traffic count with you which indicates such an average taken in front of this property prior to the taking?

July, 1958 page 13 } A. Well, not specifically tied down to this piece of property. However, it is tied down between this point and three-quarters of a mile west, maybe a mile west of this property.

Q. So that traffic count covering a strip of highway from where to where?

A. From Glebe Road to Washington Street or Washington Boulevard.

Q. Washington Boulevard?

A. Yes.

Q. What is the date of the traffic count before the taking which you have reference to?

A. 1956.

Mr. Simmonds: Is he talking about Glebe Road or Lee Highway?

The Witness: Lee Highway.

By Mr. Russell:

Q. From Glebe Road to East Falls Church. All right, sir. What was the daily average figure given by that count in 1956?

A. 15,949.

Q. Do you have a similar figure for—strike that. Do you have a similar count made after the construction work was done?

A. Yes, sir, I have one for 1957 which is 18,433.

July, 1958 page 14 } Q. According to your records, would the construction work have been completed prior to that time?

A. Prior to the count in '57?

Q. Yes, sir.

A. Yes, sir, I believe so. The project was accepted in September of 1957.

Q. Will you state what the Commonwealth's purpose was in having this work executed?

A. Of course, the purpose of the project on 29 and 211 was to tie it in with the over-all improvement that has been made on Glebe Road and to better channelize the traffic that has been so congested there at that intersection. This is a part of the over-all project that improved Glebe Road.

Robert M. Sandridge.

* * * * *

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* * * * *

By Mr. Russell:

Q. Would you comment specifically from the standpoint of accessibility of this property to pedestrian traffic as a result of the construction?

A. Of course, the accessibility to the property of pedestrian traffic has been improved considerably because there is now a continuity of the sidewalk structures within the area and a person walking along anywhere near the intersection of Glebe Road can get to this property without actually leaving the regular travel-ways and having to cross driveways, that there is no protection for them, and no apparent location for sidewalk space.

Q. Well, now, is there a continuous sidewalk all the way from Glebe Road at the Gulf Filling Station up in front of this property?

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A. There is a continuous sidewalk all the way from the intersection of North Glebe Road on the southerly side of 29 and 211, to the entrance to the hardware property. The sidewalk has not been constructed from that point in a westerly direction as yet.

Q. And before the present project of the Highway Commissioner, was there any such sidewalk from Glebe Road up to the hardware property?

A. No, sir.

Q. From the standpoint of automobile accessibility, has there been any change?

A. Yes, sir. The accessibility to the property has been improved considerably because now, instead of two lanes of traffic, we have five lanes in front of this property which means that you can enter the property and leave the property much more safely and naturally; with five lanes of traffic to accommodate the cars in the area, you are bound to get those cars in and out quicker and safer.

Q. Has there been any change in this property by reason of the construction with respect to drainage, surface water flow?

A. The drainage that the property had to begin with was perfectly adequate. The only difference between the drain-

Robert M. Sandridge.

age structures that we have there now is the over-all modernization of the area by installing curb and gutter sections rather than paved ditch sections.

July, 1958 page 18 } Q. Has there been any substantial change in grade in front of either property?

A. No, sir.

Q. Now, as to the Evans property, upon which there has as yet been no construction, is any change of grade contemplated there?

A. No, sir.

Q. Will you describe the presently contemplated improvements to be made by the State in front of the Evans property as shown on plans which you have with you and which we will introduce in evidence?

A. The Highway Department at the present time is negotiating for right-of-way for Project 1700-6 which is a continuation of the improvements that have already been placed. This continuation proceeds towards Fall Church, out to Washington Boulevard.

The right-of-way line remains the same all the way through the Dewey property.

Q. Including the Evans parcel?

A. Including the Evans parcel. There will be a five-foot sidewalk, 1-1/2 foot utility strip, and then the same road construction placed on the strip of land that now exists. As we get on past this piece of property, though, the channelization will go back into four lanes divided by four-foot median strip and proceed on in the direction of Falls Church with that typical section.

July, 1958 page 19 } Q. Will there be a continuation of sidewalk on to the west of this property?

A. Yes.

Q. All the way to Washington Boulevard, or do you know?

A. It will take some time to look through this plan to see if it goes all the way.

Mr. Simmonds: You wouldn't contend that running a sidewalk to Washington Boulevard would help this property, would you?

By Mr. Russell:

Q. Does it, according to the plans which you have before you, does it appear the sidewalk will be extended any appreciable distance west of the Evans parcel?

Robert M. Sandridge.

A. Yes, it is on past Edison Street, which is approximately half a mile and ties into an existing sidewalk in that area.

Q. That's far enough. I won't ask you to go further on it.

Is any change of grade contemplated in front of the Evans property when that construction is made?

A. No, sir.

Q. Now, what will be the situation of the Evans property? You stated there will be curb and gutter and sidewalk there, and utility strip; what will be the situation with regard to entrances? Will that affect Mr. Evans, Mr. Dewey's entrance possibilities in front of that parcel?

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A. We have designed as a part of this project two entrances to the existing parking area on the Dewey tract. Each of these entrances being 25 feet in width. The first entrance is located down near the west property line of the property and the other entrance is located where the existing entrance is now.

Q. The existing entrance, then, is the one that is now used through which traffic can go into either the Dewey lot or the Evans lot; is that correct?

A. No, sir. The existing entrance I am referring to is the entrance that traffic now uses to get into the Evans parking lot.

Q. I see. What about the entrance that traffic now uses to get into the Dewey lot?

A. That is located partially on the Evans tract and partially on the Dewey tract.

Q. In any event, plans did not contemplate destroying either existing entrance; is that correct?

A. No, sir.

Q. You state there is another entrance plan down near the extreme westerly end of the property?

A. Yes, sir.

Q. The westerly end of the Evans lot?

A. Yes, sir.

Q. There is no existing entrance there now, is there?

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A. No, sir.

Q. Can you state the approximate time table with respect to this proposed construction?

A. The tentative day for the scheduling or advertisement of this project is in September.

Robert M. Sandridge.

Q. 1958?

A. Of this year, yes, sir. However, there is a possibility we will not be able to secure this right-of-way by that time.

Q. You are now negotiating for the land?

A. Yes, sir.

Q. Has the money been appropriated for the acquisition of land?

A. Yes, sir.

Q. Can this sheet be detached? Is this the only applicable sheet?

Mr. Sandridge, I will ask you to identify the plat to which you have referred in giving these construction details of the proposed work.

A. This is Plan Sheet No. 3 of the Virginia Department of Highways Plans for the Improvement of Routes 29 and 211, Project 1700-6.

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Mr. Russell: Your Honor, I would like to introduce this sheet which Mr. Sandridge has just identified as an Exhibit.

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By Mr. Russell:

Q. Mr. Sandridge, have these plans had final approval by the Highway Department?

A. Yes, sir.

Q. These are the final plans upon which, as far as you know, construction will be made?

A. As far as I know, yes.

Q. Do you know of any proposed change?

A. There are some proposed changes in the project itself but none that affect this immediate area here.

Mr. Russell: I have no further questions.

May I ask what that exhibit is?

The Court: Commissioners' 4. Admitted.

(The document referred to as Commissioners' Exhibit No. 4 was admitted into evidence.)

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Whereupon,

WILLIAM H. KENNEDY,

was called as a witness and being first duly sworn was examined and testified as follows:

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page 47 } DIRECT EXAMINATION.

By Mr. Russell:

Q. Would you please state your name and occupation, sir?

A. William H. Kennedy, Zoning Administrator, Arlington County, Virginia.

Q. Mr. Kennedy, are you familiar with the zoning of two adjacent parcels of real estate on Lee Highway, just west of the intersection of Glebe Road owned by Bernard W. Dewey, one of which is used as a hardware store, and the adjacent parcel is known as the Evans Coffee Shop property?

A. Yes, sir.

Q. What is zoning of those two parcels of ground?

A. C-2, general commercial.

Q. Can you tell us what building set-backs are imposed by the zoning ordinances and regulations of Arlington County?

A. Forty feet from the 1942 right-of-way line.

Q. I show you a plat which is marked Commissioners' Exhibit 1, which shows the old, or 1942, right-of-way line and also the center line of Lee Highway, where it passes in front of these properties, and ask you if you will take your scale and mark that 40-foot set-back line on that plat and draw it on with a pencil, if you will, sir.

Mr. Simmonds: May I inquire the materiality of this? I think the testimony is that these buildings were
July, 1958 erected in 1938 and the other one in 1939. I don't
page 48 } know whether any set-back lines are applicable to them.

The Court: I think the answer is obvious. He claims that is in set-back and you can't build on it.

William H. Kennedy.

Mr. Russell: Future building cannot be made on it.
Mr. Simmonds: You are claiming it couldn't be used for parking?
Mr. Russell: Oh, no; no such claim as that.
The Witness: You state this is the 1942 line here?
Mr. Russell: Yes, sir.
Mr. Lewis: Off the record.

(Discussion off the record.)

By Mr. Russell:
Q. Mr. Kennedy, if I tell you now that the State is taking a strip of land from this property which is of uniform width, between 19 and 20 feet, less than 20 but more than 19, and that it extends across the entire frontage of this property from east to west along the old south right-of-way line of Lee Highway, would that entire area of taking be within this set-back line, be within this set-back area?
A. Yes, sir.
Q. No buildings could ever be erected on it under the present zoning; is that correct?
A. That's right.
Q. It could be used for parking, could it not?
July, 1958 A. It could.
page 49 } Q. The line that you have drawn cuts through part of the building of the Evans Coffee Shop as shown on this plat. Does that, in any way, interfere with the operation of the present business that is constructed there?
A. No, sir, it does not.
Q. Why not?
A. It is a non-conforming, sir. It was there before the establishment of this provision of the zoning ordinance.

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Q. Based on your studies of present day parking necessary, and requirements, and not necessarily on what the ordinance requires, do you feel that the parking here as shown on this plat is adequate for these buildings?

William H. Kennedy.

The Court: You are not talking about over-all; you are talking about the unit space?

Mr. Russell: I am talking about the over-all space now, the number of spaces.

The Court: Everybody agreed it wasn't.

The Witness: You mean all the spaces shown on the entire plat, or just in front of the 40-foot line?

By Mr. Russell:

Q. I mean all of them shown on the plat. You have personal knowledge of the nature of those buildings and the businesses that are carried on there, do you not?

A. Yes, sir.

Q. You know the Evans Coffee Shop, the type of business that is in that, and the type of business conducted in the Dewey Hardware Building?

July, 1958 page 54 } A. Yes, sir.

Q. With that knowledge, do you feel that there is adequate parking shown on that plat for those two, an adequate number of spaces?

A. In my opinion, no, sir.

Q. Why do you say that?

A. I have been up there and couldn't park the car.

Q. Best reason there is.

What do you think about a proper number of spaces for those?

A. I think this plat shows a total here of 51. That is the highest number.

Q. What do you think would be an approximate number of spaces which would be adequate for these two buildings?

A. I don't see how I could say unless I knew the area of the two buildings, use a ratio that way—I don't know the area of the two buildings.

Q. What ratio would you use if you knew the area of the building? How many square feet of parking do you feel should be employed for a square foot of space in the building, commercial floor space?

A. Well, depending upon arrangement, I would say somewhere between two and three square feet of parking for one square foot of sales area.

Q. You feel that is a good, modern ratio?

July, 1958 page 55 } A. We have a proposal from our consultant just delivered to me this morning. He called for four to one.

Carroll Wright.

Q. It is increasing all the time, isn't it?

A. Yes, sir.

Q. Would you say it is increasing because of the change in size of automobiles, or because of a change in the mobility of commercial public, or what? Do you know?

A. The size hasn't changed that much. I think everybody is riding to shop now rather than walking or using public transportation.

Q. But in your experience, hasn't it been a constant change in the requirement of parking ratio, that it seems to constantly increase?

A. Yes, sir.

Q. The proposed change, then, is four to one?

A. That is what our consultant has suggested.

Mr. Russell: I have no further questions.

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CARROLL WRIGHT,

was called as a witness and being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Russell:

Q. Would you please state your name and occupation?

A. My name is Carroll Wright. I am a realtor, specialist in appraisal of real estate. Address, 1 North Glebe Road.

Q. Will you state any particular training or background which you have in the field of real estate appraisal work?

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A. I have been a broker engaged in the profession actively since 1946. I originally have been in the business since 1925 and I have been president of the Alexandria-Arlington-Fairfax Real Estate Board, the Virginia Real Estate Association, Member of the District of Columbia Chapter, American Institute of Real Estate Appraisers, Senior Member, Society of Residential Appraisers.

I have appraised for banks, insurance companies, utilities,

individuals, counties, states, school boards, in this area, and throughout the State.

The Department of Justice and General Services Administration as well as others.

Q. Mr. Wright, have you been engaged in this work in Arlington County during this entire period?

A. Particularly since return from military service in '46, yes.

Q. Do you have active and working knowledge of real estate values in Arlington County from the period since 1946?

A. I think so. I try to keep up with it.

Q. Have you appraised at our request the property of Mr. Bernard W. Dewey on Lee Highway, just west of Glebe Road in Arlington County?

A. Yes, sir, I did.

* * * * *

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Q. Will you then state the procedure that you used?

A. I studied the petition of the taking, the plans. I determined the items of damage which could be considered as compensable.

I inspected the property, determined the shape, the area of the land involved, and took notes on the improvements. I determined the zoning as being C-2 which provided for 45-foot height from the curb, the sewer and the other utilities that might be available.

July, 1958 page 74 } I found all of those were available to the property—the building set-back lines which I found to be 40 feet from the property line.

Q. You say property line. What line is that?

A. That would be the line on Lee Highway.

Q. The right-of-way line?

A. The right-of-way line.

Q. Not the center line?

A. Not the center line. It would be the right-of-way line.

The rear yard requirements and the set-backs—on that, which I found to be none—the buildable area before this taking and the buildable area that would remain after the

taking, I found that it would be the same inasmuch as this taking is all within the set-back area of this property.

I studied the plans for any changes, if any, in the elevation of the highway, and found that there was negligible difference, not enough to consider.

Changes in the elevation of the property, there was really nothing there.

And the location of the area that was to be taken in fee, which was a strip approximately between 19 and 20 feet, a little variance, which was along the front, the study I had made of the previous road, the new one, the improvements to be made, and the use to be made of the area that

July, 1958 was acquired, the sales of comparable properties page 75 } in the area before and after taking. The fair rental value of what I thought the property could support, the topography of the property which is generally cleared and generally level.

Neighborhood characteristics and changes, highest and best use I considered for the property before and after this taking.

Q. What was your conclusion as to the highest and best use of this property?

A. I felt that the highest and best use for the property was to continue it in its present use.

Q. It is now used to its highest and best use?

A. Yes, I think it is. I would say that advisedly because if the land were free and clear of any buildings, probably would recommend something else, but they have not depreciated to a point where they are so far obsolete you would say those buildings should be taken down unquestionably and do it.

Therefore, I think to continue it in its present use is the best utilization of the property.

Q. Will you then describe the condition of the property itself before the taking?

A. Well, it was rather irregular-shaped lot improved by a two-story brick store and apartment building.

Q. You are speaking of the Dewey parcel now?

A. I am speaking of the Dewey parcel, yes.

July, 1958 These apartments had been used one time as page 76 } offices. The units had two rooms, kitchen and bath, small foyer. The store was used by the owner as a hardware store. The hardware store catered to local trade and also to certain outside, or wholesale, or builders' trade. Certain people would come up and back and get their supplies and go right on from that area, so it was not wholly

dependent on the retail trade coming off the street for that particular business.

The other property—as I say, there was a 15-foot alley there, the front area between the road and the store was used as parking, which was capable of storing, according to the study which I saw and which appeared as favorable to the property, as I think could be developed of storing about 15 cars in a crowded capacity.

That is allowing about 8 by 18 parking space which is getting the most on the lot that could be hoped to be done.

A Commissioner: Before taking?

The Witness: That was before taking, yes, sir.

By Mr. Russell: These questions are all directed to conditions before the taking, you understand that, Mr. Wright?

The Witness: Yes, sir.

Mr. Russell: What we are talking about now?

The Witness: Yes, sir.

By Mr. Russell:

July, 1958 page 77 } Q. You feel that 8 by 18 parking space is adequate?

A. No, it is too crowded I think it is very crowded. Those cars on the area were crowded anyway.

I think to resolve it in favor of the man, you should consider he has as many parking spaces as could be worked out on it. He was utilizing it to its very best use but it was deficient.

Q. I show you Commissioners' Exhibit No. 1 which shows an engineer's conception of available parking spaces on this property before the taking and I ask you if you consider that that is just about the maximum number of parking spaces that could have been usably crowded into that area?

A. Yes, I certainly think so.

Q. According to this—

A. According to this, and this line which would come up, when these were separated. When it was decided to determine its value in these two parcels, I think the line which would come—

Q. You are referring to the line between the Evans and Dewey property shown as line A-B here on Dewey's Exhibit No. 2?

A. Do you have that line drawn on here?

Q. It is on this plat.

A. It is on this plat. If that plat comes up, it is a little

different from the one I had. If this comes up, you would only have about fourteen parking spaces available
July, 1958 to this area. I had a little different line on mine
page 78 } which showed 15, but according to that, there would only be 14 parking spaces available to this property.

Q. So, before the taking, with the maximum amount of cramming, you feel that 14 is about the maximum number of spaces that Mr. Dewey could have had on his parcel?

A. According to that parcel there, yes, sir, that dividing line.

Mr. Simmonds: When you say "this" and "that" are you referring to Dewey's plat or to—

Mr. Russell: He is referring to line A-B drawn on Exhibit No. 1 as the line he pointed to when he said "that line" and it is my understanding that his testimony is that if the line were superimposed on Commissioners' Exhibit No. 1, it would show 14 parking spaces on the Dewey parcel.

Is that correct, Mr. Wright? Have I stated it correctly?

The Witness: Yes, because that line comes up through and cuts through this one which is indicated as 15 and 16—would be off, too.

Mr. Russell: Mr. Wright's testimony referred to the number of spaces that would be shown if the line between the Dewey and the Evans parcel were to be drawn on this plat, it would run roughly along the extension of the side line of the Dewey building.

By Mr. Russell:

July, 1958 Q. In other words, referring again to Commis-
page 79 } sioners' Exhibit No. 1, it is your testimony that this line between the Evans and Dewey parcel, which is shown on Dewey's No. 1, would eliminate parking space No. 16, is that correct?

A. And it would catch 15, too, because your line—

Q. Pass through part of 15?

A. Pass through part of 15 because your line would come like this.

Q. I see.

A. But whether it is 14 or 15 is not too much.

Q. Mr. Wright, do you consider that that is a practicable—referring now to Commissioners' Exhibit 1, which is before you—do you consider that that is a really practicable parking arrangement?

A. No, sir, I don't consider it really practicable parking arrangement because today it is generally accepted that the ratio of three feet in parking to every foot of space in your building is desirable, and certainly the minimum today that is recognizable for operation is two to one. This does not come up to that.

Speaking about the parking, on your store, I might be getting a little ahead of myself, but as I computed it, there is about 9751 square *foot* of store area in this building; parking ratio of three to one, you should have 29,235 square feet of parking needed, or about 117 car spaces.

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Now, a ratio of—

Q. That would be 117 car spaces for the Dewey store alone?

A. Yes, sir.

Mr. Simmonds: Are you talking about Dewey and Evans?

The Witness: Talking about Dewey.

If there is 9751 square feet in his building, in his floors, on a ratio of three to one, that would be 29,253 square feet; and on a basis of 250 square feet to a parking space, I think that works out, if I am not in error, about 117 car spaces.

Mr. Simmonds: Four to one or three to one?

The Witness: Three to one. 29,253 square feet of parking desired.

If the ratio is two to one, then there would be 19,502 square feet of parking needed or 78 car spaces at 250 square feet per car.

Mr. Simmonds: What was the last figure?

The Witness: 78 spaces on the basis of two to one, assuming this property had 15 spaces available before the taking.

Mr. Russell: Before the taking, you say?

The Witness: Assuming that it had. We were discussing between 14 and 15, but if you want to say 15 spaces *avaiable* before the taking, the property has only about 20 per cent of the acceptable minimum standard of parking. That has been determined by experience and research and experts.

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By Mr. Russell:

Q. Mr. Wright, considering for a moment—we will come back to that—but considering for a moment a modern shopping center development, such as Seven Corners, do you

happen to know the parking ratio that has been utilized for those commercial establishments?

A. No, I don't have the ratio on that building, but I should say that would be a minimum of about three to one, anyway. Two-story buildings.

Q. I don't want to digress into a detailed consideration of parking at this point and we will come back to it, but I would like to ask you now to resume your description of the premises before the taking.

A. Well, also on the land, I think we may as well describe this at the same time—this is on the other part—I would like to describe the Evans parcel.

Also on the land was a one-story restaurant with parking on the front and the west side which was permitting about 36 crowded spaces, the property was subject to the limitations of ingress and egress as provided in the rules and regulations of the Highway Commission. By that, I mean the Highway Department has the right to limit the areas of ingress and egress on any property in the county at any time.

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page 82

I know that because I have a property at 4701 Columbia Pike that you used to drive on and off the highway and then the State came by and put in a curb and put in an opening and a drive and there was no compensation for it. They didn't take any of the land but they had the right to do it. So I had to abide by that.

And this property did have, faced the same possibility that the State could do it whether they had done it as yet or not. That is a right which I think has been given them by the Legislature.

Mr. Simmonds: If Your Honor please, I don't know whether Mr. Wright is going to give us some more dissertations on the law. Frankly, he is telling me some law I never knew before, but I don't think it is proper for this witness. As long as he said it—

The Court: We are going to take it that that is what he assumed the law was when he came to his conclusions.

The Witness: The foyer to the restaurant was, as I gathered, was a little bit within the building restriction line. Just how much, I don't have a note of it here. No curb, gutter, sidewalk, utilities. A strip between the utility and the highway. The stakes separated the highway from the parking lot.

Mr. Russell: Stakes?
The Witness: Stakes driven in the—

July, 1958
page 83 } By Mr. Russell:
Q. White posts?
A. White posts, yes, sir.
The highway was an obsolete, sub-standard, rural type, about 40-feet width, 30 foot paving; and set-back line here was also 40 feet.
While the land today, as I say, was not under today's condition improved to highest and best use, it was not to the point of being obsolete and justifying removal so we could consider it was all right.
Q. Will you now describe the situation that existed on both of these parcels after the taking? You might describe the Dewey property first to keep up the same order.
A. After the taking, there is no change in the brick store building. The sign on the restaurant had to be moved from adjacent to the highway to the top of the foyer in an elevated position. The sign at the west end of the property which extended over the restriction line by an overhang and would require moving, and—
Q. Let me interrupt you there to ask: When you later come to your assessment of damages for this taking, have you made any allowance for the moving of this sign at the West end?
A. I considered it in my damages at the time.
Q. We will let you get to that later. Go ahead.
July, 1958 A. All right, sir.
page 84 } The 6-inch curb would be placed along Lee Highway at the new right-of-way line in place of posts which were formerly used. Lee Highway was to be widened to a 76-foot width with one 32-foot moving lane on the north side and a 30-foot moving lane on the south side. There would be a three-foot median strip with a break at Buchanan Street. Set-back line would be reduced to approximately 20 feet instead of 40 feet.
Present entrance to the store—
Q. You mean by that, the set-back line will be 20 feet from the new right-of-way line but the set-back line stays the same place on the ground, does it not?
A. As far as building, your building would be, but instead of 40-foot set-back, you have 20 feet.

Carroll Wright.

Q. Three-foot with break at Buchanan Street?

A. Your present entrance to the store which is 30 feet will remain. There will be two 25-foot cuts allowed on the west area if desired and shown on approved plans.

The rural type of road now will be replaced with a modern, urban type. Nine feet of this 19 feet which is being taken will be used to install sidewalks, curbs, gutter and the utility strips. Utility strips for your poles between your sidewalk and your curb.

July, 1958 page 85 } The storm drainage, at the junction of Lee Highway and North Buchanan Street, would be installed.

Prior to that, the water ran over that land and towards the alley. There would be storm sewers set in to take care of drainage at the area.

Q. Does that storm sewer encroach on this property or run across it in any way?

A. No, sir, I could find nothing for that; it would be caught in the street.

Q. It will be out in the street entirely?

A. Yes, sir, in their right-of-way.

Q. This 20-foot strip which is being taken across the front of the property will eliminate approximately eight parking spaces, and as far as the store goes, on the west side, of the restaurant, the parking will be reduced from a crowded 36 places to 28 crowded places, according to that same study?

Did you make those computations on the basis of comparison between Commissioners' Exhibit 1 and Commissioners' Exhibit 2?

A. Yes, I did.

Q. That would be the comparison between the number of parking spaces shown on this plat which is before, and this plat which is after? Is that correct?

A. That's correct.

Q. If, as you have testified, Commissioners' No. 1 shows a rather excessive allowance of parking spaces,

July, 1958 page 86 } would you still apply the same standard to plat No. 2?

A. Well, they are going to still be crowded but if you are going to use one measure against one, I think the same measure should be consistently applied to the other. If it is going to have the benefit of as many parking places prior to taking, the same uniformity should be applied afterwards, and for that reason, it was.

Carroll Wright.

Q. Would it be your testimony that both of these show almost the maximum possible crowding of parking?

A. That was.

Q. That was not necessarily the optimum parking?

A. Oh, no, but as to what would be the best in the way of accommodation.

Q. The area taken—I will get to that later.

We have already had testimony as to the total area taken. As to the breakdown between the two properties, do you have any knowledge as to the flow of traffic through the—this is before and since the taking,—through the parking area in front of Mr. Dewey's store, as to the availability of egress from that, primarily? We know where the ingress is. Where is the egress?

A. The egress is to the property to the east. You go over some of the property to the east and then you go out onto Lee Highway a little nearer Glebe Road.

Q. Is that egress on Mr. Dewey's property?

July, 1958 page 87 }

A. No, sir, that is on the adjoining property owner.

Q. That is Sumner?

A. Sumner. If that was ever closed off, I don't know what the effect would be.

Q. All right, sir. That situation has not changed one way or the other by reason of the taking, has it?

A. As far as the ingress and egress goes, no, sir.

Q. Also with respect to this, this also goes to before and after the taking, can you state whether the parking area has been one that has been maintained for the exclusive use of Dewey Hardware patrons, or use in common with others?

A. I think it has been more or less in common with others. From all indications that I can find, it was never pressed.

Q. Has the taking made any change in this respect as far as you know?

A. I don't think so, the maintenance of it.

Q. All right, sir. Would you then tell what elements you considered as causing damage to this property?

A. Well, approximately 16 places of this crowded type will be eliminated, the sign on the front of the property which was there by the foyer is going to require relocation. It was taken up off the ground.

Mr. Simmonds: Are you talking about both properties now, or Dewey's or the Evans Coffee Shop?

A. I am talking about both properties.

July, 1958
page 88 } By Mr. Russell:
Q. Sixteen lost?

A. Sixteen are lost to both properties, yes; about 8 in one and 8 in the other.

Mr. Russell: May I say there that when he says 16, he is again basing it on the answer that that is the comparison between these two before and after plats we have introduced. They do not show on them the dividing line between Dewey and Evans so it is not too easy to say how many are lost from each parcel.

Your answer is, it is apparently eight from one and eight from the other?

The Witness: Yes, sir.

By Mr. Russell:

Q. All right, sir.

A. Speaking of the damages, the sign at Evans Coffee Shop which used to sit in front of the foyer has had to be moved, and has been set up on top of that foyer, which there was some expense involved by Mr. Evans, I am sure.

Q. There is a sign at the west end of the Evans Parking Lot, is there not?

A. There is the sign, yes.

Q. Will that require moving when the change is ultimately made down there?

July, 1958 A. I think it could be, yes, sir. I don't know
page 89 } how the State would react but I think they have a right to insist that it be moved, and I assumed so in my report. The 1985 located in the building restriction line was reduced in depth from that sign.

Q. Did you find any elements which would serve as benefits offsetting these damages?

A. Well, yes; I found some.

The first thing, there was an over-all increase of six feet in frontage which was practically all attributable to the frontage occupied by the Dewey Hardware.

Q. How does that come about?

A. Because the line on the bias comes into the road in this manner and by the time you cut off this strip across the front of that, it just naturally widens it out.

Q. To get this phrased for the record, because we cannot

get your gestures in the record very well, would it be correct to say that as the two property lines, the Dewey property, approach Lee Highway from the south, they converge and therefore, as you take off frontage, as you take off a strip of land along Lee Highway, you increase the frontage on Lee Highway?

A. I think by the time you take this line—what I am saying, with this line coming in like this instead of running up the street, coming in like this—with your other line

July, 1958 over about here, by the time you take it off, you

page 90 } have increased your width across that front a little bit. According to computations, it amounts to about six feet. It goes from about 236 for the whole, to about 242 and is really practically all on—affects that portion that is divided as Mr. Dewey's property.

Q. Did you find other elements of benefit?

A. Yes, sir. You are going to have a wider highway which is going to aid the traffic movement, provide safety, and thereby encourages the use of the neighborhood for your shopping. The hazards from accidents are reduced as the former uncontrolled driving is being channelized. The curb is being provided for the property.

The building is being brought into closer proximity to the road, permitting show display to be seen more clearly, and the front of the restaurant is freed from concealment by the parking formerly thereby.

Take a look at the stores—formerly a parking of cars right up close to the curb toward the stores. Another parking towards the highway.

This one strip of parking has been eliminated there along the front and certainly a store is better off if there is only one row of cars in front of it than if there is two.

If there is none, it is still better.

Clarendon is an example of what they are trying

July, 1958 to do, that they recognize if you can get away from

page 91 } parking—

Q. What is the situation in Clarendon, if you know?

A. There is a lot of agitation, a lot of effort being made to eliminate some parking on Wilson Boulevard entirely. The merchants there feel they would be better off if there were no parking on Wilson Boulevard, that people could better see their display windows; the pedestrian could enjoy the stores more and set your parking somewhere else because you have curbs, gutters, and sidewalks, and it isn't too difficult for

people to walk now. People don't want to walk through mud puddles and through side drainage ditches that are just there for the cars; but where you have sidewalks and curbs and gutters, like Washington and the more Arlington becomes urbanized, the more it becomes a city, the more people will accept those things.

The subject property is smartened up in appearance by new modern highway with sidewalks, curbs, utility strip, and gutters and with the storm sewer drainage corrected, with no,—with road installed at no expense to the property owner—even your neighborhoods in the close proximity are going to be smartened up and it is going to be improved and look better.

There are some other dwellings in that general area that have been enhanced in appearance.

Q. Now, would you get to the appraisal that you have made of this property and give us the figures that you

July, 1958 have worked out for the values of it?

page 92 } A. Taking the store, there are a number of offsets and extensions to the property. I can break them down if it is necessary. To save time, if anyone wants it, I will be glad to—

Q. Unless one of the Commissioners particularly requests it, and you may be asked about it on cross examination, I will not ask you to give breakdowns of the various square footages of each addition and each shed and so forth, but you can give it as a whole.

A. 9751 square feet in the building, including 3595 square feet on the second floor.

Q. This is Dewey's Hardware?

A. This is Dewey Hardware.

Q. 9751?

A. Yes, of which 3595 was in the second floor area.

163,131 cubic feet. That is on different heights.

Assuming the 9751, which is your square foot up and down, two floors, giving that a replacement cost of $8.50 a square foot, it amounts to $82,873.

On the basis of a cubic foot basis—

9751 at $8.50 comes to $82,873.

163,131 cubic feet at 51 cents equals $83,196, which I rounded out at $83,000.

Allowing physical depreciation of 20 per cent,

July, 1958 years at two per cent, and the property has been

page 93 } maintained physically in pretty fair condition, that amounted to $16,600 which left a depreciated,

physical depreciated value of the property of $66,400 for that building.

The restaurant had 8027 square feet.

Q. What was that again?

A. 8027 square feet, of which 2021 were in the basement restrooms area and 105,653 cubic feet. I gave the 8027 square feet $8 a foot and indicating a value of $64,216; on a cubic foot basis, 105,653 cubic feet at 62 cents, $65,503. I rounded this at $65,000.

I gave this building physical depreciation ten years at two per cent, $13,000, making a depreciated physical value of $52,000.

The walks, terraces, paving, and so forth, depreciated value of $3,500, which made that $55,500.

Mr. Simmonds: How much for the terrace and so forth?

The Witness: $3,500.

Mr. Simmonds: Total of how much?

The Witness: $55,500.

I looked at the property also from the standpoint of income, as to about what income could be expected from the property.

The store had 77 front feet, which I estimated should produce about $8.50 a front foot a month or $650 a
July, 1958 month, which amounted to about $7,800 a year.
page 94 } The four apartments which are in the building I estimated would probably produce $62.50 each which would amount to $250 a month, $3,000 a year, and on apartments, you can give that about an average, average them on a capitalization basis of about seven times the annual gross which would give you about $21,000 of that value; and the $7,800 a year times—ten times that, which would be about $78,000.

By Mr. Russell:

Q. May I ask you how you arrived at that ten multiplier? You say you are multiplying the approximate income by seven to capitalize?

A. That is a general rule. When you don't have access, when you don't have the full operating statements where you know over a period of years how much income and how much expense a property has, it is necessary to sometimes use certain rules of thumb and they work out fairly well.

In the case of the commercial property, ten times an annual rent is reasonable for that and apartments will often sell for

seven times, usually sell for seven times. This type of investment, I thought seven would be right and I considered ten times in arriving at it from that investor's standpoint.

Q. When you consider that ten-times multiplier, what brought that to my attention, are you familiar with the sale of a shopping center by John Wright, no relation to you?

July, 1958 page 95

A. Yes, sir, I made appraisal of that property about a year or so ago, a year ago.

Q. Considering that as a first, do you feel that has any elements of comparability to this property?

A. Well, it is a commercial property. It is an income-producing property. The only person buying it would be one looking for income. Had no residential amenities or anything like that. This is the same type of property. It was a larger area; it was located here in this general metropolitan area of Washington. It was just over the line in Alexandria, down by Quaker Lane and Fern Street in that Fairlington area. I think there was a lot of comparability. There was some ways it wasn't. It had stores that were adaptable for many uses. One of these stores was a single-purpose, generally a single-purpose type. It would be expensive to convert it to another use than probably the restaurant is used for, but I think it was sufficiently comparable to get an indication.

That was a property that over the several years, around '55, '54, '56—in there—had been producing an annual rent of around $89,000 to $93,000. If you want to settle at $90,000, and it sold for $750,000—if you want to, that is a little over eight times the rent. So when I think we use ten times here, I am being very fair because ten times ninety would indicate $900,000 value.

July, 1958 page 96

So I thought I was very reasonable in this approach.

There is another little property down at Washington Boulevard and Glebe Road that a man by the name of Godelsky owned, sold in 1957, about June, to Leshinsky. That property brought $50,000. It was where the old Safeway Store used to be before they moved out.

Leshinsky rented that property to Hugh Riley—I am pretty sure it is Hugh Riley Paint Company for $450 a month a ten-year lease which would indicate $5,400 a year and ten times that would be $54,000, so I felt this was enough of a yardstick as to that rental per front foot per month.

That ties in some of the other rentals that had been made in that area where such as the People's Drug Store, when

Sumners rented to People's Drug Store, or when he rented to Seidel.

I might say that in—this is a lease now so I must necessarily go back considerably further than I may have done otherwise. In 1940, Sumner rented to People's this space of 30 by 90 for $200 a month for five years, $225 a month for five years, $250 after five years, and this original ten-year lease indicated your last rent under that lease at about $8.33 a front foot.

Then, in 1951, Sumner rented to Seidel, 4750-54 Lee Highway, 57 by 90 on a ten-year basis for $475, with a five-year option at the end of the 10 years at $600, which

July, 1958 indicated a rent of $8.33 a front foot.

page 97 } I thought under those circumstances to assume a front foot rental of $8.50 for these other properties was being fair. That is how I built that up.

So, on that basis, it was obvious that there I had to make a choice because I came out at more than what the capitalization would prove.

By Mr. Russell:

Q. Would you give us the figures that you got, multiplying the annual income from the hardware business by ten and the apartments by seven?

A. The store, seventy-seven fifty would be six-fifty. That would be $7,800, times ten would be $78,000.

And the $3,000 times seven would be $21,000 which would amount to $99,000, as a value for that property.

Q. Did you treat the restaurant building similarly?

A. I treated the restaurant building similarly, not exactly the restaurant building—I was able to find out it was leased with 18 more years to go provided two five-year options are exercised. There are two five-year options yet to go after the lease expires, but if they are taking care of them, they would have about 17 or 18 years more to run, and that restaurant provides for $9,000 a year, minimum rent and a $13,200 per year maximum rent. 6 per cent percentage.

That runs from $750 a month to about $1,100 a

July, 1958 month.

pkage 98 } From the information I was able to develop, that rent had been about $12,000. As of the time of this taking, Mr. Evans was paying about $12,000 a year which was above the minimum, below the maximum.

Q. Closer to the maximum than the minimum though?

A. Within ten per cent of the maximum, yes.

Carroll Wright.

Q. Do you know how long that has been the case?
A. How long he has been paying that?
Q. Yes.
A. I wouldn't know exactly. I couldn't get all of that information. Just general. I just had to do the best I could.
Coming back to the store, I figured a value of the store before the taking, depreciated replacement cost, $66,400. I gave economic obsolescence of—

Mr. Simmonds: Excuse me again. You are back to the store again?
The Witness: Yes, back to the store.
$66,400.
Mr. Simmonds: All right.
The Witness: In addition to the physical depreciation, I took $6,893 as economic obsolescence to the property making $59,507 as depreciated value of that building.

By Mr. Russell:
Q. What is that figure again?
A. $59,507.

July, 1958 page 99 } Mr. Simmonds: This is before taking?
The Witness: This is before taking, yes, sir.
Mr. Russell: On what did you base the economic obsolescence?
The Witness: Well, the thing that I based it on primarily was because of this second floor to this building. Second stories are not popular. A lot of times, in mortgage appraising, mortgage lending, people won't give any consideration to the second floors. You will notice the new stores that are being built, most people prefer just a one-story type of store. So I took that because of that.
Mr. Simmonds: What did that give you for your final figure before taking?
The Witness: $59,507 for the building only, Mr. Simmonds.
Mr. Simmonds: Talking about Dewey?
The Witness: Dewey.

By Mr. Russell:
Q. Both physical and economic obsolescence?
A. That's right, yes, sir.
This parcel of land, computation apparently contains—I say apparently—it contains 12,331 square feet.
Q. This is the Dewey parcel?

Carroll Wright.

A. Dewey parcel. I gave this land $3.25 a square foot which amounted to $40,092. That gave me a total value of $99,600 for that property.

July, 1958
page 100 } Mr. Simmonds: $40,093?
The Witness: $99,600.

The taking on this property amounted to 1388.9 square feet. Giving that a value of $3.25 a foot, and I saw no reason to differentiate between an over-all value of this land and making it any less just because it was in a building restriction line and couldn't be built on, that amounted to $4,514.

When you take that from the value before, that gives you a value of the fee less the taking for the severance of $95,086. That was what the instruction that I had to appraise the property before taking, and then deduct from that value the value of the land, property taken.

I took $4,515 for the land taken from $99,600 and I got a value of $95,086.

Now, to come to the value after the taking, I have the building at $59,507. I didn't feel that there was any damage to the building, reducing the original amount of area from 12,331 by 1,388—the lot will be reduced to 10,941.1 square feet remaining.

Q. What is that figure again?

A. 10,941.1 square feet.

I gave this $3.50 a foot. It was 25 cents more than what I had given it previously because I felt that with
July, 1958 the work of this highway, with cleaning up this
page 101 } area, the way the traffic was backing up at that stop-light for three, four, five turns of the light before they could get through, that moving traffic, inviting traffic, people to come back into the neighborhood more, whereas they had been diverging, going off difierent ways previously, and in line with indications of the way that values had moved in the area, that that was a very conservative, reasonable amount.

That gives you $38,295. It gives me a total of $97,802 as the value of the property after the taking.

Q. $97,802.

So that what you are saying, in effect, then, is that the residue of the land, and this is not the building but land only, you feel has from before to after the taking, increased in value from $3.25 to $3.50 per square foot?

A. Yes, sir.

Carroll Wright.

Q. This means that the total parcel remaining is now probably a few thousand dollars more valuable than it was before the taking?

A. I have been trying to make my subtraction. You could not subtract it from the other because it was greater. Therefore it shows enhancement, and my figure is $2,716 different, which is enhancement instead of damage.

Q. This still takes into consideration making full payment for the land taken, which, as to the Dewey prop-
July, 1958 erty, would be 1389 square feet; is that correct?
page 102 } A. 1388.9, yes, sir.

Q. So your conclusion is, then, that there would be no damage to the residue after that payment is made?

A. That is true, yes, sir. As a matter of fact, the property is going to be very materially better.

Mr. Russell: All right, sir.

The Witness: The restaurant, the value before the taking—

A Commissioner: May I ask a question there? I don't quite follow your arithmetic on that. Would you give me those figures again? I believe you said that the residual portion of the land at $3.50 was worth more than the entire portion taken at $3.25; is that correct?

The Witness: No, sir, not the entire proportion. I gave the building the same—before the taking the 12,331 square feet at $3.25, $40,395. The remainder of the land after this taking, which is 10,941.1 at $3.50 would give a value of $38,295.

The Commissioner: I see.

The Court: His arithmetic is immaterial because he says the building is worth so much and the land is more, so it doesn't matter how much more. This jury does not have to take that into consideration. They only have to consider loss. So the arithmetic doesn't make any differ-
July, 1958 ence.
page 103 } The Witness: As to the restaurant, the depreciated reproduction cost of $55,500—

Mr. Simmonds: We are going into after on the restaurant?

The Witness: This is before, on the restaurant. $55,500 for the building. I gave that an economic obsolescence of $3,939. The reason that I gave—

By Mr. Russell:

Q. I wish you would.

A. The reason I gave it that is because it is a one-purpose

type of building. While it can go on this rental for 17 or 18 years, with those options, it could also be changed.

I know that Mr. Bayard Evans has done a great deal towards that place in giving it its distinctive character with bric a brac and other articles he has put in there and for the type it just may not suit somebody else who may be very modern in their attitude or ideas. I think it is entitled to recognize some obsolescence for that type of property. So I gave it $3,939 which reduced it to $51,561.

Q. $51,560?

A. Five hundred and sixty-one.

Q. That represents depreciated—

A. Of the building, yes, sir. The land, 22,813 square feet which embraced this parcel at $3 a foot would amount to $68,439. Total value of $120,000.

July, 1958 page 104 } The Court: You said $3 a foot?

The Witness: Gave this $3 a foot, yes, sir.

The taking on this parcel amounts to 3,507 square feet which, at $3 a foot, comes to $10,521.

This would reduce the value to $109,479 as the value of the fee before taking, less value of the property taken.

By Mr. Russell:

Q. This is in line with Mr. Wilt's previous question. This figure represents, not the whole property, but the residue before the taking?

A. That's right, the residue after.

Q. This is sort of fiction because you are really trying to visualize a piece of land that never existed. The residue didn't exist before the taking, but this is the theoretical value of the residue before the taking; is that right?

A. That's right, sir.

Q. What is that figure?

A. $109,479.

Q. All right, sir.

A. After the taking, the building at $51,561, and there will then be—

Q. The building is the same?

A. The building is the same, $22,718—19,306 square feet.

Q. That land is how much?

July, 1958 page 105 } A. 19,306 square feet remaining, deducted from 22,813, which is originally in it, at a value of $3.25 a foot, and by the same reason as previously, I think that this land, after the taking and the improvements,

the general clean-up of the area, can support an enhancement of 25 cents a foot, amounts to $62,804, a total of $114,365.

This also show an enhancement of $4,846 and therefore no damages.

Mr. Simmonds: Would you let them have that?

The Witness: Value of $19,306 at $3.25.

$62,804. Total of $114,365. The difference, which is enhancement rather than damage, $4,886.

My recapitulation: The store value of the taking, from the store property, was $4,514. The restaurant was $10,521, a total of $15,035. I could find no damages that were done to the property that were not more than offset by the enhancement which goes on. Certainly that sign is damaged but I think even over-all, considering it, that it still enjoys a 25 per cent enhancement over and above its damages.

A Commissioner: Twenty-five cents?

The Witness: Twenty-five cents per square foot, excuse me if I said that. So that gave an over-all enhancement to the property of $7,602.

By Mr. Russell:

Q. Would you give us the comparable sales, if any, which you found in this area which would tend, in your July, 1958 opinion, to support the values before the taking page 106 } which you gave to these two parcels?

A. I might add here that the land values comparable, that I would find some sales in the area which could support the value which had been assigned to the land, the reproduction cost which I used on these buildings were substantiated with Beck's Manual of Costs and Dow's Valuation Calculator.

Some of the comparable sales, gentlemen, that I found was—I will be glad to detail this if you want to—

Q. You might give us a few digested here briefly without going into all the background. I anticipate that in cross examination counsel may want some of the details.

A. Deed Book 1149, page 574, April 27, 1954, Mount Vernon Insurance Agency sold to the Lee Highway Corporation which was the Old Dominion Bank there at Old Dominion Drive and Lee Highway, 37,814 square feet which included the former Acme Market Building. The revenue stamps there are $101.75. Subject to original first of $32,000, which indicated consideration of $121,485.69 or $3.25 per square foot, includ-

ing, or without giving any consideration to the building that was on that land, which was used in connection with their bank. This is the corner of Lee Highway and Old Dominion Drive.

Deed Book 1130, page 306; 1157, page 442—these are right together—the first, November '54; the second, July, 1958 July 9, 1954—Teck Construction Company sold to page 107 } Glebe-Lee Corporation, 94,753 square feet which is on Lee Highway and Glebe Road, which is about the drug store at the corner. $198,060 which indicated a value of $2.09 a square foot.

The deed book is—

Mr. Simmonds: For two, average of two tracts?

The Witness: Average of two tracts.

Mr. Russell: $2.09?

The Witness: Yes.

Deed Book—

The Court: The drug store?

The Witness: No, sir, this is that vacant land which was part on Glebe Road, part on Lee Highway.

The Court: Goes around the drug store?

A Commissioner: Preston's Drug Store?

The Witness: Yes, sir.

Deed book 1232, page 351, December 19, 1955, Matty Poindexter sold to People's Service Drug Stores, 29,823 square feet for $100,000 indicating $3.35 per square foot.

This property was on the corner of Lee High and Albemarle Street and was improved by the present People's Drug Store.

Go on up Lee Highway to the other side. I think it is a fair assumption that a lot of this traffic which comes off of Lorcum Lane, Spout Run, Lee Highway, becomes diverted this side of Glebe Road. I think there is rather July, 1958 a difference in value because from there it moves page 108 } over toward your Country Club and towards that good residential area and that good residential district.

So that had a bearing on the decision which I made as to the value of this land.

Coming closer to this property, on Deed Book 1109, page 184, June 24, 1953, Thayer Corporation sold to Lewis J. Faust, 13,032 square feet at $20,000 which was the house and lot at 4815 Lee Highway.

This indicated a value of about $1.50, including the house.

Carroll Wright.

By Mr. Russell:

Q. Where is that from, this property?

A. This is just up and across the street, almost directly, almost from the Evans Coffee Shop.

You have your Safeway Store there.

There is another house right next to it and right next to that there is a house that has a little frozen custard stand on it.

Q. It is commercial?

A. Commercial. Has a house and custard shop.

Q. These are all commercial properties you have referred to?

A. Yes, sir, these are all commercial properties.

A custard shop, custard stand, very nominal
July, 1958 building was put on this property; and then Deed
page 109 } Book 1286, page 173.

March 27, 1957, Faust, after building this custard stand, sold to Clifton G. Stoneburner, $14,043, subject to the original $14,000, which indicated sales price of $27,000 or $2.08 per square foot.

I felt that with these, it was, we had a sufficient pattern to establish the pattern of this land at $3.25 for the one parcel and $3 for the other parcel.

Q. Do you believe that there is any, that there have been any economic conditions which have been produced by the construction of the road there by the State Highway Commission which would affect these values one way or the other?

Let me go back before I ask that question, to preserve some continuity here.

If I may withdraw my previous question, I will ask this one: Speaking of these comparable sales, do you feel that there has been any effect on the value shown by these comparable sales from the construction of this very highway, this whole series of highway improvements and widenings? Do you think that has reflected itself one way or another in these comparable sales?

A. I am afraid I do, Mr. Russell. I will have to admit that because the Old Dominion Bank was discussing grades, the grade, and how it would affect their building and what their

plans were at the time that they made their
July, 1958 negotiations.
page 110 } This Glebe-Lee, we were discussing the fill, the

fill of the property of their land, as to how that could be done, and I think it was pretty general knowledge—I

think most all of them had. I am sure that People's Drug Store knew what they were doing.

Q. So you feel that even these sales—

Mr. Simmonds: I object to the leading questions, if Your Honor please.

The Court: Objection sustained.

By Mr. Russell:

Q. Mr. Wright, do you feel that even back at the time that some of these sales were made, to which you have testified, in 1955 and 1956, that there was any knowledge or anticipation of the present highway improvements?

A. Yes.

Mr. Simmonds: Same question, if your Honor please.

The Court: A little bit, but still leading.

"Do you feel" and "You feel" are practically the same thing; but "How do you feel" might be a little bit less.

Mr. Russell: I asked him if there was any, instead of trying to tell him what there was.

By Mr. Russell:

Q. Mr. Wright, what, if any, effect, in your opinion, would a knowledge of the projected highway improvement have had upon these sales?

July, 1958 page 111

A. It would have had a very definite effect of enhancing the value. A pattern works out too consistently. They have reports from all over the country, even from all studies they have made, showed that these values are enhanced by highway improvements in the areas. These were no different.

Q. To go back to the question which I started to ask you, has there been any economic conditions produced up here by this construction work which would not otherwise have existed?

Mr. Simmonds: I think that is a right general question, if Your Honor please. I don't quite see how we can tell what he is driving at in a question like that.

The Court: I don't know, either.

Mr. Simmonds: Economic factors throughout the world that might have had some effect on the local situation.

Mr. Russell: I asked about economic factors produced

at that intersection by this construction. I have asked him to list any factors.

Mr. Simmonds: What do you mean by economic factors?

Mr. Russell: I would be willing to let him list them. I am asking him three specific ones, but I will ask three times.

The Court: The objection is overruled, as long as you explain what you are after.

The Witness: I speak of some of the factors
July, 1958 that I have some knowledge of in this area.
page 112 } But let's look at the area.

The bus used to stop on the west side of Glebe Road as it was going towards Falls Church, going west.

That bus change, station was changed to the east side. I think that has been a general factor in the area.

The Safeway used to be there at the corner of Glebe and Lee, Glebe Road and Lee Boulevard—

By Mr. Russell:

Q. Highway.

A. Lee Highway, yes. They left because of the smallness of the store. People's Drug Store left because of inadequate—

Mr. Simmonds: I object to his testifying why they left unless he is in position to state of his own knowledge.

The Court: Objection sustained.

The Witness: The Spout Run-Lorcum Lane-Old Dominion Drive tended to divert the Country Club traffic east of Glebe Road. The commercial areas were opened to the east and west of this property.

Your Howard Johnson's, your service stations, the bank to the east of this place which opened up, which was bound to give it some competition.

To the west you had stores up around Edison Street, in that section.

* * * * *

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page 120 }

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By Mr. Russell:

Q. Mr. Wright, I would like to ask you to list and explain

any economic factors which you may have found affected your appraisal of this property, and when I say "economic factor" I refer to a factor which affects its value which is tracable to economic conditions and not traceable to the work of the Highway Department.

The Court: Which took place either contemporaneous with or after the taking of the land.

Mr. Russell: Yes, sir.

Mr. Simmonds: Your Honor, is this inquiry directed at the present time or as of August 20, 1956?

Mr. Lewis: The date of taking. It has to be before.

Mr. Russell: Of course, these factors, Your Honor, I don't think can be produced instantaneously. There are some things which would affect someone making the appraisal of the property now, and appraising it as of that date, but they would be current factors, current factors now operative, that influenced his appraisal.

The Court: You take a position, these gentlemen will take the position, then, that whatever they were, July, 1958 that would have had effect before just as well as page 121 } after. You have to fix it as of August 20.

Of course, the trouble is, you have to look at it now and figure the date backwards or the time backwards, so the Court will revise its ruling to say he may mention any economic factors he considers had an effect upon this property within a period of two years before and two years afterwards.

Mr. Simmonds: May I have an exception, please?

By Mr. Russell:

Q. You understand, Mr. Wright, these are factors?

A. Factors on which I gave consideration which affected my value of the property.

Q. Which weighted your value of the property and did not arise from the construction.

A. This property, at the time I made the appraisal, and go back to the date of August 20, 1956, was a property of a type that has had considerable difficulty. They were the types that had been built some years ago. The parking had not been sufficiently provided for. I don't blame anyone because certainly 20 years ago, 18 years ago, nobody could forsee these things that were coming.

But today, as you drive over the area and you see most of your little shopping centers that are in difficulty, they are

the older ones where they were built with shallow
July, 1958 depths, where they were built with a minimum of
page 122 } parking and today they have become obsolete.

That was one factor that has to be recognized in this property.

For instance, your stores on the north side of Lee Highway, where there has been a good bit of turnover and vacancies, those stores have only a 35-foot depth on an average. They are too small for people to desire and with the development, building, that has gone on in previous years since the war, people have been better able to satisfy themselves in other areas.

It is indicated by the Safeway Store there at Glebe Road and Lee Highway which was too small, too inadequate.

They had to go elsewhere.

These stores are all in keeping with the general trend.

Things move along here very fast because you get urban population; you get a lot of changes that affect property. The very traffic change—traffic was brought up this Spout Run Drive, up Lorcum Lane. It had a tendency of diverting. People could get over into other areas without having to come by this Glebe Road, this Lee Highway corner.

Even so, the traffic was very difficult there at that point. You had just a little 40-foot road down there, this 30-foot strip of this highway.

July, 1958 At the light, you were having three, four, five
page 123 } changes to get through that light there at a time.

That had a tendency to discourage people from coming into the area to get across the street.

The commercial areas were opened up, both to the east of this property and to the west of it. They themselves had a tendency to pull from this area which, at one time, I agree thoroughly, had been one of the nicest, most desirable little shopping areas in the county, in its day.

The parking ratio that you need today, most people recognize it as around three to one, is not present in these properties.

Also, the fact that as of that time, there was a general tightening of money and some economics in '56. There wasn't as much being built. We were trying to tighten up and it was having its effect upon building and it had its effect on value and had its effect upon people venturing into these businesses.

They reflected themselves in vacancies. We have seen more vacancies in these years, probably the most, since the war.

This is also applicable to doctors who were in crowded conditions and were accepting certain types of office space where now they have more of their doctors' buildings and they can find accommodations more to their liking.

July, 1958 page 124 } Q. Do you know whether they had doctor tenants, Mr. Dewey had doctor tenants?

A. I understand there were some doctor tenants in that building at one time. A plaque is there that may have been a doctor's plaque on there.

This is so serious a situation that, as I say, even Clarendon has been faced with that problem of what to do because of this lack of parking.

These properties also that we have under consideration today are the right-hand side of the street. They are not on the—not on your going-home side. People normally prefer the right-hand side, the going-home side. That was taken into consideration.

Some stores are closing in that area even as of the time before this taking, so it was not a case of where, in my opinion, that they closed down simply because of the highway.

We have got to recognize that changes in design and customs and habits of the people make obsolescence rapid unless situations are kept up with and adjustments made as the situations require. That was something here. Things moved along fast.

Those are the situations which had an effect, in my valuation, in placing the value upon the property that I did, Mr. Russell.

July, 1958 page 125 } I think the analogy, two analogies made yesterday, it is a situation where you have a bad situation here and it is due to a number of other causes. I don't think it can be pinned down to just one cause.

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By Mr. Simmonds:

Q. You said you were acquainted with another Standard Oil transaction in that area. Are you acquainted with one whereby they purchased the property on the north side—I mean on the west side of Glebe Road, north of Lee Highway, removed some 150 or so feet in 1958?

Carroll Wright.

Mr. Russell: Your Honor, I believe that that should be objected to. I didn't object to the last one because of the date but I think that this one certainly should be, because this is so far after the taking it is hardly to be comparable at all, and almost bound to represent an enhanced figure by reason of the road construction itself, so we are being penalized by our work if this sort of thing comes out.

The Court: I think that would be true if you had not gone into these economic items which he talked about, which extended two years both ways. The objection is overruled.

Mr. Russell: May I have an exception for the record on the ground that it is our position that comparable

July, 1958 sales any substantial length of time after taking

page 154 } should not be admissible?

Mr. Simmonds: I believe you have used them two or three years prior to that time, Mr. Russell.

Mr. Russell: Not to my knowledge. The Judge has overruled the objection.

By Mr. Simmonds:

Q. Are you acquainted with that sale, sir?

A. To a degree, Mr. Simmonds, just as I heard of a sale, whether Atlantic or Sinclair, almost across the street from where this was, some land being zoned, three-and-a-half, or four-and-a-quarter, something like that. I don't doubt it. It is improving up there very rapidly.

Q. Around $4 a foot?

A. That is my impression. I don't have my figures.

Q. You are acquainted with a sale at the northeast corner of Old Dominion Drive and Military Road of 16,780 feet—$69,500, or four hundred and fifteen?

A. Was that the Greenwood Garage?

Q. No, sir, the old Brick Wood property at Cherrydale.

A. Yes, sir, that was a fairly recent sale; I think took place this spring or this summer, the Brick Wood property, yes, sir. That was $4 a foot, around $4 a foot, if I am not wrong on it.

Mr. Russell: May I have it understood that my objection runs to all of these, Your Honor?

July, 1958 The Court: Yes, sir.

page 155 } The Witness: These were all service stations, too I think this last one was a corner service station, too, at Military Road.

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By Mr. Lewis:

Q. I just asked you thereafter if this was not general knowledge to all persons in that vicinity, that this road was being contemplated prior to, substantially prior to, August 20, 1956, and you said, yes. Isn't that correct?

A. Yes, sir.

Q. Well, now, if that were true, and the increase in the value of the land accrued as a result of the knowledge that this was going to be put in, and therefore, make it better, in your opinion, why wouldn't there have been an increase before the taking of a comparable amount based upon identically the same knowledge?

A. Because, as I understand the law, you are not supposed to give consideration to knowledge or anything to do with the road having come in; you are supposed to see this property as it was without this road and assume that this road was not there, just under the same conditions it was, and then in the twinkling of an eye, if you can get it that quick, be able to visualize as of the moment just under the conditions it was without the road, as though the road was never in, and then quick set in with side walks and curbs, and

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page 200 }

see it as you would have to see Mr. Evans' today in determining his "after" value, with enhancement, with all of these improvements in—it is mental gymnastics, but that is the way the appraisal has to be done, as I see it.

Q. You have sold a lot of real estate in your day and appraised a lot of it, and in either appraising it or selling it, you always take into consideration the reasonable possibilities of the use and the improvements of the neighborhood when you are either buying or selling a piece of real estate, whether it is in being or not, do you not?

A. They won't let me do it when I testify in court on a condemnation case. I have to consider it otherwise.

Q. From a practical sales standpoint, you do it, do you not, as a real estate broker?

A. When I buy property, I want to know everything that is going on in the neighborhood.

Carroll Wright.

Q. That affects the price?
A. Affects the price.
Q. Materially?
A. Yes, sir.
Q. Well, now, do I understand you to say that you are not permitted to testify in this Court and to use the same basis of valuing the properties in order to ascertain the fair market value of it, that you would use if you were doing it for me as a private person?

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A. You can make appraisals.
Q. You said that there was a difference in ascertaining the fair market value in so far as your testifying was concerned in this proceeding, than there would be in ascertaining the same result if you did it for a private person. I want to know if that is correct.
A. That there is a difference?
Q. What is that difference?
A. There is a difference because it is the law and I don't claim to know the law. I will give you the best I know if you want it. You probably know more than I, but my impression is, what I have been held to, when I have testified in courts, what I was recently told to do, as an example, of why I did it, was because a certain Judge in this area held in the case of the Alexandria Water Company, that you could give the value as of a certain date, but that any enhancement which had occurred as of three years previous, when they first announced what they were going to do in their water reservoir, could not be considered in connection with the value of the land as of the time of taking.
Q. Let me ask you this one question in connection therewith, Mr. Wright: Had you been employed by a business firm to give an honest, fair, market value of that land on August 18, 1956—August 19, 1956,—and were permitted to take in all factors that are generally considered by expert appraisers in valuing it to determine the fair market value, would you have used any different procedure than you did to reach the fair market value in this case?

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Mr. Russell: Your Honor, I would object to the question on the ground that it asks for a conclusion which would introduce into the case an illegal standard of proof.
The Commissioners have been instructed, and so has this witness, as he has testified, he was instructed when he made

up his appraisal to rely on the standard of valuation which the law requires in a condemnation case.

Mr. Lewis is now asking him what would the standard be if he were not in a condemnation case which would be completely irrelevant here. It might do a lot of prejudicial harm if it came into this case.

The Court: May I have the instructions?

Mr. Lewis: Do I understand you to take the position that there is a different fair market value of a piece of land for condemnation purposes than there is for the same fair market value of the same piece of land at the same time for other purposes?

Mr. Russell: I don't have to answer the question, but I will say this: In a condemnation case, we are certainly anxious to see that the public does not have to pay for the enhancement in value to the highway which is produced by its own work on the highway.

July, 1958 page 203 } Of course, you cannot help a certain amount of that. We always find it when a road is built that all values go up along the road. Then we end up paying those higher values reflected in that by reason of our own construction work but it shouldn't be the standard of proof in a condemnation case.

The Court: I will let you all argue the case when the time comes.

Let me see what the instructions on fixing valuation do say.

The objection is overruled.

Mr. Russell: I note an exception.

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Whereupon,

N. McKENZIE DOWNS,

was called as a witness and being first duly sworn was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Russell:

Q. Will you state your name, sir?

N. McKenzie Downs.

A. N. McKenzie Downs.

Q. Where do you live?

A. I live in Fairfax.

Q. What is your occupation?

A. I am a real estate broker and appraiser.

Q. What, if any, special qualifications, education and experience, have you had as a real estate appraiser?

A. I have been in the real estate and appraisal business for approximately ten years.

I do appraisal work for several of the leading

July, 1958 oil companies, banks, loan companies, churches.

page 225 } I have appraised for Fairfax County, Town of Fairfax.

I am a member of the Planning and Zoning Board for Fairfax.

I have done work with the Army, both overseas and in Alaska on appraisal work.

Q. Have you done appraisal work substantially in Arlington County?

A. I appraise Arlington, Alexandria, and Fairfax. We are members of the Board, the Real Estate Board, and we operate principally in Alexandria, Fairfax, and Arlington Counties.

Q. What firm do you belong to?

A. The firm name is Walker and King. I am in partnership with Bennett and King. There is no Walker in the firm. It is a misnomer.

Q. What oil company do you represent?

A. I appraise chiefly for Sinclair.

Q. Have you had an opportunity, at our request, Mr. Downs, to appraise the property of Mr. Bernard W. Dewey on Lee Highway, just west of Glebe Road in Arlington County?

A. I have and I did such an appraisal.

Q. As of what date did you make your appraisal?

A. I made the appraisal as of August 20, 1956.

Q. Mr. Downs, in order to save time, I will not ask you as to the instructions that you were given and the process you

used in arriving at your work. Other counsel may

July, 1958 want to bring that out on cross examination.

page 226 } Will you describe the change, the physical change, if any, that was made in that property by reason of the taking, if you are familiar with it?

A. Yes. I am.

The taking was approximately a 20-foot strip across the front of the property. It did not affect any of the buildings

involved. The taking was in the area which was included in a 40-foot setback, so it actually was an area which could not have been build on. It was used for parking.

There were two signs involved. If you want to go into any improvements which were taken, necessitated—

Q. Do you want to mention those? What was done with the signs, or will have to be done?

A. One has already been moved and, as far as I could determine, to really a more advantageous position. It has been moved from the front to the top of the entrance to the Coffee Shop and it gives the motorist, the person going by, a much better chance to view the sign, and I think would probably, he would be inclined to stop there to eat, with the reputation that Evans Coffee Shop has. Otherwise, he might be inclined to run by it with the parking obstructing the sign which previously existed prior to the taking.

Q. Mr. Downs, will you now give us the detailed appraisal that you made as to these properties before the taking and, separately, if you will, treating the two parcels separately.

July, 1958
page 227 } A. The depreciated value of the hardware building, I came up with a value of $57,228, and the land value prior to the taking, of $40,692, which is a total of $98,920.

The restaurant, the depreciated value, was $54,369. The land value was $68,439, for a total of $122,808.

Do you want the "after" at this point?

Q. $97,920 represents land and building on the hardware parcel?

A. That's correct.

Q. And $122,000—

A. $122,808.

Frankly, I feel that is drawing it rather fine. It could have been evened out but if you asked me how I arrived at the figure, this is the exact figure I came out with and I quote it.

Q. Will you give us the breakdown, then, as to how you arrived at these figures, starting with the hardware parcel?

A. The hardware parcel involved 10,000—wait a minute—that is after the taking. The actual taking is that which you want, the taking at this point?

Q. I would like a breakdown of the figures which led you to these totals, total value before the taking.

A. Before the taking.

N. McKenzie Downs.

Involved in this was the land of the hardware,
July, 1958 12,331 square feet, which I valued at $3.35 a square
page 228 } foot.

The restaurant land is 22,813 square feet. I valued that at $3 a square foot for the figure of $68,439.

The actual, I used the reproduction cost, less depreciation on both buildings and the actual reproduction cost varied depending on which portion of the building I was dealing with, the hardware was originally, the original part of the hardware was constructed in 1938. There was an addition in 1948. The original coffee shop was constructed in 1939 with an addition in 1949.

So there was a difference in depreciation, obsolescence, and so forth, involved.

Of course, there was a difference in construction. So the actual cost per square foot which I used varied as to each one. The total figure, as I say, came up with on hardware of $56,478 and the restaurant of $54,369.

Q. All right, sir; then you add for the hardware building, would you give us that figure, the building and land on hardware?

A. Building and land on hardware—building and land, 97,920—

Q. I mean the two figures that go together to make that.

A. $57,228 and $40,692.

Q. All right, sir; and on the Coffee Shop property, would you give us the land and building figures separately on that?

A. $54,369 on the building itself, and $68,439
July, 1958 on the land for a total of $122,808.
page 229 } Q. All right, sir.

Now, in arriving at these figures, did you use the depreciated reproduction cost approach entirely?

A. Yes, I did. There are normally three approaches that appraisers use in determining value: either cost, income, or reproduction, comparative approach. In the income approach there were no figures made available to me. I feel that in considering an income approach you have to consider the source of the income stream.

In this particular case, due to very excellent management, I feel that probably the income is above what it normally should be under what might be termed adequate management. In other words, it would be necessary to determine any economic rent which, to arrive at a figure, and any excess rent, as we term it, would be capitalized at a very high rate, at a very high figure. So I discarded that.

I did check it with what we call the annual gross multiplier to determine whether my figures on a comparative basis, reproduction cost, fell in line with current values, and it did. But I did not rely on that heavily.

I feel that a comparative basis, with reproduction cost, is a much better way of arriving at a figure in this case.

Q. When you speak of the inapplicability of the income approach because of excellent management, are you referring to both the Coffee Shop and the hardware store?

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A. Undoubtedly. I think Mr. Dewey and Mr. Evans both have excellent reputations and run very fine enterprises.

Q. Now, the Evans enterprise, of course, is one which—I will withdraw that—as to the Dewey business, are there any factors there which you feel remove that from the surface impression that one has of a retail business?

A. Yes. In discussing the matter with Mr. Dewey, I found a great deal of his business is what he terms back-door business—a misnomer, perhaps, but he does—if you have been inside of his store, you will find that he has quite a staff of accountants, bookkeepers and so forth; much more than the normal hardware store, the ones I inspected, carry. So it indicated to me, and I questioned it at the time, as to how much business he actually did. I got no firm figure but I was given the impression that a great deal of his business was through the back door.

Incidentally—

Q. What do you mean by "back door"? Would you explain that?

A. In other words, that business which normally is not carried on by the usual neighborhood hardware store, items which are perhaps a little bit too bulky to carry.

In other words, not pots and pans. Women in the neighborhood perhaps go in and buy pots, pans, cleaning materials and so forth, but there are other items which are sold to builders and developers which cannot normally be carried out the front door.

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In other words, he has in the rear of his store a fair-sized storage shed and quite a bit of stuff goes out of there. I think he also has other locations for storage of heavier materials.

Q. Although the Commissioners have seen it, just for the sake of the record, will you describe what facilities exist in the rear of the store for this type of business?

N. McKenzie Downs.

A. He has a ramp-type arrangement. I term it ramp-type because trucks can back up to this storage shed and to the rear ports there, and it facilitates the bringing in of those materials, but also taking out of those materials by the buildings and developers that buy from him.

As a matter of fact, I might cite a trend in the retail hardware business which I discovered after I got into this thing. I found that these are sales as reported by marketing conditions, that January '58 over January '57 was off 9.5 per cent.

Q. Is that a national or a local study?

Mr. Simmonds: Just what is the purpose of this? Does this have anything to do with your appraisal on the property?

The Witness: Definitely.

Mr. Simmonds: It does?

July, 1958 The Witness: Yes.

page 232 } Mr. Simmonds: What is the date?

The Witness: These are figures which indicate trends in the retail hardware business.

In other words, an appraiser, when he goes into to make a study of a piece of property, probably one of the first things that he would determine is, as to whether or not are there too many hardware stores in the area? Is there a need for it? What is the trend in that business? Will it continue? If that cannot continue, will that land and building be used for something else? It definitely develops a value.

Mr. Simmonds: Is that a survey of Arlington County hardware business?

The Witness: This is a business which is nationwide, but is broken down in particular areas and considers Arlington, Fairfax, and—

Mr. Simmonds: Is that a separate category?

The Witness: Does it consider Arlington as a separate category?

Mr. Simmonds: Yes.

The Witness: No, it does not break Arlington—

Mr. Simmonds: Does it have Arlington-Fairfax-Alexandria?

The Witness: No, it considers it, breaks it down into nine different regions. This is in the South Atlantic

July, 1958 Region. As I said, it was off 9.5 per cent. An

page 233 } additional 3.5 per cent the year before, which means that the retail hardware business in the

last, or the period under consideration, few years is off better than 13 or 14 per cent down.

Mr. Simmonds: If Your Honor please, I object to the use of those figures for this reason: He is talking about the economic situation in a general area as it affects the retail hardware business.

I think in the area of Arlington, we have a situation that, as far as retail business is concerned, is absolutely entirely different from the Southeast part of the country and would be entirely misleading. I object to his use of that.

The Court: I wouldn't disagree with you or with him either. I think that is a matter that you all can argue to the Commissioners about. He is giving the reason that go into his opinion which, as I indicated with the previous witness, can be good, bad, wise, foolish, or anything else. It is still his own reasons.

The objection is overruled.

Mr. Simmonds: I must just clarify.

He has only given the value before taking, so far, and now he is coming in with figures to justify something he hasn't even testified to.

The Court: The objection is overruled.

July, 1958 page 234 } Mr. Simmonds: Exception, if Your Honor please, on using that basis.

Mr. Russell: If the exception is going to be taken, I would like to state for the record what our position is in introducing it. I had previously asked him for factors which caused him to discard the income method as an appropriate method to approach the value of this property and this is one of the factors. That is the purpose of it.

The Witness: If I may continue further on other factors which I felt—

The Court: We spend a lot of time showing why he didn't do something.

Mr. Russell: Why he discarded the approach.

The Court: The minute you go into that, they can cross examine about everything he says. If you want that, it is all right, but it seems to me it is a waste of time.

He says he didn't use it because he didn't think it was an adequate measure. Why don't you let it stop at that?

Mr. Russell: All right, sir.

By Mr. Russell:

Q. Mr. Downs, in arriving at your values before the taking,

did you make any allowance for sidewalks, curb, asphalting, terraces, and the like? Are they included in your figures?

A. Yes, I did. I made allowance for any physical improvement to the land.

July, 1958 page 235 } Q. Posts, signs, patio, all those?

A. If you want those figures, I will be glad to give them to you.

Q. That's all right. I won't ask for them. They may be asked for on cross examination.

A. They are included in the total figure which I gave you.

Q. Will you now give us the figure that you arrived at for after the taking?

A. After the taking, the building value actually stayed the same. However, there were improvements not included in the building itself which were taken. So I made allowance for those. So I came up with an evaluation prior to the taking—after the taking, I beg your pardon, of the hardware building, of $57,098. The land value of $36,108, which is a total of $93,206.

Q. I am not sure I understand that.

A. That is the total of the building and the improvements after the taking. In other words, prior to the taking was the figure I gave you before. This includes not only the land which remains but the actual, all improvements which remain after the taking.

Q. Mr. Downs, give us, if you will, the breakdown; after the taking, the building is $57,098; correct?

A. That's correct.

July, 1958 page 236 } Q. On the hardware building?

And then what do you attribute to the land which was taken away, taken from the hardware parcel?

A. There remained, after the taking, 10,942.1 square feet. I valued that at $3.30 a square foot. I could not detect any appreciable change in land value before because of the taking.

Q. You gave the land the same value after the taking as you did before, as to the hardware parcel?

A. Yes, I did.

There have been improvements to the property. There is, and perhaps we should go into that, if I may give these figures, as to the actual parking—

Q. Before you do that, let me get these figures down as to your appraisal.

N. McKenzie Downs.

Your land is 10,942 square feet at $3.30 a foot. That comes to what?

A. $36,108.

Q. $36,108?

A. That's correct.

Q. So the total of those two figures would be your total value of—

A. Property after the taking.

Q. Property after the taking. What is that total? Do you have that?

A. $93,206.

July, 1958 page 237 } Q. Therefore, would it be your conclusion that a fair award for the land taken from this property, the hardware parcel, would be $3.30 a square foot?

A. Yes, I included $130 in that in addition to the amount taken for improvements, which were taken involving the asphalt, posts, which were removed, and so forth.

Q. How much?

A. $139.00. It gives me a total of, a difference in there, of four seven one four for that portion allotted to the hardware.

Q. So it would be your conclusion that $4,714 would be the total difference in the value of the entire parcel before the taking and the reduced parcel after the taking?

A. That's correct.

Q. If you were to pay Mr. Dewey $3.30 a square foot for the land that was taken from him, from that hardware parcel, how much would that be?

A. What are you getting at?

Q. I have it here. You are taking from him 1,389 square feet. Is that not correct, from the hardware?

A. Taking from the hardware 1388.9.

Q. Round it off.

A. At $3.30 a square foot, rounded off gives me forty-five, eighty-four.

Q. So that $4,584 would, in your opinion, be the award to be made for the land taken alone?

July, 1958 page 238 } A. That's correct.

Q. That should be included in this figure of 4,714?

A. Yes, that is part of it. The other portion is $130 which I allowed for posts, asphalting and so forth.

Q. So you feel that actually your testimony would be that

there is damage to the residue amounting to just that difference?

A. It is very, very difficult to measure damage in a case like this where you lose such a small percentage of parking. That is the only damage which I could see at all, and in this case it amounts to about 11 per cent of your required parking. And when you need, or you depend elsewhere, for about 70 per cent of your parking, that percentage is negligible.

The enhancement created by the improvement, in appearance, the provision of sidewalks in front of the property, to provide for pedestrian traffic, more than exceeds anything, any damage done; yet to pick a figure out of the air, it is almost impossible to do. Anyone who comes up with a figure, I feel that they are picking it out of the air. There is no question in my mind, after examining the thing before and after, that it probably is enhanced up and above any damage. But to measure those to the exact dollar, I find it very difficult to do.

Q. Mr. Downs, would you then give us a breakdown of your after figure on the Coffee Shop property?

July, 1958 page 239 } A. Yes, sir.

After, on the Coffee Shop, there remained 19,306 square feet valued at $3 a square foot, and I came up with a figure of $57,918.

Combined with the restaurant valuation, I have a total of $111,617.

Q. Did you hold the same restaurant figure that you had before the taking?

A. Except for $670 which I allowed for posts again, asphalting, movement of the sign, which I felt the owner should be compensated for, but other than that, they remained identical. There was no damage to the building itself. It would still operate as a restaurant.

There, again, we are dealing with a very small percentage of parking compared to the total requirement and there was no damage involved at all, as far as I could determine.

Q. All right, sir.

I did not get the restaurant value as you revised it after the taking by reason of the—

A. $670 less than the previous figure I gave you. I will have to do some addition myself to get it at that point because I didn't break it down in that manner.

If you will subtract $57,918 from $111,617—

Q. $53,699 is what I get.

N. McKenzie Downs.

A. That's correct. I have a difference of before and after in the restaurant of $11,191. That is thirty-five

July, 1958 zero seven—I take that back. That is incorrect—
page 240 } thirty four, twenty-three square feet of land at $3 a square foot.

Q. Again, you have held to the same square foot value?

A. I have held to the exact square foot area. I can see no difference in value because of the taking at all.

A prudent buyer would, I think, pay just as much; if he considers parking, he would consider the inadequacy of it prior to the taking; he would consider the inadequacy of it afterwards. And when you change about six per cent in your over-all taking, or over-all requirement, it isn't relevant at all.

When you exceed 50 per cent of your parking for a particular area, if you depend on some other area for 50 per cent of your parking, five per cent one way or another after that isn't material at all.

Q. If you were to multiply the square feet taken from the restaurant parcel, 3,423 square feet, by $3 a square foot, what value do you get?

A. I arrive—

Mr. Lewis: The agreed figure is 3,507. You are using the first figure there. The agreed square foot taken is 3,507.

Mr. Russell: I beg your pardon. We agreed on another figure.

The Witness: At $3 a foot. I have the correct figure in the over-all. I had the figure here.

July, 1958 Mr. Simmonds: $11,191 is 3507 square feet.
page 241 } The Witness: That is ten, five, twenty-one, plus 670 which I gave you to take care of the signs, asphalting, and so forth.

By Mr. Russell:

Q. Is it your opinion that there has been no damage to the residue of the restaurant parcel by reason of the taking or not?

A. Absolutely no damage, none whatsoever.

Q. Let me then get your figures for the total award you believe should be made to give just compensation to Mr. Dewey on both parcels.

A. It involves four five eight four for the land, plus one thirty for improvements taken.

N. McKenzie Downs.

Q. You are speaking of the hardware?

A. Four seven one four. The restaurant is ten—ten thousand, five, twenty-one for the land plus $670, is the $11,191 for a total of $15,905.

Q. On the two parcels together?

A. On the two combined.

Q. Will you then give us any basis which you have for arriving at the conclusion that you stated that there has been no damage to these properties by reason of this taking, in excess of compensation for the land?

A. Yes. I considered the actual parking, if anything, might be detrimental to a parking area. I mean, to an

July, 1958 enterprise.

page 242 } However, I went into it a little bit further to determine what was required. I found that up to, say five years ago, approximately three to one was required; a ratio of three to one. So I determined the area which—excuse me,—should be required for a building of that size.

As to the restaurant, and I have considered everything from Hogates Arlington House, all through the area, I found that not the rule of thumb, but the definite basis that they work on is actually if they can seat 300 people you divide that by two for 150 parking spaces. In the case of Evans Coffee Shop, Mr. Evans indicated to me that he had a maximum capacity of 275 but normally, without crowding, it would be 250. So I used a figure of 250 on that.

In other words, a requirement of 125 parking spaces.

I might, if I may, quote an authority other than myself. Arthur K. Beman, who is an authority—

Mr. Lewis: Just a minute. If he is going to quote from some manual, I certainly would object to it.

The Court: I think the objection is well taken. On the basis of his training and his study, he can give his own opinion.

Mr. Lewis: That's all right, but I don't want him to read from some book or some magazine.

The Witness: In any case, I found that the hardware area required about 17,814 square feet. That is three

July, 1958 multiplied by your basic floor area, display area.

page 243 } In other words, there is only 22 per cent of the parking available in the area prior to the taking.

By Mr. Russell:

Q. You say 22 per cent was being provided by Mr. Dewey

of what he actually would have needed to meet that standard?

A. That's right. In other words, roughly 75 or 80 per cent is being provided for in other areas for the parking required for that particular business, somewhere else.

Q. This is before the taking?

A. That is prior to the taking.

In other words, the prudent buyer in considering this thing would definitely consider the adequacy of that parking and he would immediately determine that elsewhere customers were being provided with parking for about 80 per cent of the trade. In other words, if 20 per cent go there, it is filled up. Eighty per cent have got to go somewhere else to look for parking.

As far as the restaurant is concerned, they had only 28 per cent available. This is crowding them in. Normally, we allow 10 by 20. The existing there in that study which I saw, I think was 8 by 18, which is not really adequate. Female drivers will use up that extra space in getting in there.

You may allot two but they will combine two into one so you will actually use a parking space. It is much

July, 1958 better to provide a 10 by 20 parking area.

page 244 } So in the case of the restaurant, about 70 per cent, over 70 per cent, 72, would be exact, are going elsewhere to get parking.

The last three times that I have been to Evans, I have parked elsewhere. I felt a little bad about using someone else's parking space, but I think you have found the same trouble.

Q. Mr. Downs, although this situation still persists, according to your testimony, are you still describing the situation which existed prior to the taking?

A. Yes, this is the position that actually happened prior to the taking. I have not gone into that. I figured we should cover that as compared to the over-all.

Actually, after the taking, we lost about 11 per cent in the case of the hardware, which must go elsewhere. In other words, it is a negligible factor when you consider the fact that they are going elsewhere anyway, or about one-ninth.

In the case of the restaurant, about six per cent are going to have to go elsewhere. I am not telling the landowner what he should do but if he takes this money and buys property elsewhere, he has arrived at about the same thing. It is a negligible factor when you consider that only that small percentage has to go elsewhere for parking. He doesn't have to use that money for that, I am well aware, but someone else

is going to have to provide that parking space if he does not provide it for his tenant or for himself.

July, 1958 page 245 } Q. Mr. Downs, have you investigated the local parking situation in that shopping area to determine whether or not there is adequate parking being provided by each merchant for his own business, or whether there is sort of a mutual sharing or parking pool?

A. There is a mutual sharing. However, parking in the area is inadequate.

I think the merchants, or someone, has taken steps to provide additional parking.

I notice the Glebe-Lee Corporation, I know they own that land adjacent to Preston's Pharmacy, have opened a parking lot. I think the solution to that particular area, or the life of it, will be the provision of additional parking.

The trend of the present day family is toward more than one car. I think I am the only man in Fairfax County that has one car. Everybody else has two or three. People are using their cars more. Everyone is recognizing this and providing parking at business places.

The mere fact that People's Drug Store moved out of there, Safeway has gone to a larger store to provide for more customers, more parking space, space which was adequate ten or fifteen years ago is no longer adequate—we can't consider it adequate. Builders and developers don't.

So, even though there is a certain amount of parking available there, my feeling is, and my investigation has shown, that more is needed.

July, 1958 page 246 } It is very difficult at times to find proper parking in that particular small area.

Q. Mr. Downs, in your opinion, has the inadequacy of parking in that area been produced in whole or in part by the construction work done by the Highway Department?

A. Well, I think, of course, naturally, parking is something that, the more traffic you get, probably the more parking you are going to have to provide. So if you want to say, don't build this road because you are going to bring me more business, and I will have to provide more parking, I think what you have said is true. But I don't think the actual taking has materially affected the parking required in that particular area.

Q. Mr. Downs, with reference to the figures which you arrived at for the land values at $3.30 per square foot on the Dewey parcel, and $3 on the Evans, will you state what the basis was which led you to that, to those figures?

A. Yes. Most people, I think, understand and use more readily because the old rule of substitution, a man is not going to pay more for a piece of property than he can buy a like piece of property for elsewhere. So in determining land values, I used comparables.

I have a list of the comparables which I used.

July, 1958 page 247 } Of course, you get a lot of comparables and you have to discard some of them because they don't fit into the picture for one reason or another. It is impossible to adjust them to the subject property and we try to adjust all comparables to the subject property.

Q. What, in your mind, is the test of a truly comparable sale which is a proper guide to the valuation of the property in a case like this?

A. Well, in a case like this, where you are dealing with a certain amount of obsolescence in your buildings, I think that you have to determine comparable land sales and from those land sales, you try to adjust, because of location, area, topography, many things enter into it. You have to consider all of those things in adjusting to your comparables to establish a land value. Once you have established the land value, of course it is very easy to determine the reproduction cost of a particular building.

Q. All right, sir.

With reference to what time and what date, if any, have you limited your comparables?

A. I think it is unfair to go back too far. I think most people will agree to that. But all that you do there is establish a trend in rising prices or lowering prices. We have yet to go into a lowering in this area.

I covered a period of roughly four years before, in my computations because I felt that was indicative of the values in that particular area at that time.

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July, 1958
page 300 }

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BAYARD EVANS,

was called as a witness and after being first duly sworn, was examined and testified as follows:

* * * * *

July, 1958
page 304 }

* * * * *

By Mr. Lewis:

Q. Have you maintained records showing the gross amount of restaurant business that you have done at that location for the year 1955, '56, '57, and to date in 1958?

A. Yes, I have those records.

Q. Are they accurate records taken from your books?

A. CPA records.

Mr. Russell: Mr. Lewis, just a minute.

Your Honor, I don't object to those questions but I should say now that I will object to any record of gross restaurant business. That should be inadmissible. It is not a compensable item because it is too speculative. Too much depends on the initiative, the enterprise, and advertising of this particular businessman. He may introduce evidence of rent he pays the landlord but not evidence of the business which he himself has in the premises.

Mr. Lewis: I can reduce it to percentage because I can—as you know, the lease provides for a percentage rent and this is the gross figure as kept by his CPA for the number of dollars that he has taken in, in each of those years which is a question of mathematics.

July, 1958
page 305 }

I will give it to you either way you want.

Mr. Russell: As far as I am concerned, I have no objection to the rent he pays to Mr. Dewey, but I object to any figures on his business revenues.

Mr. Simmonds: If Your Honor is intending to rule on that, not only for Mr. Evans but for Mr. Dewey, I would like to say this:

It seems to me that the Commonwealth witnesses made great point of the fact that because of the improvement to this road that there should be an increase in business because of more customers in the area.

Now, we certainly ought to be allowed to refute that testimony to show it just isn't so.

Mr. Lewis: That is the purpose, to show that these are—I can reduce it to customers, if you want it that way.

Mr. Russell: I object to any statement like that because the

Commonwealth witnesses certainly do not do that of their own initiative or mine. It was dragged out of them by cross examination, and these gentlemen are trying to raise themselves by their bootstraps. They tried to get witnesses to testify about it; their witness said, no, they haven't. They kept on, kept asking question after question. Now, they wish to make their own opening wider and march in with this inadmissible testimony.

The Court: The objection is overruled.

July, 1958 page 306 } Mr. Russell: May I have an exception, please?
Mr. Lewis: May I proceed?
The Court: Yes, sir.

By Mr. Lewis:

Q. Mr. Evans, what was your gross dollar take in 1955?
A. We did—you want the round figures?
Q. Yes.
A. $195,176.53.
Q. In '56?
A. $198,387.00.
Q. 1957?
A. $178,279.
Q. And for the first six months of 1958?
A. Well, now the first six months of 1958, $87,992.
Q. Now, this $87,992—

Mr. Russell: I would like to renew my objection to this, to evidence of this kind, and also ask the Court for an instruction at an appropriate time to the Commissioners that they should not take this into consideration.

The Court: I think we can take care of the instructions all right. I think I know what you have in mind.

The objection is overruled.

Are you through with these particular figures now?

Mr. Lewis: Other than to explain one part of the last six months.

July, 1958 page 307 } The Court: Before he leaves this, I would like to ask him whether there has been any rise in prices.

Mr. Lewis: I am going to ask him that, also.

The Witness: Yes.

By Mr. Lewis:

Q. During 1958, where you listed a half year at $87,000, would it be fair, based upon your business experience at this

location, to multiply that figure by two to get the full 1958 business?

A. No, the latter months, the colder months, October, November and Christmastime, are not as good as the spring season when your best business comes.

Q. Does that represent 60 per cent of your estimated gross for this year, or what per cent?

The Court: This is your witness. I think you had better let him testify.

Mr. Lewis: Yes, sir.

By Mr. Lewis:

Q. What per cent does it represent?

A. I don't quite follow the question. But up to June, the first half of the year is $87,000 and for the balance of the year we won't do that much.

Q. How much will you do?

A. I would say $70,000 for the balance.

Q. And adding those two together, would make, July, 1958 what, for 1958?

page 308 } A. $157,000.

Q. All right.

Now, Mr. Evans, has there been any increase in price of your food—strike the food—in your charges to the public? Has there been any increase in price from the first year, 1955, up to the present?

A. Oh, yes; the prices have advanced to us, our costs.

Q. Not to you. I don't want that. Just to the customer.

A. We have reflected about a 10 per cent increase in price scale in the past six or seven months.

Q. In other words, has the increase been mainly in 1958?

A. It has been terrific in this time, yes. The labor and food, and we pass that on.

Q. You pass that on to the customer?

A. That's right.

Q. So the 1958 figure showing $157,000 is a 10 per cent increase in the retail price over the '57 figure; is that correct?

A. That's right.

Q. Now, during 1957 and 1958, up to the present time, have you been permitted to use a part of these parking spaces that the State will ultimately take away by widening the road?

Bayard Evans.

July, 1958
page 309 } Mr. Russell: May I break in to put an exception on the record? I would like the record to reflect my exception to the admission of testimony regarding gross profits and prices and the changes in the same, by a tenant conducting a business on the property, as being too remote and speculative, and dependent upon other factors, to be a guide to the value of the property.

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July, 1958
page 312 }

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CROSS EXAMINATION.

By Mr. Russell:

Q. Mr. Evans, what would you consider the—you just spoke of a formula that the parking area should bear to the restaurant floor space—what formula do you consider proper nowadays, under present day circumstances, for that ratio?

A. It all depends on style and type of business. Hot Shoppe has a formula. They want, for every seat in the restaurant, they may want a comparable seat outside.

Now, with the drive-in type of business, where you eat in your car, you may want, maybe, twice that much space. There is a tendency for a small building and more parking.

But ours a distinctive atmosphere restaurant that you can't gage that way, but for every parking space brings in so many dollars to the register and if you don't have that available parking area, your register suffers, so you have a diminishing return, based on parking lot.

Q. I understand, sir, but with reference to your type of restaurant business, what formula do you think should apply? How much parking space for how much restaurant space?

A. Let's go back to this particular spot.

July, 1958 Since I am in there, I went in there under an
page 313 } economic condition when it was all I could afford.

It wasn't what I would have liked to have. If I had an ideal situation, give me two more acres of parking land and now I am having some taken away in the second place.

Bernard W. Dewey.

Q. It was always inadequate even at the outset?

A. It was never perfect, no. But even at the best, we did a good business and made a nice living, but now with 40 per cent deducted, I don't know what the future is going to hold. There is a point of return there where you can't make it. If you take all my parking lot, I would be out of business in two months.

Q. With respect to the passage of time, though, wouldn't you say in all fairness that this situation gets worse and worse every year because of the increased dependence of people on motor travel and larger size of cars, and other factors of that kind?

A. Yes, sir; increase the highway and they go by faster and they don't stop as quick.

Q. It might have been barely adequate to start with but it is worse, or got worse, as time went on, until now it is acute; is that a fair summary of it?

A. I guess that's fair enough.

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July, 1958
page 320 }

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BERNARD W. DEWEY,

was called as a witness and having been first duly sworn was examined and testified as follows:

July, 1958
page 321 } DIRECT EXAMINATION.

By Mr. Simmonds:

Q. Please state your name and address.

A. Bernard W. Dewey, 4756 Lee Highway, business address.

Q. Mr. Dewey, are you the owner of the property that is involved in this condemnation proceeding?

A. Yes, sir.

Q. Briefly, what does it consist of?

A. Generally, hardware business.

Q. And do you also own the real estate in which the Evans Coffee Shop is operated?

A. Yes, sir.

Bernard W. Dewey.

Q. Going back to the hardware store, when was that erected?
A. 1938.
Q. Were any additions made to it?
A. Yes, sir.
Q. When was that?
A. Warehouse on the east was added about 1940 and the garden shop on the west was added about '46.
Q. What type of business do you conduct there?
A. As I say, general hardware business, including builders' hardware.
Q. When you say general hardware, what do you mean by that as distinguished from builders' hardware?

July, 1958 page 322 }

A. House furnishings, paint, some sporting goods, garden supplies.
Q. Now, Mr. Dewey, does your trade come from people who come to your store, or order by telephone, or both?
A. Both.
Q. Do you have both a cash business and a credit business?
A. Yes.
Q. Have you kept an account of your business, your gross business, month by month?
A. Yes.
Q. Do you have that with you, sir?
A. Yes.
Q. I ask you for what period of time you have it?
A. Well, from—

The Court: I understand the same objection goes to this line of questions or testimony from Mr. Dewey as from Mr. Evans?
Mr. Russell: Yes, sir.
Is the ruling the same?
The Court: Yes.
Mr. Russell: Same exception.
Mr. Simmonds: We are not introducing this for loss of compensation or loss of hardware business by Mr. Dewey but merely for showing the value of the property.
The Court: All right, sir.

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July, 1958 page 336 }

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VINCENT L. MARCUM,

was called as a witness and, being first duly sworn, was examined and testified as follows:

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July, 1958
page 348 }

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By Mr. Simmonds:

Q. Do you have any others?

A. Now, the Deed Book 1331, page 102, dated the 10th of June, 1958, from the Glebe-Lee Corporation to the Commonwealth of Virginia,—

Mr. Russell: I object to that on the grounds previously stated. Transactions with a condemnor are not admissible. There, too, that was a transaction in 1958 after the highway construction had taken place and it was also a settlement of pending litigation with the State.

It has not come into the case prior to this time although it was asked for. Your Honor never had to rule on it because the witnesses did not know.

Apparently this witness has informed himself and I think there should be some ruling as to whether or not it would be admissible.

July, 1958 Mr. Simmonds: As I understand, you are using
page 349 } dates two years either way, in any event.

The Court: He is not talking about the time but the amount for which the sale was made.

Mr. Simmonds: Testifying as a comparable sale.

Mr. Lewis: This is not a condemnation sale; this was a private sale. No pending suit, as I understand, on it.

The Court: The objection is overruled.

Mr. Russell: May I have an exception, Your Honor?

May I state this for the record: I would like to have an exception on the ground that the transactions between a private owner and condemnor should not be admissible in this proceeding, the parties not being free to contract at arms length as would private buyers.

Also on the ground that this transaction involved pending condemnation litigation.

Mr. Simmonds: Mr. Russell, since this is for the record, are you willing to stipulate for the record that there was no certificate of taking on that property?

Vincent L. Marcum.

Mr. Russell: Yes, sir.
Mr. Simmonds: All right.
The Court: All right.
Mr. Simmonds: Go ahead.
Mr. Russell: I will also stipulate for the record that the time of taking, for the purpose of that trans-
July, 1958 } action, was 1958.
page 350 } Mr. Simmonds: You make the statement for the record?
Mr. Russell: I will stipulate, if Your Honor please.
You were on the other side of the case so you are in position to do it.
Mr. Simmonds: I didn't understand that that was the date. You stated it for the record.
Mr. Russell: I will offer to stipulate.
The Court: Go ahead, sir.
The Witness: This sale from the Glebe Corporation to the Commonwealth of Virginia in Deed Book 1331, page 102, deed dated the 10th of June, 1958, included two parcels, one parcel being on Lee Highway, east of the Preston Drug Store, I believe, there on the corner, and the other parcel, which included this ground, the Esso Standard Oil Company bought on Glebe Road. The Esso Oil Company bought the residue of this ground that the State purchased from the Glebe-Lee Corporation.
There is a total of 9079 square feet.
After checking the records, it indicated sale price of $32,000 or $3.51 per square foot.

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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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