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Clerk, Supreme Court of Appeals
Richmond, Va.

Record No. 5203

In the Supreme Court of Appeals of Virginia at Richmond

JOHN F. KULLGREN, ET AL.

v.

FRANK SLEETER, ET AL.

FROM THE CIRCUIT COURT OF LOUDOUN COUNTY

RULE 5:12—BRIEFS.

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

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

HOWARD G. TURNER, Clerk.

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

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 5203

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 8th day of June, 1960.

JOHN F. KULLGREN, ET AL., Appellants,

against

FRANK SLEETER, ET AL., Appellees.

From the Circuit Court of Loudoun County

Upon the petition of John F. Kullgren and Helen G. Kullgren an appeal is awarded them from a decree entered by the Circuit Court of Loudoun County on the 21st day of December, 1959, in a certain proceeding then therein depending wherein the said petitioners were plaintiffs and Frank Sleeter and others were defendants; upon the petitioners, or some one for them, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of five hundred dollars, with condition as the law directs.

RECORD

* * * * *

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* * * * *

Virginia:

In the County of Loudoun Circuit Court Clerks Office.

Received and filed this the 5 day of October, 1959.

Teste:

J. D. MARTZ, Clerk
By N. B. HAMMERLY, Deputy.

COMMISSIONER'S REPORT.

To: The Honorable Rayner V. Snead, Judge of said Court.

Pursuant to that certain decree entered in the above-captioned cause on the 16th day of February, 1959, your undersigned commissioner gave due notice as required by law of his intention to execute said decree. Thereafter depositions and evidence were received, the same being filed herewith, and your commissioner reports as follows:

While there has been no specific direction to ascertain whether an actual controversy exists, such as may be determined under the Declaratory Judgment Act, your commissioner finds, as supported by the bill and proceedings herein, that such a controversy exists.

(1) Complainants are seized in fee simple of the three tracts of land described in the bill of complaint under paragraph 1 (a), (b) and (c). However, the deed reference to 1 (b) should read Deed Book 13 Z's, at Page 293. Certified copies of the deeds to each of these tracts of land, and marked by the commissioner (a), (b) and (c) together with the deed book and page reference, are filed in the papers of this cause under date of March 30, 1959.

page 29 } (2) The first question for determination is whether or not there is a right of way (or easement) or public road over and across the lands of the complainants.

I. *Right of Way or Easement.*

"Right of way," in its strict meaning, is the right of passage over another man's ground * * * Black's Law Dictionarp, p. 1561; 37A Words and Phrases 411. An easement is a right of way. 37A Words and Phrases 416, 417. Further an easement is* * * an interest in land, which is usually irrevocable and freely transferable in connection with the dominant tenement * * * 1 Minor on Real Property 2d, Section 92.

Easements may arise (1) By natural right; (2) By express grant; (3) By express reservation or exception; (4) By implied grant; (5) By implied reservation; (6) By prescription; (7) By estoppel. 1 Minor on Real Property 2d, Section 93, et seq.

By natural right refers to the right to support of land and to natural drainage. This is not applicable to the instant case.

By express grant refers in general to creation of an easement by deed, a writing under seal, such as a deed of dedication or a grant to a person or persons of a right of way or easement. However, in equity a contract for the creation of an easement will be specifically enforced whether not under seal or merely oral, but under conditions not herein applicable.

By express reservation or exception refers (1) to a reservation of a certain right in favor of the grantor created in a conveyance and (2) to the exception by the grantor in a conveyance of the privilege wished to be retained.

By implied grant is subdivided into (a) an easement by necessity and (b) quasi-easements converted into easements by transfer of dominant tenement.

page 30 } The former thereof, (a) an easement by necessity, arises because without such an easement the property granted could not be used by the grantee, or could not be used for the purpose for which it was granted. That is it is an easement which arises by a necessary inference, since otherwise the whole grant would be nugatory. Such an easement or right of way by necessity may arise by implied grant where one conveys land entirely surrounded by the grantors' land, or land bordered in part by land of the grantor and in part by the land of a stranger. It is important to note that the necessity referred to is the subjective necessity of the inference that the parties so intended at the time of the grant, not the objective necessity to make the land profitable or useful.

The latter thereof, (b) concerning quasi-easements, deals with the accustomed use of a part of ones own land which he uses for the benefit of another part, and which part when granted carries with it an implied easement which is obvious and apparent, continuous and reasonably necessary to the enjoyment of the dominant tract. It is a question of degree as to what is reasonably necessary; human nature dictates that one would always rather walk a shorter and easier way than a longer and more difficult way to his objective.

By implied reservation is also subdivided into that of (a) necessity and (b) quasi-easements converted into reserved easements by transfer of servient tenement.

The former thereof (a) an implied reserved easement by necessity refers to a situation where an owner conveys property retaining a part thereof which is surrounded on all sides by the property conveyed. This is not the case here.

The latter thereof, (b) concerning quasi-easements, deals with the implication of an easement the absence of which is apt to make the land totally useless and unproductive, and where the easement is strictly and obviously page 31 } necessary.

By prescription is meant an easement based upon presumption of a grant, arising from long use coupled with certain requisite elements, the presumption being *prima facie*. This phase shall be deferred to a later point in this report.

By estoppel refers to actual or constructive representations by a seller to a buyer as to the existence of an easement appurtenant to the land sold to be enjoyed in the land retained by the seller. The seller would be estopped to deny to the buyer the existence of such an easement. Estoppel is not herein applicable.

There is no evidence of an express grant of easement, reservation or exception thereof, and your commissioner finds none of record.

Responding defendants are not concerned with a right of way or easement by necessity, either by implied grant or implied reservation. Their lands, from and along which they desire an easement over and across complainants' lands, have road frontage on Virginia State Route No. 7.

Likewise the required element of necessity is absent such as would give operative effect to an easement in the nature of quasi-easements heretofore mentioned.

Accordingly it appears that no easement or right of way through complainants' lands has been acquired unless it be by prescription.

In order to obtain an easement or a right by prescription

it is requisite that the use and enjoyment of what is claimed must have been adverse, under a claim of right, exclusive, continuous, uninterrupted and with the knowledge and acquiesence of the owner of the estate in, over or out of which the easement prescribed for is claimed for twenty years 14 M. J. 563. Section 7 through 13.

page 32 } By exclusive is meant that the use and enjoyment is a proprietary one and not a use by the public generally. The use by the neighborhood generally under an implied license or permission negatives a presumption in favor of any individual that the use was adverse and exclusive. While there is no doubt that there presently exists a controversy as to the use of a roadway and the existence of an easement, the preponderance of evidence is that the use was permissive. There is evidence of open and public use, but not of continued and uninterrupted use for at least twenty years such as would establish a claim of right.

The use must be adverse or hostile. 2 Minor on Real Property 2d, Sections 994 and 995. If there be permissive use acquisition by prescription is defeated. Acquiesence, while required, is distinguished from permission in that acquiesence is the inactive submission to a hostile claim, while permission denotes a grant of permission in fact or a license. 32 Words and Phrases 215. There is no evidence of permission in fact but only evidence of presumptive permission. There is evidence that at least some prior owner's of complainants' lands made no objection to use of the roadway, and while this might be construed as acquiesence, there is no showing by prior users of hostility in their use of the road. This would seem to tip the scales in favor of permission as against acquiesence.

Even so the evidence of the lack of exclusive use, but use by the public or neighborhood residents, the absence of proof that use was continuous and uninterrupted, and that it was adverse and hostile, defeats the acquisition of an easement by prescription. See also *Commonwealth* v. *Kelley,* 8 Grat. (49 Va.) 632 (1851) and *Stanley* v. *Mullins*, 187 Va. 193, 45 S. E. (2d) 881 (1948).

The foregoing also appears to coincide with the law relative to private ways. See 14 M. J. 576, Section 1, et seq.

page 33 } II. *Public Road.*

The word "road" in its generic sense means all kinds of ways, but in its statutory sense in Virginia it signifies a turnpike, state road or county road * * * Public roads are the property of the state, constructed and maintained by its

agencies * * * Public ways are those common to all the people of the state * * * The word "highway" is a generic term embracing all kinds of public ways. 17 M. J. 445 through 448, Section 2.

It is further stated on page 450, that generally there are but three methods by which the public may acquire the right to use land for a public road or highway: (1) By condemnation proceeding * * * (2) by continuous and use by the public during the statutory period, accompanied by some official recognition thereof as a public road by the county, and (3) by the owner's dedication of the land to the public use.

There is neither evidence nor record that the land comprising the roadway in question was condemned or dedicated. Further an examination of the records in the Clerk's Office of this court fails to disclose any proceeding in the old county court for the establishment of a public road in and along the said roadway.

The maxim "once a highway, always a highway" refers to the fact that an individual cannot destroy public title or easement by a claim of prescription, adverse possession or equitable estoppel since the people cannot be deprived of their sovereign rights in any of these ways. 17 M. J. 493, Section 23. However it is to be presupposed that a highway had to be lawfully established, and it must be remembered that a highway can be lawfully closed, abandoned and title to the land thereto lawfully conveyed to individuals.

The second method by which the public may acquire the right to use land for a public road or highway has
page 34 } been codified in Section 33-98 of the Code of Virginia, to-wit:

"*Evidence as to existence of a public road.*—When a way has been worked by road officials as a public road and is used by the public as such, proof of these facts shall be *prima facie* evidence that the same is a public road. And when a way has been regularly or periodically worked by road officials as a public road and used by the public as such continuously for a period of twenty years, proof of these facts shall be conclusive evidence that the same is a public road. In all such cases the center of the general line of passage, conforming to the ancient landmarks where such exist, shall be presumed to be the center of the way and in the absence of proof to the contrary the width shall be presumed to be thirty feet.

"Nothing herein contained shall be construed to convert into a public road a way of which the use by the public has been or is permissive and the work thereon by the road officials has been or is done under permission of the owner of the servient tenement."

To attempt to interpret this section, it is necessary to define terms therein. It deals with public road" which by definition mean a way which is the property of the state, constructed and maintained by its agencies to furnish means of travel and transportation to all citizens of the state. 17 M. J. 446: *Shirley* v. *Russell*, 149 Va. 658, 140 S. E. 816 (1927). This definition if applied to the foregoing section would presuppose the state having first acquired title to or at least an easement over a specified area. This view is supported by the case of *Payne* v. *Godwin*, 147 Va. 1019, 133 S. E. 481 (1926), wherein the court states "the way cannot be deemed a public one so as to charge the local authorities with the duty of maintaining it, unless it has been legally established or accepted." See also *Derifield* v. *Maynard*, 126 W. Va. 750, 30 S. E. (2d) 10 (1944) wherein the court held that a road which has never been established by order of any public authority and was not originally constructed by, nor had been maintained or repaired by any public authority or public money or labor expended thereon, is not a public highway.

If on the other hand the work by road officials was done on the way treating it as though it were a public road, even though the way was not the property of the state, then the statute provides a means whereby a way may be-
page 35 } come a public road without dedication and acceptance and without any other legal proceedings.
Your commissioner believes this construction rather than the former should be put upon the statute. This view is clearly sustained by *Stanley* v. *Mullins*, 187 Va. 193, 45 S. E. (2d) 881 (1948), which is the latest case wherein the foregoing section is considered.

The evidence does not sustain a finding that there is *prima facie* or conclusive evidence that the way is a public road. It has been heretofore found that the evidence failed to establish the necessary elements for a right of way by prescription, and one element lacking in proof was the continuous uninterrupted use for a period of at least twenty years. Furthermore the evidence is by no means conclusive and is clearly conflicting as to whether or not the way was

worked by the county or road officials. To be sure it was used by various persons, or the public, but this alone is not enough under the statute.

There is uncontradicted evidence that the use of the way was not objected to by a prior owner of complainants' land, that users did not have to get permission, and that permission was supposed. This taken with the use of the way would imply permission. There is no evidence of hostility or denial to users of the way prior to complainants' acquisition of their land, and certainly it is hard to conceive that users of the way did so with out the knowledge and consent of the owners.

Your commissioner viewed the way in question on two occassions. There were no signs, marks on the road or route numbers present to indicate that it is recognized as a State road. It would be most difficult if not impossible to traverse the length of the road in a conventional automobile, especially just south of the complaintants' property before reaching the "Grey place." The way was narrow, rough and large rocks were in the bed. It appeared to have had very little or no use for a considerable period of time.

page 36 } It appears to your commissioner that the case of *Stanley* v. *Mullins, supra,* states the law of the present case. Particular attention is called to the case of *Commonwealth* v. *Kelley,* 8 Grat. (49 Va.) 632 (1851), cited therein.

The case of *Bond* v. *Green*, 189 Va. 23, 52 S. E. (2d) 169 (1949) deals with a situation where a road was properly taken into the county road system by action in the county court of Fairfax. In the case of *Basic City* v. *Bell*, 114 Va. 157, 75 S. E. 766 (1912) a dedicated and accepted street was before the court. Such is not the situation in the present case.

In *Norfolk & W. Ry. Co.* v. *Faris*, 156 Va. 205, 157 S. E. 819 (1931), apparently there was uncontroverted evidence that the county had improved and worked a county road. As has been heretofore stated, the evidence in the present case is conflicting on this point, and is not such as would warrant a finding that the way is a public road as defined.

Accordingly your commissioner concludes and reports that there exists no right of way or easement, and that there is no road or way—public or private—over, across and through complainants' lands.

(3) Complainants are entitled to the relief prayed for in their bill of complaint.

There is attached for filing herewith the depositions of

witnesses, the exhibits introduced, and the memoranda of counsel for the parties.

WILLIAM W. NICKELS
Commissioner in Chancery for the Circuit Court of Loudoun County, Virginia.

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Virginia:

In the County of Loudoun Circuit Court Clerks Office. Received and filed this the 7 day of Dec., 1959.

Teste:

J. T. MARTZ, Clerk
By N. B. HAMMERLY, Deputy.

OPINION.

Complainants have requested a judgment declaring that they own certain lands in Loudoun County in fee simple and that there is no public road, right of way or easement over the same. The land in question consists of three tracts totaling approximately five acres acquired in 1950, 1951 and 1953, and lies several hundred feet south of State Route Number 7 in the western part of the county.

Respondents, Sleeter and Cravens who own land south of the complainants', maintain by their answers that there is either a public road across or over the land of which complainants have possession and claim title or that the defendants have an easement or right-of-way over complainants' land and request that the prayer of complainants' bill be denied and ask the Court to declare that there is a public road or easement over complainants' land.

By decree the cause was referred to a commissioner with direction to report whether or not there is a public road, right-of-way or easement through the lands of complainants, and he reported after hearing the evidence and reading the depositions that there was no public or private road or easement or right-of-way over the land of complainants.

Respondents except to the Commissioner's report and contend the report is contrary to the law and evidence and without evidence to support it.

It is the opinion of the Court that the exception is well founded and that the evidence clearly shows that there is a public road in existence as shown by the plats and photographs filed as exhibits in the cause. For convenience the road in dispute will be called the "Kullgren
page 39 } Road."

Although the commissioner's report is due considerable weight it is not entitled to the same weight as a jury's verdict, especially when all the evidence was not taken before the commissioner.

Besides complainants who admittedly bought the land with knowledge of the old road, only three witnesses testified for them.

The first witness for the complainants, Fleet James, 73, testified that he owned 58 acres, of which the Kullgren land was a part, from 1911 to 1917, but "to his knowledge" the road to the Kullgren house was never worked by the county road system. He had no recollection of the road prior to 1903 and said two families used or could use the road. Landon Wynkoop, 72, the second witness, testified he worked on Loudoun roads 18 or 20 years ago, but not in vicinity of Kullgren property. He did not think Kullgren road was worked as a county road during his lifetime. John Chamblin, 81, was overseer of roads in Mt. Gilead District from 1906 to 1911 and to his knowledge Kullgren Road was never worked by Loudoun road authorities.

This testimony is all somewhat negative and may be compared to testimony in a railway crossing case by witnesses who said they did not hear the train whistle blow.

The respondents have by positive testimony and the greater weight of evidence proved that the so-called Kullgren Road has been a public road since 1883. John Lickey, 87, testified he was born in 1871, lived in Loudoun all his life except one year, and that he worked this road for 8 or 10 years from the time he was 12 for his father who was Overseer or Commissioner of Roads for 35 years in Mt. Gilead District. He said he plowed the road out by the George Gray Place through to Wynkoop and out to Izaacs, and that he also hauled rocks. He said he was paid 50¢ a day
page 40 } for himself and $1.00 for a team; the time was sent into Leesburg by his father and it was paid from there. He named the ones who worked the road; stated that the road was fenced; that it was used by the public;

that mail was carried over the road and school children used the road.

Florence Tracy Beans recognized the road and said she lived on it and used it from 1907 to 1912; that her father carried mail over it; and that the public used it.

Lutie Wilson, an elderly lady, didn't know if the county worked the road but thought it must have been as she remembered her brothers worked the road with the neighbors every spring. She went to Hawthorn School on this road which also led to Scotland Heights where there was a mill and blacksmith shop.

The testimony of a dozen other apparently impartial witnesses indicates that the road was used generally by the public; that it was fenced on each side and not obstructed by gates; that public traffic in carriages, on horseback, in wagons, and pedestrians used the road from 1883 to the time this suit was filed. Motorized traffic has used the road more recently.

Section 33-98 of the Virginia Code controls this case:

"When a way has been worked by road officials as a public road and is used by the public as such, proof of these facts shall be *prima facie* evidence that the same is a public road. And when a way has been regularly or periodically worked by road officials as a public road and used by the public as such continuously for a period of twenty years, proof of of these facts shall be conclusive evidence that the same is a public road. In all such cases the center of the general line of passage, conforming to the *acient* landmarks where such exist, shall be presumed to be the center of the way and in the absence of proof to the contrary the width shall be presumed to be thirty feet.

"Nothing herein contained shall be construed to convert into a public road a way of which the use by the public has been or is permissive and the work thereon by the road officials has been or is done under permission of the owner of the servient tenement."

The evidence in this case clearly establishes that the road was worked by road officials as a public road and that it has been used by the public as such continuously for a
page 41 } period of twenty years. Certainly, respondents have made out a *prima facie* case under the statute which has not been satisfactorily rebutted or explained by complainants who have the burden of proof. *Railway Company* v. *Faris*, 156 Va. 205.

Complainants rely upon *Stanley* v. *Mullins*, 187 Va. 193,

to support their contention that there is no public road established by the evidence. That case is entirely different. There the complainants sought an injunction to remove a fence that had been placed across a road through their land. Justice Buchanan in his opinion states, "The bill does not allege and the evidence would not support a claim that the road has become a public road by virtue of public use." There the complainants had not made out a case in their pleadings or proof. The Court held that the demurrer to the bill should have been sustained.

Having decided that the complainants have not proved by a preponderance of the evidence that the road should be closed, because it is a public road, there is no necessity to decide whether or not an easement or right of way by prescription exists over the complainants land.

A final decree will be entered denying the relief sought and dismissing the bill.

RAYNER V. SNEAD, Judge.

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FINAL DECREE.

This cause coming on to be heard upon the motion of complainants for a declaratory judgment, the answer of Frank Sleeter and Elizabeth S. Sleeter, the deposition of John Emory Lickey taken on behalf of the defendant, Frank Sleeter, before Barbara E. Mann, a Notary Public, on November 28th, 1958, by agreement of counsel, and the depositions of witnesses for the complainants and the defendants taken before Special Commissioner William W. Nickels to whom this cause was referred, the report of Special Commissioner William W. Nickels with the exhibits and depositions returned by him, the exceptions of Frank Sleeter and Elizabeth S. Sleeter and William H. Cravens to said report, and on the decree adjudging the Board of Supervisors in default, and was argued by counsel; and it appearing to the Court that the road involved in this proceeding
page 45 } known and referred to herein as the "Kullgren Road" is and has been a public road since 1883 and that the exceptions to the report of the Special Commissioner are well taken, UPON CONSIDERATION

WHEREOF, the Court doth ADJUDGE, ORDER AND DECREE that the said exceptions be and the same hereby are sustained and the Court doth declare that the road known as the "Kullgren Road" is a public road and has not been legally abandoned, and it is further ADJUDGED, ORDERED AND DECREED that the relief prayed for in the motion of the complainants be and the same hereby is denied, to which action of the Court the complainants, by counsel, except.

It is further ADJUDGED, ORDERED AND DECREED that the costs of this proceeding be and they hereby are assessed against the complainants, to which action of the Court complainants by counsel except.

And the Court doth further adjudge, order and decree that the Clerk of this Court shall enroll a copy of this decree in the current deed book of his office indexed in the names of John F. Kullgren and Helen G. Kullgren, grantors.

And there being nothing further to be done in this cause, the same is hereby stricken from the docket.

AND THIS DECREE IS FINAL.

Enter this 21st day of Dec., 1959.

RAYNER V. SNEAD, Judge.

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Virginia:

In the County of Loudoun Circuit Court Clerks Office.

Received and filed this the 17 day of February, 1960.

Teste:

J. T. MARTZ, Clerk.

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

To the Clerk of the Circuit Court for Loudoun County:

Counsel for John F. Kullgren and Helen G. Kullgren, the Complainants in the above-styled case in the Circuit Court

for Loudoun County, Virginia, hereby give notice of appeal from the Decree entered in this case on December 21, 1959, and set forth the following assignments of error:

1. That the Court erred in sustaining the Exceptions filed by Frank Sleeter, Elizabeth S. Sleeter, William H. Cravens and Marie P. Cravens to the Report of Special Commissioner William W. Nickels, filed herein October 5, 1959.
2. That the Court erred in finding that the road involved in this proceeding, and which is known and referred to herein as the "Kullgren Road" is and has been a public road since 1883.
3. That the Court erred in denying the Complainants the relief prayed for in the Bill for Declaratory Judgment filed by the Complainants.
4. That the Court erred in assessing the cost of the proceedings against the Complainants.
5. That the Court erred in its opinion filed herein on the 7th day of December , 1959, in holding that the testimony presented by the witnesses for the Complainants "may be compared to testimony in a railroad crossing case by witnesses who said that they did not hear the train whistle blow."
6. That the Court erred in considering the photograph, identified as "Defendants' Exhibit One," and the
page 47 } hand-drawn sketch, identified as "Defendants' Exhibit Two," as both exhibits were improperly admitted in evidence.

ELIJAH B. WHITE
RICHARD E. HILL By E.B.W.
Counsel for John F. Kullgren
and Helen G. Kullgren.

* * * * *

JOHN EMORY LICKEY,
being duly sworn, deposes and says as follows:

By Charles Pickett:
Q. Mr. Lickey, will you please state your full
Vol. I name?
11/28/58 A. John Emory Lickey.
page 2 } Q. Where do you live?
A. With my son.

John Emory Lickey.

Q. Foster Lickey?
A. Yes, sir.
Q. What year were you born?
A. 1871. I had to study over it a little bit.
Q. You will be 87 years old this year?
A. Yes, sir.
Q. Were you born in Loudoun County, Virginia?
A. Born in Loudoun County, yes, sir.
Q. Have you lived in Loudoun County all your life?
A. All except one year. We left here and lived at Greenwood County, Kansas. We stayed out there one year and then we came back here in an old wagon.
Q. Your whole family went out there?
A. Yes.
Q. Did your father have any office position in Loudoun County with connection of the roads?
A. He was over-seer in roads, Commissioner of road for 35 years.
Q. Was that before or after you went to Kansas?
A. Both. It was before and after we went to Kansas. He turned it over to old man Newt Taylor and came back and took it up again.
Q. In what district was he responsible for the roads?
A. Mt. Gilead.
Q. Mt. Gilead Magisterial District?
A. Yes, sir.
Q. Did you ever do any work on the roads for your father?
A. Yes, I worked with him from the time I was 12 years old. When we came back I went to work with him. I plowed this road up (pointing) through here between the Bonner place straight through out by the George Gray place through to Wynkoop out to Izaacs.

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11/28/58
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Q. Where did the other end of the road go?
A. Through Scotland Heights up to Sunny Ridge.
Q. Was it anywhere near Hawthorne School?
A. I suppose about 300 or 400 yards from Hawthorne School on the West.
Q. Do you know whether the road crossed the pike?
A. Yes, sir. It went out through Scotland Heights.
Q. Did the road have a name?
A. No, sir.
Q. How did people refer to it?
A. The Wynkoop and Cochran road. When Daddy got a chance to work on the road, he would tell people to meet him at the Wynkoop and Cochran road. It went out to Bonners

John Emory Lickey.

and through place where Paynes lived on out by the Barney Nolan place, and he sold out to Gardner. I work for Gardner in the dairy barn and the tenant house on top of the hill was where a colored fellow by the name of Fred Parrott lived. He worked for Gardner.

Q. How many years did you work on the road?

A. Eight or ten years.

Q. What compensation did you *received*?

A. I run the plow team and hauled rocks.

Q. What pay did you get?

A. Fifty Cents a day, and $1.00 for a team if I had a plow, and $1.00 for a team and $1.00 for a plow, and if I had a wagon, I got a $1.00 for that.

Q. And who paid you.

A. The time was sent in to Leesburg, but I can't tell you the names of the men. My father kept all of the time down, and when the end of the month came, he made each man's time and sent it to Leesburg. They took out the tax and all over was sent back to each man. Fifty Cents a day, and he paid it out to them.

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Q. Was that road in use by the public?

A. Yes, sir.

Q. Do you know when the public stopped using it?

A. No, sir, not exactly.

Q. Have you got any idea?

A. No, sir, I have not.

Q. What was the condition of the land adjoining the road with respect to fences?

A. Well, a wire fence on each side of it up to the top of the hill and where it went down the hill there was a stone fence on each side and on the place of George Gray.

Q. Was your father road over-seer at the time of his death?

A. No, he gave it up.

Q. Who succeeded your father, do you remember?

A. No, sir, it slipped my mind. Oh, I remember, John Chamblin.

Q. Is he living?

A. No, he is dead.

Q. Do you remember anybody old enough to know about that road?

A. No, sir. I know a man who worked on the road, but he is dead.

Q. Would you give some of the names of the men who worked the road?

John Emory Lickey.

A. Yes, sir. Ed Best, Tom Best, George Savage, Bud Schooley, Mr. Nathan Lodge, and one of them was a Summers. John William Best, and there was another person by the name of John William Blackie.

Q. Was the road worked in the vicinity of the Bonner land and Lodge?

A. Yes, and Cochran.

Q. Was it worked from the old pike back to the Gray place?

A. Yes, back from the Gray place to Wynkoop and Izaac place. It was closed and they came out the other way.

Q. Was the mail carried over that road?

Vol. I A. Yes, mail was carried over that road.

11/28/58 Q. Can you tell us what period of time that was?

page 5 } I mean what year?

A. No, sir, I can't remember.

Q. Did the school children use that road?

A. Yes, sir. There were no school buses. When the road was too bad the parents brought them.

Q. By horse drawn vehicles?

A. Yes, sir.

Q. Did you ever live on this road?

A. No, sir.

Q. How far did you live from it?

A. About two miles from where I lived. We worked that road back to where you go in Ed Best. We worked it out to the old pike.

Q. You worked on the road from the time you were 12 years old until you were about 22?

A. I worked on the road until I was 30.

Q. And you began at the age of 12?

A. Yes, sir.

Q. Are any of the mail carrier that worked that road living?

A. No, sir.

Q. Do you remember the name of the mail carrier?

A. Old Man Henderson Tracy.

Q. Where did he live?

A. He lived back in the woods, right at the other side of the Gray place.

Q. Do you know where Col. Sleeter's property is?

A. No, sir.

Q. Do you know where the Bonner tract was?

A. Yes, I have been there many times and worked there,

John Emory Lickey.

and I worked for Gardner.

Vol. I 11/28/58 page 6 } Q. Can you say whether or not Bonners used this road?

A. I don't know. The Lodges used it.

Q. What Lodge was this. Old Man Nathan Lodge?

A. Yes.

Q. Was anything hauled into people over this road?

A. Yes, sir.

Q. Coal and wood, and things of that kind?

A. Yes, sir.

Q. Did you work over to Scotland Heights?

A. No, sir.

Q. Who was over-seer on that road?

A. Old Man Charlie Hammerly was over that.

Q. What was the dividing line?

A. The old pike.

Q. What did they call that pike?

A. I couldn't tell you.

Q. Was it Snickerville Pike?

A. That was what it was called, Snickersville.

Q. Was it the Round Hill-Snickerville Pike?

A. (Pointing) That one over there was the Aldie Turnpike and this was the Snickersville Pike. It came through there and went up to Snickersville, Bluemont it is now.

Q. I believe you said Hawthorne School was on that pike?

A. Yes, sir, the Hawthorne School was on that pike.

By E. B. White:

Q. How long ago were you on the road which came through Bonners?

A. I haven't been up there for about 50 years. Myrtle, how old is Foster? It has been 50 years since I was up there. I lived up there in the tenant house on the Payne place next to Cochran woods for a year. That was the year I was married. I worked for him a year and I moved back down there and Foster was born down there. It has been about 50 years. That road was open then and was travelled.

Vol. I 11/28/58 page 7 } By Charles Pickett:

Q. When you lived in the tenant house on the Payne place, did you or your father work the road?

A. My father worked the road, but I worked for Mr. Gardner by the year on the farm.

Q. I am speaking while you were living in the tenant house.

A. I never worked when I lived up there.

Q. You say you worked for him. Who do you mean?

A. My father.

Q. Did they work the road in front of the tenant house?

A. Yes.

• • • • •

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page 2 }

• • • • •

The witness,

FLEET H. JAMES,

of lawful age, after being first duly sworn, deposes and says:

DIRECT EXAMINATION.

By Mr. White:

Q. Would you state your name please?

A. Fleet H. James.

Q. Where do you live?

A. Purcellville.

Q. Age?

Vol. II A. 73.

3/27/59 Q. Do you know Mr. John F. Kullgren?

page 3 } A. I do.

Q. Do you know the location of the dwelling house South of Route 7 and West of the road where Mr. and Mrs. Kullgren live, at least part of the time?

A. I do.

Q. Did you ever own that land?

A. I did.

Q. From whom did you acquire it?

A. Robert Gardner.

Q. Approximately when was that, Mr. James?

A. 1911.

Q. And to whom did you sell it?

Fleet H. James.

A. I sold it to Duncan.
Q. Approximately when?
A. 1917, I believe it was.
Q. Do you recall the size of the tract which you got from Mr. Gardner?
A. 58 acres and a fraction, as I recall it now.
Q. And did you sell that entire tract to Mr. Duncan?
A. I did.
Q. The parcels now owned by Mr. and Mrs. Kullgren, were all three parcels included in the 58 acres?
A. Well, I am not prepared to say about that because I don't know what their ownership embraces.
Q. Do you know where Mr. Marvin Brown's property is?
A. Yes, sir.
Q. I believe that it is correct that it lies on the south side of Route 7?
A. That's right.
Q. It lies to the north of the Kullgren land?
A. Yes.
Q. Was the Marvin Brown land included in the 58 acre tract you have just mentioned?
Vol. II 3/27/59 page 4
A. Yes, sir.
Q. Did you live in the vicinity of the Kullgren and Brown properties, Mr. James?
A. Yes.
Q. When?
A. From 1912. I moved into the house which is the Humphrey house and I remained in the house until the property was sold.
Q. Where does that Humphrey house lie relative to the Kullgren and Brown lands?
A. To the north of the properties, approximately.
Q. Is it on the same side of Route 7 as those properties are?
A. Yes.
Q. Mr. James, I believe that you went to the Kullgren property just this week, did you not?
A. I did.
Q. Do you recall the roadway which you travel over going from Route 7 up to the Kullgren house?
A. I do.
Q. How far back in your memory does that roadway go?
A. My father bought his home place in 1903, I believe it was, that is the place where Bernard Kelley lives now and

we moved to that place that Fall, I guess, so began in that area at the close of 1903 or 1904.

Q. What is your business?

A. Real Estate Broker.

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

A. 1932.

Q. What portion of your life has been spent in Loudoun?

A. Most of it since 1903. I was away at college for a period of time from 1906.

Q. Are you able to tell the Commissioner whether or not beginning with your earliest recollection of the lane leading from Route 7 if that land was ever included in the Loudoun County road system?

Vol. II
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page 5 } Mr. Pickett: I object to the form of the question as assuming it is a lane. It is argumentative and calls for an opinion. I don't exactly know how to refer to it.

By Mr. White:

Q. Mr. James, in order to meet Mr. Pickett's objection, I will rephrase the question. I believe you previously stated that you are familiar with the roadway leading to the Kullgren house from Route 7. I am only concerned, Mr. Pickett, with the possession of the roadway. I ask you, Mr. James, whether in your knowledge that roadway leading from Route 7 in the generally southern direction to the Kullgren house and to the southern boundary of the Kullgren land which is not too many feet south of the house proper, was ever in the County road system of Loudoun County.

Mr. Pickett: I submit that he is not qualified to answer that question.

By Mr. White:

Q. Was that roadway ever worked by the County road force?

A. Not in my knowledge.

Q. Your knowledge goes back to 1903?

A. Yes.

Fleet H. James.

By Mr. White: Your Honor, this witness has already testified that he owned the land himself and I think he would have knowledge if a County road ran through his land.

Commissioner Nickels:
Q. When did he sell the land?
A. 1907.

Commissioner Nickels: I think he can testify as to his knowledge of it. If he doesn't know, he can testify he doesn't know it.
By Mr. Pickett: If he says he knows it, he will be expressing an opinion.
By Commissioner Nickels: He can ask the question.
By Mr. Pickett: I object for the reason stated.

Vol. II
3/27/59 By Mr. White:
page 6 } Q. Mr. James, did you do any checking on title to this land when you bought it?
A. I couldn't answer that.
Q. A little too far back in the past?
A. Yes. The property was sold under a foreclosure. I bought it at public sale.
Q. I will ask you whether or not within your knowledge that stretch of land from Route 7 to the Kullgren house and the south boundary of the Kullgren land was included in the County road system of Loudoun County?
A. I cannot answer that.
Q. You don't have any knowledge on it one way or the other?
A. No, sir.
Q. Mr. James, within your knowledge from which you said goes back to 1903, were there any gates or fences across that roadway between the Kullgren house and the present Route 7?
A. No, sir.
Q. Was that roadway, and I am restricting my question to the portion from the Kullgren house to Route 7, used by the public?
A. Two families used it or could use it. Gray lived in the hollow beyond Mr. Kullgren and a family named Tracy lived in the house that was later bought by Dr. Dodd and a fellow named Heskett. I am not sure if Heskett lived there. Tracy

was a rural mail carrier and drove a horse and buggy carrying the mail and he would come out that way or come out through another road part of the time which Dr. Dodd owns south of the Gray property coming out of the Ballenger property and down by the Bernard Kelley property and the property Mr. and Mrs. Sleeter own now.

Q. Was this stretch of road which I will call the Kullgren road for easy identification, within your knowledge ever included in any U. S. mail route?

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A. No, sir, not from 7 going south. Let me qualify that. South to the Jim Wynkoop, Copeland Corner and Mason James farm.

Q. Mr. James, you said that two people or two families used this roadway in order to get to Route 7 or what is not Route 7?

A. They could use that. They had other accesses to Route 7.

Q. And those families were the Gray and Tracy families?

A. Yes.

Q. Are you able to tell the Commissioner anything about the frequency with which Gray or Tracy or their families would use this particular stretch of road from Kullgren's house north to Route 7?

A. I am not.

Q. Did Gray use it as a means of vehicular, that is horse and buggy or horse and wagon or for foot travel?

A. I would say both.

Q. Did I understand you correctly that Tracy formerly owned the house later owned by Dr. Dodd?

A. No, sir, you didn't. He did not own it.

Q. Where was Tracy's home?

A. It was almost west from the present Kullgren home.

Mr. White: I wish to introduce two maps as Complainant's Exhibit B and Complainant's Exhibit C.

Mr. Pickett: May I see them? (Looked at them.) It is agreeable provided we can introduce any maps or aerial photographs of the area.

Mr. White:

Q. Mr. James, I hand you Complainant's Exhibit B which is a map of the western portion of Loudoun County showing the rural mail routes and direct your attention to the vicinity of Round Hill, and I ask you if you notice the name Dodd written in on that map?

Fleet H. James.

A. I do.
Q. The name Simpson?
A. Yes.
Vol. II Q. Wright?
3/27/59 A. Yes.
page 8 } Q. Gray?
A. Yes.
Q. Now, that Dodd, was there any Dodd other than Ambassador Dodd, the former Dr. William E. Dodd?
A. No.
Q. Starting at the point indicated by a dot on this map and which is at the southwest intersection of the road from Round Hill to Airmont, is that roughly the present road to Airmont from the center of the town of Round Hill?
A. That's right.
Q. Road 1 (marked then in pencil) is that the road that goes south just across from Patterson Pharmacy in Round Hill?
A. Yes.
Q. I direct your attention to another road marked as Road 2 and which is west of Road 1 by one-quarter of a mile. Are you familiar with that roadway?
A. I am.
Q. You will note that the name Wright is written just to the North of the old pike right where this road goes to the south of the pike. Was that property formerly owned by that family?
A. Yes, and still is.
Q. What is the name for that Wright?
A. Yatton Wright.
Q. Going further to the west along the pike from Round Hill to Bluemont I have marked the next route as Road 3, could you tell the Commissioner where that route intersects the present Route 7 which of course is not in the same location as the old pike?
A. Just west of the present entrance into Mr. Bernard Kelley's farm and between Mr. Bernard Kelley's farm and the Sleeter Orchard.
Q. Is it to the east or west of the Sleeter property?
A. To the east.
Vol. II Q. Is it to the east or west of the road we have
3/27/59 identified as the Kullgren roadway?
page 9 } A. East.
Q. Mr. James, does the Kullgren roadway appear on this map?
A. It does not.

Fleet H. James.

CROSS EXAMINATION.

By Mr. Pickett:

Q. Mr. James, I understood you to say that your father in the year 1903 bought what you called the home place?

A. A portion of it.

Q. And where was that house located with reference to No. 7?

A. South.

Q. Where was it with reference to what has been identified as the Kullgren road? Was it on the east or west side?

A. On the east but south.

Q. South of the Kullgren road?

A. East. In other words, if you moved my father's place directly opposite it would be slightly east.

Q. Would that land extend across the Kullgren road?

A. The original Mason James farm would but my father bought 90 acres and I later bought the remainder from two aunts.

Q. At the time your father acquired his tract, was the Kullgren road the west boundary?

A. No, sir.

Q. Where was the west boundary with reference to that road?

A. East of the Kullgren road from 7 up to Kullgren's. The west boundary of my father's property would have been the Copeland farm and the Jim Wynkoop farm.

Q. Did both farms lie between your father's and the Kullgren road?

A. No, sir.

Q. But your father's acquisition did not touch the Kullgren road?

A. No, sir. They were to the west of my father's farm and on the north of my father's place was this property which is called the Gray place on a piece of property which is known as the Ballenger property.

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Q. How far was your father's northwest acquisition from the Kullgren.

A. Probably one-quarter of a mile.

Q. And you lived there from 1903 until you went to college in 1906?

A. I came back to the home place in 1909. I came back from college in '06 and in '09 I bought the land from my aunts as I recall it now and I was then at my own place. That has been a long time ago.

Fleet H. James.

Q. Where were your aunts' properties located?
A. East.
Q. And that was where you lived?
A. Yes, sir.
Q. And then you later acquired this 58 and a fraction acres, which was bounded on the east by the Kullgren road?
A. That's right.
Q. And lay between what is now the Kullgren property and No. 7?
A. Yes.
Q. Was there a road leading south from No. 7 on beyond the Kullgren house?
A. Yes.
Q. How far did that go to the south, do you know?
A. Yes, probably a mile or more from the Kullgren property.
Q. Did it empty into another road at that point?
A. Yes.
Q. Is it not true that this road going by the Kullgren property to the south was fenced on both sides?
A. Yes, I think so.
Q. There were stone fences and wire fences at the others?
A. I would have to answer that stone rows rather than stone fences and wire fences were there.
Q. What is the difference between stone fences and rows?
A. Well, in stone rows the stones are laid one upon another and they drag stone off the field and pile them one on top of the other.

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Q. But they both serve the same purpose to keep the cattle in, don't they?
A. No.
Q. What is the difference?
A. The stone row must have a rail on top to keep cattle in.
Q. Were the stone rows equipped in that way?
A. One stretch was and the others were not.
Q. Now, do you remember the Hawthorne School.
A. Yes, sir.
Q. Where was that located?
A. On the south side of the then Route 7 or what is known as the old pike. It is on the north of it now and east of Col. and Mrs. Sleeter.
Q. In other words, was that road located by the Old Snickersville Pike and the present Road No. 7?
A. Yes.

Fleet H. James.

Q. Did this road which has been referred to as Kullgren Road continue on beyond the Hawthorne School?
A. It went north across No. 7.
Q. And across Snickersville road?
A. That's right.
Q. Did it go to Scotland Heights?
A. It did.
Q. Beyond?
A. Yes.
Q. Do you know where it terminated?
A. That road that goes from Woodgrove to Bluemont.
Q. You mean it intersected and ended at another road?
A. That's right.
Q. North of Scotland Heights?
A. Yes.
Q. How far?
A. Probably a mile.

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Q. Was there a mill at Scotland Heights?
A. Yes.
Q. What kind of mill?
A. Crushed corn and it had a saw mill.
Q. Was there any other industry?
A. No. Not at that time.
Q. Who did they sell their products to or did they ship them by rail or otherwise?
A. I should add to that. At Scotland Heights there was a pin factory that made pins for telephone and telegraph cross-ons.
Q. What road did they use to ship their products?
A. A road that goes off of No. 7 but goes on by Cherry Grove and meets Woodgrove-Bluemont road.
Q. What did you call this road that runs by the Kullgren property both north and south?
A. I did not know any name to call it. It was just one of those situations that you find in this part of the country. There were roads but were not used by the farms and were used for whatever use you want to make of them.

Mr. White: I move to strike part of the question as not being responsive.

Q. If you were going to refer to the road, what would you call it?
A. I never heard of it having any name.

Fleet H. James.

Q. Now, did the mill at Scotland Heights use this road we are talking about?
A. I am not prepared to answer that.
Q. Was there any way to get products out?
A. Yes.
Q. Was this road available to them?
A. Yes.

Mr. White: I am not certain to which road you are talking.
Mr. Pickett: I am referring to the Kullgren Road.

Q. I believe you said that the Hawthorne School was on the Kullgren Road?
Vol. II A. No, sir, I didn't.
3/27/59 Q. What was it on?
page 13 } A. What we call No. 7.
Q. How far was it from the Kullgren Road?
A. 250 yards, I reckon, maybe 300 yards.
Q. Was that school in operation when you went there in 1903?
A. No, sir.
Q. Abandoned?
A. Yes.
Q. Do you have any recollection of this road prior to 1903?
A. No, sir.
Q. I believe you said on direct examination that the mail carriers used this Kullgren road?
A. No, sir, I said they did not.
Q. How did the people get their mail?
A. There were only two people or two or three families on the route and that was the Gray and the Heskett and the Tracy families, they had mail boxes on my father's property. The rural mail route went over what we are calling the Kullgren road.
Q. Did you ever own any of the property upon which the Sleeter residence is now located?
A. Yes.
Q. Did you live at any time at the Sleeter place?
A. Yes.
Q. Was it occupied?
A. All the time from the date it was constructed.
Q. Were there tenants?

Fleet H. James.

A. Mr. Bonner built the house. Mr. Bonner died the night he moved into the house. Mrs. Bonner and her father and mother, Mr. and Mrs. Petrie, lived there. They had put out part of the orchard. The property was sold to Mr. W. B. Curtis and I believe purchased from him by Col. and Mrs. Sleeter.

Vol. II 3/27/59 page 14 } Q. Did any of those occupants use any part of the Kullgren Road?

A. No, I think not.

Q. Can you state, Mr. James, whether or not the Hawthorne School was sometimes known as Cherry Grove?

A. I know that it was not known as the Cherry Grove School. The Cherry Grove School house is still standing.

Q. Where is that with reference to Kullgren Road?

A. One mile and one-half north of it. In other words, it is northwest from Scotland Heights now owned by Owen Thomas.

Q. Mr. James, I show you an aerial photograph of this area which was taken, I believe, in the year 1937 in which I would like to be marked for identification as Defendant's Exhibit No. 1 and which by stipulation of counsel has been agreed may be introduced in evidence.

Mr. White: Mr. Pickett, I am quite agreeable to its being put in and it has some outlines and I do not stipulate those because they are beyond my knowledge.

Q. Can you identify the locale?

A. Very well.

Q. Does this road that we have been discussing which has been called the Kullgren Road appear on this aerial photograph? Can you trace it?

A. Yes. (Pointing) This road went across to Scotland Heights (indicated on right margin of the exhibit).

Q. Can you trace that from that point south?

A. Yes, sir.

Q. The road came from the point designated on the right margin down to a point of intersection on the old Snickersville Pike and continues south to what is now State Route No. 7 past the Kullgren residence to the Cochran property where red and green markings turn sharply west. From this point the road extends about one inch further on the map

Fleet H. James.

and then turns southeast along the southern edge of a wooded tract then turns south to the Gray entrance.

Vol. II 3/27/59 page 15 } Q. Mr. James, you will notice certain tabs are fixed to this exhibit with the names of former and present owners. Would you state whether or not they are correctly identified?

A. Yes, except for Tom Reid. Cochran did once own it.

Q. Which Cochran?

A. J. R. Cochran.

Q. Was he the father of Russell Cochran?

A. Yes.

By Mr. Hall: The date 1925 appearing at the bottom of Complainant's Exhibit C is to be disregarded.

RE-DIRECT EXAMINATION.

By Mr. White:

Q. Referring to Defendant's Exhibit 1, and calling your attention to the tract marked K, was this a road? (lies one-half inch south of Kullgren boundary was a road)

A. It wasn't.

Q. I believe you testified that the roadway did not extend in a southerly direction more than one inch on this aerial photograph before it turned to the southeast. In other words it did not extend past a fence row?

A. That's right.

Q. Mr. James, referring to the road which has been identified as the Kullgren Road, I believe you previously testified that the Gray and Tracy families used it as an access to the old Snickersville-Round Hill pike, did you?

A. I did.

Q. Do you recall any other families or persons using that road?

A. No, I do not.

Q. And you stated you did not want to state any frequency with which the families used the road?

A. That's right.

Q. Was that road used for pedestrian travel as well as travel in horse drawn vehicles?

Vol. II 3/27/59 page 16 } A. Yes.

Q. Did either of those families or anyone else in your recollection ever haul any machinery of any kind over those roads?

A. I don't remember that.

RE-CROSS EXAMINATION.

By Mr. Pickett:

Q. Mr. James, Col. White asked you about this road where it turned to the south and asked you if it was a road and you said it wasn't. Well what was it?

A. It wasn't anything but an open field, part of the Cochran land.

Q. Was it travelled?

A. No.

Q. This Kullgren Road was used by the public whenever they wanted to, wasn't it?

A. I imagine so, yes.

Q. There were no trespassing signs on it, were there?

A. No.

Q. The people had to get supplies into their homes over it, didn't they?

A. Yes.

FURTHER DIRECT EXAMINATION.

By Mr. White:

Q. Did they haul supplies over this particular stretch of road?

A. I didn't say they did.

Q. Do you recall any supplies being hauled over it?

A. No.

Q. During the time you owned it, did you object to families using the road?

A. No.

Commissioner Nickels:

Q. Did the Gray and Tracy families have another access to their properties?

A. Yes.

Q. Do you know whether or not they used other accesses more frequently than the Kullgren Road?

A. I couldn't answer that.

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Q. Directing your attention to Defendant's Exhibit 1, did this Kullgren Road terminate at the Gray's entrance?

A. No.

Q. Where did it end?

Landon H. Wynkoop.

A. Well, it went to the road going south from Round Hill to Airmont. It continued across that road to Lickey's Mill, it also turned to the left and could have gone to Yatton road back into Round Hill or a short distance beyond the Gray place, I would say one-quarter mile out beyond the Gray place it turned west and went to the Isaacs Stocks corner.

Q. Do you know who took care of the upkeep of the road or was there any upkeep?

A. Not on that road. That's the portion of the road that comes out from Yatton and meets this road. My recollection is that Will Humphrey was Road Commissioner for Mt. Gilead District and John Chamblin was the Road Overseer.

Q. That portion that was worked then was south of the Gray place?

A. Yes, well it would have been from the Gray place to where it turns off to go to Yatton. It was never worked to my knowledge nor from the Gray place to Route 7.

FURTHER CROSS EXAMINATION.

By Mr. Pickett:

Q. When the Grays and Tracys went to Bluemont, did they use the Kullgren Road?

A. I would think so.

Commissioner Nickels:

Q. Do you know John Emory Lickey?

A. I used to know him.

Q. Do you know whether or not his father was ever connected with the County Road System?

A. I do not.

Q. Do you consent for the stenographer to sign your name to this deposition?

A. Yes.

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* * * * *

The witness,

LANDON H. WYNKOOP,

of lawful age, after being first duly sworn deposes and says:

Landon H. Wynkoop.

DIRECT EXAMINATION.

By Mr. White:

Q. Would you state your name?

A. Landon H. Wynkoop.

Q. Where do you live?

A. I live down on Woodberry Street in Leesburg.

Q. How old are you sir?

A. I am 72 years old.

Q. Do you know Mr. John Kullgren?

A. Yes.

Q. Do you know his property located west of Round Hill?

A. Yes.

Q. Were you there recently?

A. I have been, yes, sir.

Q. How recently?

A. A short time ago.

Q. Within this week?

A. Yes.

Q. Did you ever live in the vicinity of the Kullgren property?

A. I did.

Q. Who now owns the property where you formerly lived?

A. A fellow named Lowery.

Q. I show you an aerial photograph which is Defendant's Exhibit 1 (pointing). That road has been identified as present Route 7, and this as the old Snickersville Pike, and this little piece right here in white as the Kullgren property. Is this the portion which you formerly owned?

A. Yes, right there in the woods.

Q. And that lies south of Route 7 and between this which we have called the Kullgren Road and the entrance to Col. Sleeter's property. (At the Southeast intersection of Route 7 and Kullgren Road.)

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A. Yes.

Q. How long did you live at that property?

A. About 18 years as well as I remember.

Q. Were you born in Loudoun County?

A. I certainly was.

Q. Where?

A. Right above Woodgrove.

Q. Have you lived in Loudoun County the better part of your life?

A. All my life.

Landon H. Wynkoop.

Q. How much of your life has been spent in the vicinity of Round Hill?

A. That has been my Post Office all my life.

Q. Did you live in the vicinity of the Kullgren property at any other location than the property now owned by Lowery?

A. Yes, I have lived several different places. When I first married, I bought a place above John Alder.

Q. Where does John Alder live?

A. It is known as the Old Paxson place, on the road between Airmont and Round Hill.

Q. Is any part of that farm on this photograph?

A. No, because that runs up to the school house. Once owned by Kelley and now owned by Wilson.

Q. The yellow school house is located on the road from Mountville to Bluemont?

A. Yes, about half way.

Q. About how far in distance was that dwelling on the Wynkoop farm from the Kullgren property?

A. It was three miles or better.

Q. Did you ever do any work on the roads of Loudoun?

A. Oh, yes.

Q. In what magisterial district?

A. It was Mr. Gilead District?

Q. Who was the road overseer?

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A. John Chamblin, and an uncle of mine, Sam Wynkoop.

Q. What years did they cover?

A. Back in my younger years.

Q. Could you give us any dates?

A. 18 or 20 years ago.

Q. Would that be about 1940?

A. Yes.

Q. How long a time did you work?

A. We worked a few days a week. Could work a day or as many as you wanted to.

Q. How many years did that road work cover during the time you worked it?

A. I was about 18 when I first started. I started when I was 18 or 20 and stopped 18 or 20 years ago, when the State took over the roads.

Q. Was the work which you did on the roads in Loudoun County any portion of it in this general vicinity of Kullgren property?

A. No, it wasn't. I worked around the yellow school house at Airmont.

Landon H. Wynkoop.

Q. Within your knowledge, has this road from the old Snickersville Pike and from Route 7 south to the Kullgren house ever been worked as a county road?

A. If it has, it was before I was born.

Q. Do you know whether or not any other persons or families use this roadway from the Kullgren house down to the present Route 7 or the old Snickersville Pike?

A. You mean down by Kullgren. Well, there never was any road through there, just a lane. You went back through Gray's. An uncle had about five gates.

Q. When you say the other road, what road are you talking about?

A. The one that turns off by Isaac Stocks.

Vol. II 3/27/59 page 20 } Q. The other road which you referred to does that appear on this map which is called Complainant's Exhibit B?

A. Yes, it is the old road coming into the Airmont-Bluemont road designated in pencil as Road 4.

Q. In your memory, how many people or families used that road to Mr. Kullgren's to get down on Route 7 or the old Snickersville Road?

A. Mr. Gray lived back in there but he had three ways out. He came through Fred James' farm which belongs to Gray down to the Copeland farm by Yatton. He used this most of the time. This has been bad all way through.

Q. Which one of those three ways would he use most of the time?

A. Most of the time through James.

Q. That's not the road to Yatton?

A. No.

Q. Do you remember any other person or family using this road?

A. Man, Tracy, used to carry the mail. He lived back there and came out through there but he came out through James' because it was the best road.

Q. Was this road running from Mr. Kullgren's house down to the pike ever a mail route in your recollection?

A. Never was.

Q. Do you know of any other persons or families who used the Kullgren road to get out to the old pike or Route 7?

A. I do not.

Q. I believe you stated that one of these men, either Gray or Tracy, used the road through James' because the road was better?

A. Yes, that's right.

Landon H. Wynkoop.

Q. Which person was it, Gray or Tracy?
A. George Gray and Henderson Tracy.
Q. Was that true of both?
A. Yes.

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Q. Did Gray and Tracy or their families use the road for wagon or buggy use?
A. I think Tracy always carried mail in a two-wheel cart. Grey had a buggy. I knew Mr. Gray very well, Tracy too.
Q. Did they use those vehicles, that is the two-wheel cart and buggy of Gray's travelling over the road?
A. Some, yes. Tracy carried mail and went over the road every day because it was a good road down through there.
Q. Your testimony is not that he used the Kullgren road every day?
A. No.
Q. Did either Gray or Tracy haul any supplies into their homes over this Kullgren Road?
A. I know Tracy did but I don't know about Gray. He had a horse and buggy.
Q. What would be the condition of that Kullgren Road, that is the road from Kullgren's property down to the old pike and present Route 7, during the winter months of the year?
A. Well, it don't get so bad unless it drifts with snow.
Q. Would it be passable?
A. Yes, sometimes.

By Mr. Hall:
Q. Mr. Wynkoop, I believe you said your activities in working on the highway were near Yellow School House?
A. Yes, that's right. Around Airmont.
Q. You did not have in charge at anytime the work nearer Round Hill?
A. No.
Q. Did you know Mr. John Thomas Lickey?
A. Yes.
Q. Didn't he work on the road?
A. His father was overseer on the road.
Q. How about John Thomas Lickey himself?
A. I didn't know him to do much work anytime.

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Q. He is still living, isn't he?
A. I think so.
Q. As to the Grays and Tracys, if they were going to Snickersville, would they use what is known as the Kullgren road?

Landon H. Wynkoop.

A. I don't think they did. They wouldn't go out over a bad road if they had a good one.

Q. Did I understand you that Mr. Tracy carried mail over Kullgren Road?

A. You didn't hear me say that.

Q. He was the mail carrier?

A. Yes.

Q. What road did he use?

A. He went through by Mr. James.

Q. How did Gray get his mail?

A. You can go out to the road and get it.

Q. Now, are George and Richard Wynkoop your uncles?

A. That's right.

Q. When you visited the George or Richard Wynkoop homes, what road did you use?

A. Come in through by James, John Wynkoop comes out beside Rowe. He bought John Wynkoop farm and Dodd bought the Jim Wynkoop farm.

Q. Did the what is known as the Kullgren Road go to Scotland Heights?

A. That's right.

Q. Was that used by the public?

A. Yes.

Q. The public road extended on to Scotland Heights?

A. You crossed over it and went on to Dave Thomas'.

Q. Did the persons living in the Kullgren house use the Kullgren Road?

A. Yes.

Q. Was the road open to the public?

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A. If you wanted to open gates and take down bars. Wasn't many who went through because they didn't take time.

Q. Where were the gates located?

A. One right at the house to this side of the woods. One at the tenant house above Gray's and there were bars through the woods.

Q. Was the land posted?

A. No, we didn't have anything like that in those days.

Q. Who kept the road up?

A. Didn't anybody.

Q. Was it fenced on both sides?

A. Some of it was, some wasn't.

John Chamblin.

RE-DIRECT EXAMINATION.

By Mr. White:

Q. Was there a fence on both sides of the road from Kullgren's house north towards Route 7 and the old Snickersville Pike?

A. Yes, at one time because we ran stock.

Q. How long ago was that?

A. Sometime ago, I can't remember how long.

Q. Was it 10, 20, 30 years?

A. Some there since I was there. I was there 18 years and a man ran his cattle there. You can't turn stock in the road, it has to be something there.

Q. You testified that the road from Kullgren's crossed the old Snickerville Pike and went to Scotland Heights, was there much traffic or many people using the road north of the old Snickersville Pike toward Scotland Heights?

A. No.

By Commissioner Nickels:

Q. Do you know whether or not this road referred to as Kullgren Road and the road on north of Route 7 to Scotland Heights was used for the farmers convenience or for the public?

A. I suppose it was put in for something before we got a road. They didn't come out this way. If they wanted to go to Bluemont they went over below the mountain by Thomas', this side of Bluemont.

Q. Do you know when this Kullgren road was first built?

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A. No, I don't.

Q. Do you consent for the stenographer to sign your name to this deposition?

A. I do.

And further this deponent saith not.

* * * * *

The witness,

JOHN CHAMBLIN,

of lawful age, after being first duly sworn, deposes and says:

John Chamblin.

DIRECT EXAMINATION.

By Mr. White:

Q. Would you state your name please?

A. John Chamblin.

Q. Where do you live?

A. Round Hill.

Q. How old are you?

A. Eighty-one.

Q. When will you be eighty-two?

A. June.

Q. How long have you lived in the Round Hill area?

A. All my life; I was born and raised five miles from town.

Q. Which side?

A. South side.

Q. Did you ever have any job connected with the roads of Loudoun?

A. I was overseer of the roads 6 or 7 years.

Q. In what district?

A. Mt. Gilead.

Q. What years did that cover?

A. From about 1906 until 1911.

Q. Do you know where Mr. Kullgren lives right in back of Marvin Brown's property?

A. Yes.

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Q. Do you know the roadway that leads from present Route 7 up to Kullgren house?

A. Yes.

Q. It used to go from Snickerville Pike to Kullgren house?

A. Yes.

Q. Was that road I am talking about and we call it Kullgren Road to identify it, ever worked by the Loudoun County road authorities?

A. Not to my knowledge.

Q. Do you know whether or not it was ever included in the Loudoun County road system?

A. Not that I know of.

Q. Mr. Chamblin, I show you an aerial photograph which has been admitted as Defendant's Exhibit 1 and ask you if you can tell from that photograph where the Kullgren property is?

A. Yes.

Q. The road leading up from the old Snickersville Pike and

John Chamblin.

across Route 7 to Mr. Kullgren's property and right to his south property line we have identified as the Kullgren road. That is the road I just asked you about whether it is in the county road system. Where did that road go after it left the southern boundary of Mr. Kullgren's property?

A. It went over to a place at Mr. Gray and another place over there where Mr. Tracy used to live.

Q. This sticker here has been identified as being the place formerly owned by George Gray?

A. That's about right.

Q. Could you tell the Commissioner what person or persons or families in your recollection used this road, the portion of it from Kullgren down to the old Snickersville Pike and the present Route 7 to get in and out?

A. Mr. Gray and Mr. Tracy used it.

Q. Did either of those people have any other way to get in and out?

A. Yes, they had a better way.

Q. A better way, can you tell us through whose land?

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A. It comes down at Bernard Kelley's, across his place.

Q. Do you know the property now owned by Mr. and Mrs. Sleeter?

A. Yes.

Q. Which side of the Sleeter lands did that road of Bernard Kelley's lie, east or west?

A. East.

Q. Along the eastern edge of the apple orchard?

A. Yes.

Q. Do I understand you to say that Gray and Tracy use that road more than the Kullgren Road?

A. I didn't say that but you could use either way.

Q. What kind of shape was the Kullgren Road in?

A. Not very good. It wasn't an automobile road.

By Commissioner Nickels:

Q. Who kept up the Kullgren Road?

A. The people who lived on it, I suppose. I knew no one who worked it. If anything was done it was by the people who lived on it.

CROSS EXAMINATION.

By Mr. Pickett:

Q. Mr. Chamblin, did you know Mr. John Emory Lickey?

John Chamblin.

A. Yes, sir.
Q. Did you know his father?
A. Yes.
Q. His father at one time was overseer of Mt. Gilead?
A. Yes, sir.
Q. Do you know when his term of office expired?
A. No, sir.
Q. Was there somebody between you and him?
A. I worked in one section and he worked in another.
Q. Do they have more than one overseer for each district?
A. Yes, sir.

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Q. Within Mt. Gilead?
A. Yes.
Q. Was he overseer at the same time?
A. Yes.
Q. Do those sections have names or districts?
A. No, sir, I don't think they did.
Q. Mr. John Lickey worked all roads under his father?
A. Yes, I am sure he did.
Q. Was what's been called Kullgren Road in Mr. Lickey's district?
A. Just between us, between Mr. Lickey and I.
Q. You don't deny that he worked on this Kullgren road?
A. Not that I know of.
Q. But you wouldn't be able to say that he didn't do it?
A. No, sir, I wouldn't.
Q. Do you remember that Mr. Lickey at one time lived in the house that now belongs to Mr. Kullgren?
A. No, sir, I don't remember that. He might have but I don't recall.
Q. That road was fenced on either side with stone or wire fences and the public were free to use it and did use it?
A. Yes, sir.
Q. Do you remember the Hawthorne School?
A. Yes.
Q. Can you tell us when that ceased to be used as a school?
A. No, sir, I can't. I just couldn't say.
Q. Children used this Kullgren road to go to school didn't they?
A. Yes, sir, as far as I know.
Q. The mail was carried over this road also wasn't it?
A. Not to my knowledge. No mail was ever carried over it.
Q. Was there both pedestrian and vehicular traffic over the road?

John Chamblin.

A. Yes, sir.
Q. Commodities were hauled in and out?
A. As far as I know. I suppose so.
Q. Mr. Chamblin, you will see here an identification of the Cravens property, formerly Cochran property or Reid. Do they have any way to get out to Route 7 except using this Kullgren Road?
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A. The only way would be across his own place. There is no other road.
Q. Does his place go down to Route 7?
A. Yes.
Q. He would have to build a road wouldn't he?
A. Yes.
Q. Is that rough terrain?
A. Yes, it is that.
Q. Grade would be pretty rough?
A. Yes.
Q. What road was used by the Cochran's to get out?
A. On the route right from the home.
Q. They had land down there?
A. Yes.
Q. Was the same true of Sleeter?
A. Yes.
Q. Was the same true of Reid, he owned land?
A. Yes.
Q. What road did they use?
A. They used this one sometime and one from Kelley sometime.
Q. It would depend on their destination?
A. Yes, the one most convenient.

Commissioner Nickels:
Q. Were there any gates across the road that Cochran would have to open to get through to Kelley's?
A. No, sir, not that I remember.
Q. Do you know if there was ever a gate on the Kullgren road?
A. No, sir, not to my knowledge.
Q. Were the Kullgren Road and the road down by Kelley's about in the same shape or condition so far as the surface was concerned?
A. The Kelley road was a better road. It was wider and better in every way.

John F. Kullgren.

Vol. II
3/27/59 Mr. Pickett:
page 29 } Q. Do you know Mrs. Thomas Wilson whose maiden name was Lutie Trenary?
A. I have heard of her but don't know her.

Mr. White:
Q. Was this Kullgren Road also known as the Wynkoop and Cochran Road in your recollection?
A. No.
Q. Did you ever hear of a Wynkoop and Cochran road?
A. That would go by Mr. Cochran and Mr. Wynkoop's places.
Q. Was there a road that ran from Cochran to Wynkoop?
A. Yes, sir, it could have.
Q. Was that the Kullgren Road?
A. No, sir, that would be Kelley.
Q. You know where Mr. and Mrs. Sleeter live. Was that place formerly owned by Bonner?
A. Yes.
Q. Did anybody else by the name of John Chamblin ever act as road overseer besides yourself?
A. No, sir, my uncle, Major John was Commissioner.
Q. If Mr. John Emory Lickey stated that John Chamblin succeeded, I would have to have been talking about you but you wouldn't have had to succeed his father?
A. No, sir.

Commissioner Nickels:
Q. Where did Tracy live in relation to Gray?
A. About a quarter of a mile southwest up the hill from Gray.
Q. Do you consent for the stenographer to sign your name to this deposition?
A. I do.

And further this deponent saith not.

* * * * *

Vol. II
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page 30 } The witness,

JOHN F. KULLGREN,
of lawful age, after being first duly sworn, deposes and says:

John F. Kullgren.

DIRECT EXAMINATION.

By Mr. White:

Q. Would you state your name please?

A. John F. Kullgren.

Q. Where do you live?

A. I live in Washington, D. C. of which I am a resident.

Q. Do you own any property in Loudoun?

A. Yes, property west of Round Hill just south of Marvin Brown's property.

Q. Did you buy that property from one person?

A. No, we bought it in three lots.

Q. From whom did you get the first lot?

A. The first lot we got from Sgt. Clayton.

Q. When was that?

A. That was—we got the deed arrangements in December, 1950. Sgt. Clayton was in Korea. Actually, we didn't get his signature back until January, 1951.

Q. Is the title in your name and Mrs. Kullgren's?

A. Yes, in mine and Mrs. Kullgren's.

Q. Now, the tract you got from Clayton, did that have a dwelling house on it?

A. Yes.

Q. That's the house now on the tract?

A. Yes.

Q. What was the next tract you bought?

A. The next tract was the tract surrounding the Clayton house to the north of it and to the east of it. That tract we bought from Mr. Elsea.

Q. Do you remember when that was?

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page 31 } A. By Mr. Hall: The deed was dated December 13, 1951.

Q. Did you buy a third parcel?

A. Yes, sir.

Q. From whom?

A. From Mr. Bill Humphrey.

Q. Later than the other two?

A. Yes, a couple of years later.

Q. I know that you are familiar with the roadway in question?

A. I think I am.

Q. What sort of shape was that in from your house to

John F. Kullgren.

Route 7 when you bought the house and lot from Clayton?

A. To give an indication, I know of no other better way to explain it. I called it the Burma Road which is a well famous road for poor condition.

Q. Have you done any work to improve the road since you first bought the property?

A. Yes, on two occasions.

Q. What sort of work?

A. The first time part of the road was sagging so deeply that it was spoiling the mufflers on my car, so I bought two or three truck loads of gravel to fill in the road in the winter of 1955-56 as I recall. Last year, the winter of 1957-58 after Mr. Sleeter had been wearing out the roads and in the summer I had the same trouble about the mufflers on my car so I hired a negro who lived in Round Hill, Wilson, and Wilson spent several weekends using hack and spade trying to plane off the middle of the road, so it would be a little more even.

Q. I believe that Mr. and Mrs. Sleeter and some of their trucks, equipment or vehicles have used the Kullgren Road at one time or another?

A. Yes.

Vol. II 3/27/59 page 32 } Q. Do you claim ownership of that road?

A. Yes I do according to my deed.

Q. Have you checked the boundaries of the description in your deed or had them checked by anyone else?

A. Yes, sir, I have had it checked. I and my wife came out and bought this place mainly as a weekend place. There wasn't any suspicion in our minds, neither of us are of that character. The deed read correctly; the Clayton deed and later the deed we obtained when we bought the Elsea property. There wasn't a feeling on my part or that of my wife that we needed a lawyer to check our deed. This concept didn't arise before Mr. Sleeter, in a rather unfriendly way, started using our roadway.

Q. When was that approximately?

A. That was in the winter of 1954-55, I guess.

Q. Have the Sleeters or their employees used the roadway prior to that time since you bought the property?

A. No, please remember that my dates are a little unclear. It could have been earlier but I had never had any indication that the Claytons or Sleeters had been using the roadway. After we had been there Mr. and Mrs. Sleeter came over to our place and we felt we had rather friendly neighbors who were operating a rather efficient orchard. Sometime later it

John F. Kullgren.

was in the summer, I recall, Mr. Sleeter on a weekend walked over his land, passed our property and said "Hello" to me, and I invited him over, and in a most friendly way we were talking about the water situation and our well. There wasn't any indication that Mr. Sleeter was unfriendly and certainly to the effect that he had any interest in using our roadway.

Q. Has Mr. Craven ever used that road, the Kullgren road, to your knowledge?

A. I can only speak on weekends while we were there. What they are doing the rest of the time I cannot testify on. As to Craven, he has paid us several visits and friendly visits over the years. Last year when the Sleeters started using our roadway many of the weekends we were out there and the road business was gradually coming to a head. One Friday night, I think it was July last year, I saw fire in one of Mr. Craven's trees a little above and to the East of our place. I went over to Round Hill and phoned his home. His wife was receiving the call and I told her about the fire. A short while later, Mr. Craven came over and sat with us in the kitchen and he said he had purposely started the fire, there was no danger involved, he thanked me for the call, and he talked about the roadway and he said that personally he had no use for our roadway. That sounded pretty comforting to us. We didn't have to contend with Mr. Craven using the roadway. Rather it was Mr. and Mrs. Sleeter who insisted upon using our roadway, and a few weeks later, however, we came out as usual on Friday afternoon, it was a lovely day, we took two chairs out on the east lawn and sat watching the sun falling. At that moment came Mr. Craven in his jeep and had a man whom I do not know with him, and in a rather silent embarrassed way we saw him and he passed. If this is an indication that he doesn't use our roadway or need our roadway—that's a matter that has to stand on its own feet.

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Q. Mr. Kullgren, I neglected to ask you your age?

A. I am 52.

Q. Who is your employer?

A. Department of the Army.

Q. Now, did there come a time, I believe it was last year, when you erected a gate or fence between your roadway and Route 7?

A. Yes, sir.

Q. I believe you did that on my advice?

A. Yes, sir, I did.

John F. Kullgren.

Q. What happened?

A. For quite a few months nothing seemed to happen before we contacted you, Mr. White. Already in 1955, I think, as a result of Mr. Sleeter using our roadway, we began to worry about the validity of our deeds. We asked Mr. Russell, a lawyer here in Leesburg, to check our deeds and go back and see in previous deeds if our roadway was used or had been used as a public road.

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Mr. Pickett: I object to any opinion of counsel in the matter. It is not admissible evidence. It would be admissible if he were alive.

Mr. White: I am sure it would not be if he were alive.

By Mr. White:

A. Then as a result of the road problem we contacted Mr. White and asked if he would act as our lawyer in this case.

Q. Tell the Commissionuer what happened after you put up the gate across the road?

A. For several weeks nothing happenued, then one day, I think it was in August of last year, 1958, I obtained a letter from the Commonwealth Attorney of Virginia stating—

Mr. Pickett: I object.

By Mr. White:

Q. Did you have any direct communication from Mr. and Mrs. Sleeter concerning this?

A. No, sir. As a matter of fact, and this is a fact, we contacted Mr. Sleeter's manager, Mr. Lowery—I think that was in the summer of 1955—and said we would like to discuss this thing with Mr. Sleeter. On one occasion, when my wife protested against his using our roadway, he stated to her, "Take it up with me in court."

Q. Was that Mr. Sleeter?

A. Yes. So from that time on we could not communicate together as neighbor to neighbor.

Mr. White: I would like to direct the Commissioner's attention to the deed in 13 Z's, page 293 from C. C. Elsea to Mr. and Mrs. Kullgren and to the fact that the deed is with general warranty of title and contains the English covenants of title. I maintain that if Mr. Elsea made any

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statement to Mr. and Mrs. Kullgren concerning this roadway and the right of anyone else to use it that that would have put them on notice concerning such an encumbrance and if he told them to the contrary it would be a statement against his own interest. I think his statement would be admissible under that concept and as a verbal fact and not as a truth or veracity of his statement but merely that Elsea made a statement.

Commissioner Nickels: What did that particular deed say about any easements?

Mr. White: Nothing.

Commissioner Nickels: Anything in there regarding appurtenances?

Mr. White: It says it is conveyed with all improvements and appurtenances thereunto appertaining.

Commissioner Nickels: Is the statement of Mr. Elsea of which you are speaking a statement he made in connection with trying to effect a sale to Kullgren?

Mr. White: Yes.

Q. Mr. Kullgren, directing your attention to the time when you purchased this tract of land from Mr. Elsea, did Mr. Elsea make any statements to you concerning the roadway which ran across that parcel of land from your house, the Clayton place, to Route 7?

A. Yes, but it is the other way around. We saw that our northern property line stopped at the Elsea property which is that of Mr. Brown now. We saw that we had a strip of road and it was naturally our concern about what rights we have.

Q. Across Brown?

A. Across Elsea now Brown and then we were informed that we had an easement in the lease of Elsea for the use of the roadway crossing Brown's property into Route 7. We checked that with the Court records.

Commissioner Nickels:

Q. Are you stating that the now Brown property was subject to an easement running in favor of your property?

A. An easement that states we have the right of way from our property along a 16 ft. right-of-way.

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Q. Is that easement of record?

A. Yes, sir, it is in the Brown's deed. The easement was in Clayton's deed. The easement existed before we bought the property.

John F. Kullgren.

Q. Mr. Kullgren, you have already testified as to when it was that you first learned that Mr. and Mrs. Sleeter and their agents were using your property. Did you register any protest to Mr. and Mrs. Sleeter or their employees?

A. Yes, to the employees. Mr. Sleeter had clearly indicated that he did not want to talk except in court.

Q. Was some protest made directly to Mr. Sleeter?

A. Yes, many weekends. Both I, and even more, my wife, who was out there had to block our roadway with our own car protesting against him using it. One time we blocked the roadway in the winter, Mr. Sleeter apparently got mad, and he takes his truck and drives it across our roadway and upon the rocks piled in a heap over into his own land.

Q. What sort of vehicles of the Sleeters were driven over that roadway?

A. Mr. Sleeter's little truck, a very tiny little pickup, trucks that were used in the apple orchard, tractors, which tear up the roads very effectively. Many times we used to stop Sleeter's farm hands explaining to them that they had no right to use our roadway. They were polite, stated however, that Mr. Sleeter had ordered them to use our roadway. In the summer this type of thing became an almost common type of thing every weekend. In the winter, of course, there is no need for trucking traffic to any large extent on the orchard. So in the winter time, we have not been much distirbed except when he takes his pickup and drives over the roadway.

Q. How far is the east side of your house from the west side of that roadway?

A. Only 16 or 17 feet.

Q. Do you know whether there is any other route which Mr. Sleeter and his employees could use to avoid coming over your land?

Vol. II 3/27/59 page 37 } A. Yes, sir, they have their own ingress and exit. They have a road that crosses the orchard, a mud road, in an east and west way around the south side of the fence or the stone wall separating our—

Mr. Pickett: I object, that is irrelevant.

Mr. Whte: I withdraw the question.

Q. Since you have owned that land has the County of Loudoun or State Highway Department of Virginia ever worked the road?

A. No, sir.

John F. Kullgren.

Mr. Pickett:

Q. You first purchased your 2.11 acres from Edward and Lucy Clayton?

A. Yes.

Q. And that is the southern most part of the three?

A. Yes.

Q. It is exhibited on Exhibit A as Clayton?

A. That's correct. Yes, sir.

Q. It is on that parcel that your house is located?

A. Yes.

Q. Did you inspect this Clayton parcel before you signed the contract to purchase?

A. Yes, we visited it.

Q. How did you get on it from Route 7?

A. We were brought there by Mr. Elsea. We passed Elsea's house.

Q. Did you use the roadway to get in there?

A. Yes.

Q. What kind of a road did you think it was, an abandoned road? There was no outlet road given you from Clayton?

A. No, not the Clayton's deed.

Q. I call your attention to one of the calls in the description of the land acquired from Clayton being call No. 4, "Thence N 83° E 404 feet to (4) an iron peg on the east side of an old road and in the west boundary of the Sleeter farm and corner to Elsea's other land;"

So you knew it was an old road?

Vol. II 3/27/59 page 38 } A. Yes, sir, you can see it.

Q. Then the next parcel you acquired was from Elsea?

A. Yes, sir.

Q. That deed did not give you a right-of-way north to Route 7?

A. Not to my recollection.

Q. You had to depend on an old road?

A. No, sir.

Q. What did you depend on?

A. An easement. It states that we had a right-of-way.

Q. In what deed?

A. Elsea deed.

Q. I am talking about the second deed to you?

A. Yes.

Q. You had to rely to an old road on access to Route 7?

A. Yes, sir.

Q. And the third parcel you acquired from Humphrey?

John F. Kullgren.

A. That's correct.

Q. And for the first time that deed gave you a 16 ft. right-of-way from that parcel of land to Route 7?

Mr. White: I object to that question as calling for a conclusion and as calling for an opinion as has not been learned by the law.

Mr. Pickett:

Q. Isn't the real difference between you and Col. Sleeter and Mr. Craven a question of a proper maintenance on this road?

A. No, sir, that question has never been brought up, according to my deed.

Q. I understood you to say that the road was torn up by his vehicles?

A. I have never claimed that.

Q. You have never come to him for the cost of fixing the road?

A. I never claimed anything from him.

Q. Never asked him to contribute to it?

A. No. I want a determination of the correctness of my deed.

Vol. II 3/27/59 page 39 } Q. There is no existing road which would furnish access by Mr. Craven to No. 7 except over a road that runs by your house?

A. He is using his own road.

Q. Is that road in existence?

A. He has a road that comes down to the glen. He has a jeep and ever so often he drives from his own barn and he hasn't built a road through his glen and over an old road and then down the gulley going back to the house.

Q. But he would have to build a new road over his property to get to No. 7?

Mr. White: I object. I think it is completely inadmissable and immaterial. It seems to me that this entire line of questioning is to establish such an easement.

Mr. Pickett: I am trying to prove that Craven has the right to use the road and not to build a new road to get to No. 7 but I will withdraw the question.

Commissioner Nickels:

Q. Do any of the people who live on the Gray, Cochran or Tracy farms use this road now?

John F. Kullgren.

A. No, sir, not to my knowledge.

Q. Have they used it since you first purchased it?

A. Not to my knowledge. The Claytons I know. The other prople spoken of I do not know except apparently the son of the Gray's was mentioned this morning. I know him vaguely. They have not used the road.

Q. Is there any automobile traffic?

A. No, sir, except our own and the Sleeter's, and ours is our own personal car.

Q. Outside of your automobile using it, is there any traffic other than what could be generally called farm vehicles?

A. Sometimes we have friends from Washington coming out and they drive up where we are.

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Q. When you first bought from Clayton, did you notice the condition of the road.

A. Very much the same as it is now, sir, but I have improved parts of it.

Q. To the south of the Clayton tract, what was the condition of the road when you purchased it?

A. Very much worse. It was evident that it had not been used.

Q. Were there trees or clumps of brush?

A. Yes, sir, about I should say, 70 ft. south of our stone line there is a little gulley through which the road went that was overgrown with vines and trees. It was difficult to try to get through it. That part was cleared up, I think it was last year. The workers said Mr. Craven was clearing it.

Q. When you first moved was there evidence that it was being used?

A. There was evidence that it wasn't being used.

Q. Do you consent to the stenographer signing your name to this deposition?

A. I do.

And further this deponent saith not.

* * * * *

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* * * * *

LUTIE WILSON,

was called as a witness on behalf of the defendants, and after having been sworn by the Commissioner, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Pickett:

Q. What is your name?

A. Lutie Wilson.

Vol. III 4/9/59 page 7 } Q. We are talking about this road that runs by the Kullgren property.

A. Yes.

Q. Can you fit yourself into this sketch and see where you are? That is the Cochrane house (indicating). This is the Gray house?

A. Yes.

Q. Now, Sleeter down here and Kullgren here, and Kelley over here (indicating).

A. I am with the Kelleys.

Q. Do you know what we are talking about?

A. Oh, yes, yes, sir.

Q. Do you live anywhere near this property?

A. Well, part of the time I do. I live with my daughter and son-in-law, Kelley.

Q. Mr. Kelley is your son-in-law?

A. Yes, part of the time I live in Arlington.

Q. How long have you know this road?

A. I am getting along in years. It has been a road ever since I can remember.

Q. Ever since you can remember?

A. Yes, sir. It has been a road.

Q. Do you know whether the county ever worked it?

A. Yes. I don't know. I can't swear that the county worked it, but I know somebody worked it. It must have been the county. They worked it with the neighbors, or men they could gather around the neighborhood, you see?

Vol. III 4/9/59 page 8 } Q. Yes.

A. My two brothers used to work it, just boys, you see. They worked it, a shovel and a hoe, maybe a horse and a plow. There was a group of men that used to come every spring and work the road.

Q. Do you remember the name of the road over here (indicating)?

A. No, I do not. Indeed, I don't.

Q. Where did that road go from there to?

Lutie Wilson.

A. Well, it went across the Snickersville Pike, across over there and went over towards—I don't know what you would call the direction, but it went in around Scotland Heights.

Q. How about the Hawthorn School?

A. I went right there when I was a little girl, to school.

Q. You went to school?

A. Yes, sir.

Q. Did this road go near this school?

A. Yes, sir. It was right above it. I could take and show you where the Hawthorn School was at, where it sat, and how far up the road was above it. West, I would call it.

Q. Was there a mill and blacksmith shop at Scot-
Vol. III land Heights?
4/9/59 A. Yes, sir.
page 9 } Q. Was this road used by people going to and from that?

A. Yes, sir. There was no other road for them to use.

Q. Did the public use it generally?

A. Sure. If anybody wanted to go anywhere, they had to use that road, but there were no automobiles that I remember of, and no convenient way to travel, only by horse and buggy and carriages, and horseback.

Q. Horse and buggies did travel it?

A. Oh, yes, all those roads were travelled by horse and buggy. This road that you are speaking of, I remember it perfectly well. Came right out by the corner of my father's home.

Q. Where was that, here (indicating)?

A. Yes, I think so. The best I can tell.

Q. Near the Cochrane property?

Mr. White: I have to object to this leading of the witness. It has gone as far as it should go. This is direct examination.

By Mr. Pickett:

Q. Where did you live with reference to Scotland Heights?

A. I lived in—what is it, Mr. Sleeter—about a
Vol. III mile from Scotland Heights.
4/9/59 Q. You have to depend on your own recollec-
page 10 } tion.

A. It is a very short distance, maybe three-quarters of a mile.

Q. What was your maiden name?

Lutie Wilson.

A. Lutie Pearl Trenary.
Q. Who, in your family, worked on the road?
A. My brothers.
Q. Did your father work on it?
A. No, my father was an invalid. He never worked on the road.
Q. What pay did your brothers get?
A. I don't know for sure. In my mind, they made about fifty cents a day.
Q. What did that go to?
A. Taxes. That was the way of paying the county taxes.

CROSS EXAMINATION.

By Mr. White:
Q. Mr. Wilson, what magisterial district did you live in?
A. What do you mean?
Q. Well, Loudoun County is divided into six magisterial districts. In which one did you live?
A. I really don't know.
Q. How long ago was it that you lived up here near Scotland Heights?
Vol. III A. It has been, I would say, sixty years.
4/9/59 Q. So that the time you are talking about, when
page 11 } this road was worked, was about sixty years ago?
A. Anywhere between sixty and seventy years.
Q. Yes, ma'am.
A. I don't know exactly.
Q. Your brothers, you said, worked on this road in the springtime, nearly every year?
A. Yes.
Q. Did they work the road near your home?
A. I have seen them right out working on the road in front of the house.
Q. In front of your house?
A. Working the whole road, did make it passable.
Q. That section of the road they were working on, was from Scotland Heights to the old Snickersville Pike? Is that right?
A. Yes. and they worked over on the old Snickersville Pike, on the other side.
Q. On the other side of the pike?

Lutie Wilson.

A. Of course. It was the same road, but the pike divided it.

Q. Was there a family by the name of Gray, and another family named Cochran living up in that section at that time?

A. Yes, sir.

Vol. III Q. Do you remember where they lived?

4/9/59 A. Yes, kind of. Cochrane lived—I forget the

page 12 } people's name that lived there now, but it was right back off this highway, off the Snickersville Pike, and the Grays lived on back further down. East, I would call it.

Mr. White: Your Honor, may I ask who prepared this map?

The Commissioner: Who prepared the map?

Mr. Sleeter: I prepared it, Counselor.

Mr. White: May I ask where the road that now leads—that turns off Route 7, this Scotland Heights, is? This is a county road. Is this a secondary road?

Mr. Sleeter: This is the old Snickersville Pike. Here is the road.

Mr. White: This road is no longer in existence?

Mr. Sleeter: That is correct. It is the one that went to Scotland Heights.

Mr. White: Is this the road you turn off?

Mr. Sleeter: No, this is that.

Mr. White: Where is the road? Have you got a county road map?

Mr. Martin: No.

Mr. White: Your Honor, there is a very important road that is omitted from this sketch here.

The Commissioner: Are you speaking of the

Vol. III road that cut off the road right south of Round

4/9/59 Hill?

page 13 } Mr. White: Yes, and goes to Scotland Heights.

Mr. Martin: I think we have one here that will identify it better.

Mr. Hall: Which is in evidence.

The Commissioner: Are you going to use that aerial photograph? I have the papers all up in the office.

Mr. Hall: This is a copy of it.

Mr. Sleeter: There is one that comes off, right down here, right here (indicating). Want me to draw it in?

Lutie Wilson.

CROSS EXAMINATION—Resumed.

By Mr. White:

Q. Do you remember where the old Simpson house was, Mrs. Wilson?

A. Stockhouse was right on the highway.

Q. Yes, ma'am.

A. It used to be called the old Snickersville Pike.

Q. There was, at the time you lived up near Scotland Heights, a road that went right on by that house?

A. Yes, sir.

Q. This road you are talking about, is that the same road as that?

A. Yes.

Mr. Pickett: I don't think the witness understood that question.

Vol. III 4/9/59 page 14 } The Witness: The road is extended across the highway, cuts the road in two.

The Commissioner: Want to rephrase the question, please? so the wtiness will understand it?

By Mr. White:

Q. Do you know where the Simpson place used to be?

A. Yes, sir.

Q. There is a road that runs right by the Simpson place, up to Scotland Heights?

A. Yes, sir.

Q. Is that the road you are talking about, that your brothers worked on?

A. Yes, and the other road extended from that road, out across the highway, back in toward where the Grays lived at. I don't know exactly where the Gray place is at, but I remember that road was extended across the highway and you can go there and see it today, but it has been many a year since I travelled those roads, but I do know there was a road there.

Q. And it is your testimony, Mrs. Wilson, that your brothers worked on that road from Scotland Heights, on the north side of Snickersville Pike and also on the south side of Scotland Heights?

A. Yes. It all had to be kept in travelling condition.

Lutie Wilson.

Q. I see. You know that the road we call the Snickersville Pike, was abandoned several years ago. You knew that?

Vol. III 4/9/59 page 15 }

A. No.

Q. And a new Route 7—

A. Well, it was rebuilt.

Q. The location was changed?

A. It was? I don't remember about that.

Mr. White: Thank you very much, Mrs. Wilson.

The Witness: Are you through with me?

Mr. Hall: Wait just a minute.

Mr. Pickett: Thank you, Mrs. Wilson. You are excused.

The Commissioner: Do you want to designate in the record the ages of these witnesses? It might be well to state in the record the ages so that it would be beneficial to the Court.

Mr. Pickett: I don't mind asking Mr. Kelley. I think some of the ladies are a bit reticient about divulging it.

The Commissioner: I think it should go in the record that Mrs. Wilson is a very elderly lady.

Mr. White: I am going to move to have this sketch removed from sight. I don't believe it has been established that it is an accurate presentation of the area up there. I don't know if it is to scale. If it is, I don't know what the scale is. I think it might confuse the witnesses.

The Commissioner: Do you want to go by the aerial photograph of the other exhibit?

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Mr. Pickett: This was brought here to prevent the witnesses from being confused, so they could understand the *the* points.

Mr. White: I submit it isn't an accurate presentation of the area.

Mr. Pickett: I submit that it is.

Mr. White: I would like to object to its being considered.

Mr. Pickett: Better get Mr. Sleeter here and identify this sketch.

The Commissioner: You want Mr. Sleeter for the purpose of identifying the sketch?

Mr. Pickett: Yes, sir.

Thereupon,

FRANK SLEETER,

defendant, was called as a witness in his own behalf, and after having been first duly sworn by the Commissioner, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Hall:

Q. Please state your name.

A. Frank Sleeter.

Q. Your residence?

A. Round Hill, Virginia.

Q. You are one of the defendants in this suit?

A. I am.

Vol. III 4/9/59 page 17 } Q. You are looking at a portrayal of the road which is the subject of this controversy, and some of the houses. Did you prepare that?

A. I did.

Q. Is it a fair and accurate portrayal of the situation?

A. I think to answer that correctly, I would say it is fair. It isn't to an exact scale, but it does show the roads and system of roads, how they tie in and relate to each other, and to Route 7. It obviously doesn't show the entire road system, because we have kept it pretty much showing the roads on the south side of the highway, but the location of the residences will show pretty well the roads that go past their front doors.

Q. You presently are familiar with all that terrain in there?

A. I am, and I had the exhibit beside me as I blew it up to a larger scale. I had the exhibit beside me to aid me in preparing it.

Q. That was the aerial photograph that was before in evidence?

The Commissioner: That is correct.

Mr. Hall: I offer it in evidence and ask that it be received.

Mr. White: I would like if this witness would say that this is an accurate presentation as of today, or as of 1880, to say that.

Vol. III 4/9/59 page 18 } The Witness: The date was 1937 of the map that was taken from.

Mr. White: Do I understand that the witness has merely enlarged this aerial photograph map or a portion of it?

The Witness: That is correct.

Mr. White: I submit, your Honor, that some of these

roads that show on this sketch, do not appear on the aerial photograph. There is no road in all this aerial photograph which would be running to the west of the Gray property on the sketch. I think if the witness wants to testify from the aerial photograph, it is all right. If he wants to have the aerial photograph enlarged, I think we certainly wouldn't have any objection to that, but I do most strenuously object to the witness' taking a portion of the aerial photograph and enlarging it to some undefined scale and having it reflect his interpretation of what is on the aerial photograph. I don't think it is admissible in evidence. I certainly want to object to its being considered. I want to object to any witness' referring to it. I think he might very easily be misled.

Mr. Hall: It shows the road in dispute, which is the only road we are concerned with.

Vol. III 4/9/59 page 19 } The Commissioner: You all want to offer that in evidence?

Mr. Hall: Yes, sir.

Mr. White: I have noted my objection.

* * * * *

BERNARD KELLEY,

was called as a witness on behalf of the defendants, and after having been sworn by the Commissioner, was examined, and testified as follows:

DIRECT EXAMINATION.

By Mr. Pickett:

Q. Have you been sworn?

A. Yes, once.

Q. Mr. Kelley, please state your name.

A. Bernard Kelley.

Q. Where do you live, Mr. Kelley?

A. Round Hill.

Q. How long have you lived in Loudoun County?

A. All my life.

Q. Do you see this sketch here?

A. Yes, sir.

Vol. III 4/9/59 page 20 } Q. That house marked "Kelley," is that where you live?

A. Yes, sir.

Q. You know the Kullgren property?

A. Yes, sir.
Q. You know what is called the Gray property?
A. Yes, sir.
Q. And the Cochrane?
A. Yes, sir.
Q. And the Copeland?
A. Yes, sir.
Q. And the Wynkoop?
A. Yes, sir. I owned about all of them.
Q. You did?
A. Yes, sir.
Q. How old are you?
A. 55.
Q. Is there a road running by the Kullgren property from Route No. 7?
A. Yes, sir.
Q. To where does it go?
A. It comes back there to the Reid place, or what I call it.
Q. Is that marked "Gray"?
A. No, it goes to the Gray and Reid place. That is right.
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Q. Which way does it go, the other way across the Pike?
A. It goes over to where the Moots farm is.
Q. Is that Scotland Heights?
A. That is right.
Q. How long have you know this road?
A. Well, I have known it ever since I have been old enough to remember much. I couldn't say the right year, but—
Q. Has the public used it?
A. Well. they did.
Q. They did?
A. Yes, sir.
Q. Do they still use it?
A. Well, that is a right-of-way out to the Reid place and the Gray place. I own the Gray place now.
Q. Is that occupied?
A. No, sir, not now. Have a fence across there. They sold it.
Q. Fence up here (indicating)?
A. That is right. I used to use it altogether to take my cows and my machinery up there. I used to own the Payne

place. It is the Kullgren, whatever you call it. It joints onto it. I used to use it.

The Commissioner: Would you mind marking that Exhibit No. 3?

(The map above referred to, was marked as Defendants' Exhibit 3 for identification, anud received in evidence.)

Vol. III
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page 22 } By Mr. Pickett:

Q. Was the road ever worked by the county during this time?

A. No, sir. Just kept it clean so you could get up and down it. It may have been away back there. I couldn't say for sure.

Q. Who owns the property which is indicated on this sketch as Cochrane and Reid? Who now owns that property?

A. Craven, I think.

Q. Has he been using that road? Do you know?

A. Well, that is the only way he can get out of there. He has got to use it to ever get out.

Q. Was the road fenced?

A. Yes, sir.

Q. On both sides?

A. Yes, sir. Used to have to keep mine up when I owned the farm up there.

Q. What kind of fences were alongside of the road?

A. Just—

Q. Wire?

A. Wire and stone.

Q. Any stone fences?

A. No, I don't think so, just wire fences, and along Scotland Heights, is a stone fence.

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Q. It was never closed up with any gates or bars, or anything of that kind?

A. No, sir.

Q. Would you consider this to be a public road?

A. Yes, sir. I thought it was.

Mr. White: Your Honor, I move to strike. I don't think this witness is qualified to give an opinion as to what is and what is not a public road. It seems to me that at our last hearing, I asked a similar question of one of the witnesses

for the complainant, and it was objected to, and I believe I withdrew the question.

I think this question and answer our obviously not within the knowledge of the witness, and no proper foundation for his stating the opinion for which he was asked.

Mr. Pickett: Well, the reason I think it is a proper question, is the fact he owned the land and was affected there, and for that reason, I think it is proper.

Mr. White: Well, I submit that the witness, who I was interrogating, owned the land before Mr. Kelley did, and had that question asked of him.

Mr. Pickett: You may cross examine.

Mr. Hall: Wait just a second.

DIRECT EXAMINATION—Resumed.

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By Mr. Pickett:

Q. Mr. Kelley, what kind of traffic went over that road?

A. Anybody went over it that wanted to.

Q. In vehicles?

A. Yes.

Q. On foot?

A. Yes.

Q. Horseback?

A. Yes, and cars went over it.

Q. Automobiles?

A. Yes, sir.

* * * * *

CROSS EXAMINATION.

* * * * *

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* * * * *

By Mr. White:

Q. Now, you said a few moments ago that Mr. Cravens who now owns the Cochrane—Reid property, had no other

way to get out but to come on this stretch of road that comes from the Kullgren Road, down to Route 7.

A. No, sir. I don't know of any other way to get out.

Q. I submit to you, sir. Does he not use the road that comes down right adjacent to your property?

A. No, sir. I have got him fenced off. He cannot come down there.

Q. You have got that road fenced off?

A. Yes, sir. I fenced it in 1938, something like that.

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Q. What about the road that goes down to Yatton? That isn't fenced off. Is it?

A. Yes, I fenced that off. The road there is full of rocks. He can't get out that way, unless he moves those rocks. Somebody has got to move them.

* * * * *

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* * * * *

The Commissioner: Do you know whether or not it was ever kept up by the county or highway department?

The Witness: No, sir, not in my day, I don't know of it. Everybody used it, and that is all I can tell you.

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* * * * *

MARIE A. COPELAND,

was called as a witness on behalf of the Defendants, and after having been sworn by the Commissioner, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Pickett:

* * * * *

The Commissioner: Will you give your age for the record?

Arthur Lawrence Woodward.

The Witness: 73. I will be 73, the 11th day of July.

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* * * * *

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By Mr. White:

Q. What was the basis of your thought that the public used this road, Miss Marie?

A. Well, that road, I just kind of know that the public used that road, although I did not use it but a few times, but those things linger with you.

* * * * *

ARTHUR LAWRENCE WOODWARD,

was called as a witness on behalf of the defendants, and after having been sworn by the Commissioner, was examined, and testified as follows:

DIRECT EXAMINATION.

By Mr. Pickett:

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* * * * *

Q. Do you know this road we call the Kullgren Road in this suit?

A. Yes. I think I do.

Q. How long have you know of that road?

A. Ever since 1936.

* * * * *

Q. Did the public use it?

A. Yes.

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The Commissioner: Will you ask the witness to explain what he means by public, whether it was the general public passing through this area, or

people passing through, calling on the people on the property?

Mr. Pickett: I would be glad to have Your Honor ask the questions you have in mind.

By Mr. Pickett:

Q. You mean by public, people who were passing through on Route 7, or the Snickersville Pike, or through by Gray, Wynkoop, Copeland, or people that were calling on the Gray and Kullgren people?

A. People who used it.

Q. For what purpose?

A. Hauling things over it, going back and forth to work.

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VIRGIE WORKMAN,

was called as a witness on behalf of the Defendants, and having been sworn by the Commissioner, was examined, and testified as follows:

DIRECT EXAMINATION.

By Mr. Hall:

Q. Will you state your name, please?

A. Virgie Workman.

Q. How old are you?

A. 38, 39 in August.

Q. Where were you born?

A. Round Hill.

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Q. How long have you lived in the vicinity of Round Hill?

A. All my life.

Q. How far were you born from what is known as the Kullgren property?

A. Well, I would say about a mile and a half or two miles.

Q. Do you remember what is known as the Kullgren Road, the road leading south from Route 7, the old Snickersville Pike, to the old Kullgren property?

Roger H. Hammerly.

A. I do.
Q. How long have you remembered that road?
A. Ever since I was eight years old.
Q. Which would make it about 27 years ago?
A. Something like that.
Q. Now, did you ever travel that road?
A. Yes, sir, I did.
Q. How did you travel it?
A. Model T Ford, with my father.
Q. With whom?
A. My father, back to the old Gray property.
Q. Did anybody else use that roadway?
A. Yes, sir.
Q. Did the public use it?
A. Yes, sir. Reids lived right above it. They travelled it.

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Q. Do you know whether the road was ever worked on?
A. Worked by the county; put rocks in it, in the holes.
Q. Was it fenced?
A. Yes, sir, fenced on both sides.
Q. Was it ever closed by any gates or bars?
A. Not then, it wasn't.

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* * * * *

ROGER H. HAMMERLY,
was called as a witness on behalf of the defendants, and after having been sworn by the Commissioner, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Hall:
Q. Will you state your name, please?
A. Roger H. Hammerly.
Q. How old are you, Mr. Hammerly?
A. 65 years old, last April 27th.

Roger H. Hammerly.

Q. Where do you live?
A. Round Hill.
Q. Have you lived anywhere else during your life, except Round Hill?
A. I lived in Washington for three years.
Q. What years were they?
A. 1909, 1910 and 1911.
Q. I believe your father formerly operated a livery stable in Round Hill. Is that correct?
Vol. III 4/9/59 page 53 } A. That is correct.
Q. Did you work in the livery stable?
A. I did.
Q. All right, sir. Please state whether or not twenty or thirty years ago, Round Hill was somewhat of a *country* resort for Washington people in the summertime?
A. It *certaly* was.
Q. This was known as the Kullgren Road?
A. Yes, sir.
Q. Did you ever drive carriages over that road?
A. I have.
Q. During what period?
A. I would say from maybe 1905 until—for several years after that.
Q. Several years? Did the public use that road?
A. They did.
Q. Please state whether or not you would drive boarders who were in Round Hill for the summer, to what is known as Round Hill. I don't mean the town, but the place that had such a good view.
A. I did.
Q. What road did you use to get to that Round Hill?
A. Through the Kullgren Road.
Q. Through the Kullgren Road?
A. That is it.
Vol. III 4/9/59 page 54 } Q. Please state whether or not the Kullgren Road extended through Route 7, which was formerly the Snickersville Turnpike in and around Scotland Heights.
A. It did.
Q. Please state whether or not the road, the Kullgren Road, was ever closed or shut off by gates and bars.
A. No, sir.
Q. Was the road fenced?

Roger H. Hammerly.

A. On both sides.

Q. Do you know what kind of fence?

A. Partly stone on either side and wire, barbed wire.

Q. Have you recently been over what is known as the Kullgren Road?

A. Yes, I have.

Q. Well, do you recognize any of the old land marks?

A. I certainly did.

Q. Can you give us any reasonable estimate of the summer traffic to the area known as Round Hill, where people would go to get the view, to which you have referred?

A. I couldn't tell you exactly. I remember when I was a boy when the summer boarders were in a number of houses that kept boarders, and my father had a livery, and maybe six or eight would come that would want to go to Round Hill, Pineytown or Black Oak. We would drive down to those places. They were all beautiful views.

Vol. III 4/9/59 page 55 } Q. Was that one occasion, or many accasions when you would drive them to Round Hill?

A. In the summertime, it depended on how much money they wanted to spend and where they wanted to go.

Q. What was located at Scotland Heights, if you recall?

A. Originally, there was an old mill there that was run by water power, and there was a blacksmith shop, and there was a creamery, and there was a station there. It was just a stop that didn't have any agent there.

Q. That was the Southern Railroad when you knew it, at Scotland Heights where they had the flag station?

A. That is right.

Q. The farmers shipped milk and cream out that road to get to the Snickersville Pike?

The Commissioner: Which road?

Mr. Hall: The road which was an extension of the Kullgren Road.

Mr. White: I object to the question as being entirely leading and without any foundation to support it.

CROSS EXAMINATION.

By Mr. White:

Q. Mr. Hammerly, did I understand you to say that you did not know where this—the locale of this area you called

Roger H. Hammerly.

Round Hill, as distinguished from the town by the physical feature known as Round Hill, was?

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A. I don't quite understand.

Q. I believe Mr. Hall asked you if you knew where this place, which you said you drove these boarders to, called Round Hill, was. Of course, we know where Black Oak is. Where is Round Hill, the physical feature?

A. You can see it plain as day. It is up right back.

Q. Which side of Route 7? Is it on the north or south side?

A. South.

Q. You are certain of that? Don't you think you are referring to a personal qualification, a round top, rather than Round Hill?

A. Never heard of round top.

Q. Never did?

A. No, sir.

Q. This road which runs southward from the present Route 7, the old Snickersville Pike, through the covering land, did it end, did it dead end, or did it go into some other road?

A. You could go right on through and come on right through the Yellow School House.

Q. That is on the road to Bluemont?

A. You could go on through.

Q. Whose land would you go through, if you recall, at the time you left Route 7, going southerly?

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A. You mean whose farms are on each side? Well, I remember when Mr. Fleet James lived at one place and Mr. Roy Beans. On the other side was Bonners and the orchards on the other side where Colonel Sleeter has his orchards. The Cochrane place, the Gray place on one side, the Cochrane place on the other side. When you run up to the house which they are talking about, where Tom Reid lived, it wasn't the original Cochrane home, but it was a place on the property which belonged to them.

Q. Where Reid lived?

A. That is right.

Q. And Reid went past that?

A. That is right.

Q. And went on up to connect from Bluemont to the center school house?

A. That is right.

Roger H. Hammerly.

Q. And it is your testimony the public used that road?
A. It is.
Q. Do you know anybody, other than the Gray-Reid family to use that road, besides the use you have mentioned that you made of it?
A. Anybody that wanted to go through there used it.
Q. Can you give any names of people?
Vol. III 4/9/59 page 58 } A. I wouldn't like to say that. I could name people. I have seen people travel that road a number of years ago. You could look from one road to another. I carried the mail.
Q. What road did you travel, carrying the mail, this road past Kullgren?
A. No, they did not put me on that road. It was prior to my time. I began carrying mail in 1920, on Route 1. When this Lynch died, they transferred me to No. 2. That was his route. When I was there, I used to go past Grays and Cochranes. They rerouted me. I came past Kelleys, Dr. Dodds' place and onto Route 7.
Q. You never actually used that?
A. I didn't use that as a mail route, no, but I served mail for these people in that vicinity.
Q. What are you doing now?
A. I am retired, a couple of years ago.
Q. How recently have you been on that road, past the Kullgren house?
A. I would say as of about a year ago.
Q. Where were you going?
A. Just driving around.
Q. Where did you drive to?
A. I drove up. My wife lived up at that place once. I drove up there.
Q. To what place?
Vol. III 4/9/59 page 59 } A. To the Cochrane place where Tom Reid lived.
Q. You drove up to that?
A. Yes.
Q. And that is where Mr. Cravens lives now, I believe.
A. It is Mr. Cravens' property. He doesn't live there.
Q. Mr. Hammerly, did you say that farmers in this vicinity used the road there past the Kullgren property?
A. Did I say?
Q. That farmers used it to go back there and haul loads?
A. When they had this creamery over at Scotland Heights, they used that road—the ones that lived back in there—to

haul their cream. They get stuff ground over at this mill. This was the shortest way. Of course, it was all horses then.

Q. You say, "The ones that lived back there." To whom were you referring?

A. I would say the Wynkoops, the Grays, and whoever lived up on this other property, anyone who lived there.

Q. In the Reid property?

A. Anybody who lived in that vicinity at that time.

Q. So far as you understood, they all had the right to use that road. Is that right?

A. That is my understanding.

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AGNES T. HAMMERLY,

was called as a witness on behalf of the defendant, and after having been duly sworn by the Commissioner, was examined, and testified as follows:

DIRECT EXAMINATION.

By Mr. Hall:

Q. Will you state your name?

A. Agnes T. Hammerly, Mrs. Roger H. Hammerly.

Q. What was your maiden name?

A. Tracy.

Q. I have got to ask you, how old are you?

A. 62. I don't mind.

Q. Now, before your marriage, where did you live?

A. I lived in a place you are speaking of, the Cochrane place.

Q. Now owned by whom?

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A. I think Mr. Cravens, or Colonel Sleeter, one or the other.

Q. Do you know what is known as the Kullgren Road?

Agnes T. Hammerly.

A. Yes, sir.
Q. How long have you known that road?
A. 50 years at least.
Q. I will ask you to state whether or not it was fenced on both sides?
A. It was.
Q. You know what kind of a fence?
A. It was a stone fence and barbed wire.
Q. Was the road ever closed by gates or bars?
A. No, sir.
Q. Do you know where Round Hill is? I mean the place people go to get a view of the surrounding area.
A. Yes.
Q. Please state whether or not in the early 1900's that Round Hill was a center where boarders came in the summertime from Washington.
A. It was.
Q. Do you know whether or not people would use what is known as the Kullgren Road to get to Round Hill?
A. Yes, sir.
Q. Who would use what is known as the Kullgren Road?
A. Anybody that wanted to, the public, anybody.
Vol. III 4/9/59 page 63 } Q. Was it used by people, other than lived in the homes, the Grays, Cochranes, *et cetera?*
A. Yes, sir.
Q. You lived in what was formerly known as the Tracy home, of course.
A. It was the Cochrane place.
Q. But your father was a Tracy?
A. Yes, sir.
Q. Where did you go to school?
A. We went to school at Round Hill.
Q. What road would you use to go to school?
A. We used the old one, the Kullgren Road.
Q. Was that before the days of automobiles?
A. I think so, yes, sir.
Q. What was the method of travel in those days?
A. Horse and buggy.
Q. How long did you live with your father in what was known as the Tracy home?
A. Well, I would say approximately six or seven years. I don't know whether that is exactly right, but it was that long at least.

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ROY B. PAYNE,
was called as a witness on behalf of the defendant, and after having been duly sworn by the Commissioner, was examined, and testified as follows:

DIRECT EXAMINATION.

By Mr. Pickett:
Q. What is your full name?
A. Roy B. Payne.
Q. How old are you, Mr. Payne?
A. 80 years old.
Q. Where do you now live, Mr. Payne?
A. Round Hill.
Q. What farm? Did you ever own any farm near what is known as the Kullgren Road, which runs into Route 7?
A. Yes, sir.
Q. Which farm did you own?
A. The farm I bought from Duncan.
Q. Which side of what is known as the Kullgren Road is that on?
A. The north side.

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Q. Now, how long have you known what is known as the Kullgren Road?
A. Forty years.
Q. When did you buy the farm which was near the Kullgren Road?
A. 1918.
Q. When did you sell that farm?
A. I don't know exactly. I stayed there about 20 years.
Q. Then, as I understand, you moved to the town of Round Hill?
A. Yes, sir.
Q. Where you now live?
A. Yes, sir.
Q. Are you familiar with what is known as the Kullgren house?

Roy B. Payne.

A. Yes.

Q. Was that on the land which you purchased from Duncan?

A. Yes, sir.

Q. What use did you make of what is known as the Kullgren house?

A. A tenant house.

Q. Was what is known as the Kullgren Road ever used for traffic?

Vol. III 4/9/59 page 68 } A. Yes, sir.

Q. Who used it?

A. Just we call it a little public road. It wasn't a highway or anything like that, just convenient to people living back there and people wanting to go to Route 7 and Airmont Road.

Q. Coming from the Airmont Road?

A. Yes, sir.

Q. Where would it come out approximately on the Airmont Road?

A. At the corner of that place.

Q. How far would it come out from what was known as the yellow school house?

A. The yellow school house was back quite a distance.

Q. When you owned the Duncan property, it also included the Kullgren house?

A. Yes, sir.

Q. I will ask you to state whether it was fenced for stock.

A. Both sides.

Q. Both sides?

A. Both sides.

Q. As you travelled the Kullgren Road to Route 7, how was it fenced, what kind of fences?

A. Wire mostly, part of it was stone.

Q. Would it turn stock?

Vol. III 4/9/59 page 69 } A. It wouldn't turn horses or anything like that, cattle and horses. It is all right. It is all it is used for.

Q. Do you know whether or not mail was ever carried on the Kullgren Road?

A. Yes, sir.

Q. Who carried the mail?

A. John Lynch.

Q. How many years, to your knowledge, did he carry the mail on that road?

A. I can't say exactly. He carried it in a horse and buggy

until the snow drifted in the road, and he would carry it on horse back and carry it on to Scotland Heights.

Q. Did the Kullgren Road cross Route 7 and go on across to Scotland Heights?

A. Yes, sir.

Q. This road, to your knowledge, the Kullgren Road, was it ever closed by gates or bars?

A. No, sir.

Q. Mr. Payne, please tell us whether or not the Duncan property, formerly owned by you, joined what is known as the Kullgren Road?

A. Yes.

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EDWARD GRAY,

Vol. III
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page 73 } was called as a witness on behalf of the defendant, and after having been first duly sworn by the Commissioner, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Pickett:

Q. Mr. Gray, what is your full name?

A. Edgar Fenton Gray.

Q. Where do you live, Mr. Gray?

A. Round Hill.

Q. How old are you?

A. If I live until the 13th of August, I will be 59.

Q. Do you know what is known as the Kullgren Road?

A. Oh, I travelled it all my life.

Q. When did you first know it, about what year?

A. Well, when I commenced going around. I was six or seven years old.

Q. Did you ever live on what is known as the Gray place, which was on the Kullgren Road?

A. Yes, sir.

Q. How long did you live there?

Edward Gray.

A. Well, I lived there—I wasn't born there. I lived there nigh onto 19 years, and I moved, moved when I got married. I moved over to Mr. Cochrane's. Lived there and went back and forth to my father and mother. Mama died
Vol. III and I moved back there with Papa for three years.
4/9/59 I went back to the Cochrane place and stayed and
page 74 } I worked for Uncle Cochrane for 35 years.

Q. Did you ever use this road known as the Kullgren Road?

A. Yes, sir. That is the only way I used.

Q. Please state whether or not you would use this road to get to the old Snickersville Pike now known as Route 7.

A. Yes.

Q. It was what is known as the Kullgren Road, cross Route 7 and go to Scotland Heights?

A. Yes, sir.

Q. Did you ever use it to go to Scotland Heights?

A. Yes, sir. I used to go with a horse and buggy to Sunny Ridge to see my wife.

Q. What kind of traffic would use this Kullgren Road?

A. After I got a car, I drove it in a Model A and Model T.

Q. Did you ever drive over it in a horse and buggy?

A. Oh, yes.

Q. Was any mail ever carried over what is known as the Kullgren Road?

A. Mr. John Reid carried it over that.

Vol. III Q. How long did he carry it over that road?
4/9/59 A. I can't recollect. To tell the truth, I don't
page 75 } know exactly.

Q. When you lived on what is known as the Gray place, Gray house, over which road would the doctor use to get to your home?

A. Always come up seven, that road. Always has ever since.

Q. What road?

A. Kullgren.

Q. Kullgren?

A. That is right.

Q. Please state whether or not the road was fenced, the Kullgren Road?

A. No, sir, never fenced that I know of since I have been big enough, except on both sides is the only fence.

Q. No, I am not speaking of a fence across it, but was there a fence on the side of it?

A. Yes, sir, absolutely so.

Ralph Daniel Baxter.

Q. On one side?
A. Both.
Q. Were any gates or barriers put across it?
A. Not as I know of.
Q. You knew what was known as the Cochrane house?
A. Yes, sir.
Vol. III 4/9/59 page 76 } Q. Was that an old house when you knew it, first knew it?
A. I wouldn't say it was old.
Q. Do you know when it was built?
A. No, I don't know that.
Q. Did you ever use what is known as the Kullgren Road to get out to the Aldi-Bluemont Turnpike?
A. Oh, yes.
Q. Did anybody besides the people who lived on this road, what is known as the Kullgren Road, use it?
A. Anybody who wanted to use it, to drive in.

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RALPH DANIEL BAXTER,
was called as a witness on behalf of the defendants, and having been first duly sworn by the Commissioner, was examined, and testified as follows:

DIRECT EXAMINATION.

By Mr. Hall:

* * * * *

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Q. Please state whether or not you know a road known as the Kullgren Road, which runs south of Route 7.

A. Yes, sir, I know where the road is.

Q. How long have you know that road?

A. I worked for Mr. Curtis, started to work for him in 1924, and I travelled that road back and forth to work then.

Q. Anybody else use the road?

A. Yes, sir.

Q. How many used it?

A. Everybody along back in there, and people used it going on over to the road to the Bell Humphrey place, going over to the yellow school house.

Q. Was it fenced on both sides?

A. Yes, sir.

Q. What kind of fence?

A. Mostly stone on both sides, sometimes rail and wire would be on one side.

Q. Ever barred with gates?

Vol. III A. No, sir. I see no gates.

4/9/59 Q. It was what is known as the Kullgren Road,
page 82 } cross Route 7 and go to Scotland Heights?

A. Yes, sir.

Q. Did you ever use the portion known as Route 7, to get to Scotland Heights?

A. No, sir, I did not.

Q. Do you know whether or not it was open north of Route 7, to go to Scotland Heights?

A. It was open. I never used it.

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WALTER HOWARD PEYTON,

was called as a witness on behalf of the defendants, and after having been sworn by the Commissioner, was examined, and testified as follows:

DIRECT EXAMINATION.

By Mr. Hall:

Q. Please state your full name.

Walter Howard Peyton.

A. Walter Howard Peyton.
Q. How old are you, Mr. Peyton?
A. I was 64 years old the 15th day of March, past.
Q. Where are you now living?
A. I am living down to Mrs. Copeland's old Ronny Inn.
Q. That is Miss Maria Copeland?
A. That is right.
Q. Where did you live in the year 1908, if you recall?
A. 1908, I expect I was living in—you will have to give me a minute on that. I was living in the Ballenger House, I think.

Vol. III 4/9/59 page 86 } Q. In where?
A. Oh, Bernard Kelley and I rented the—Baulman is the man who owned it. I rented from Baulman.

Q. Did you ever know a road that ran south Route 7, formerly the Snickersville Turnpike, known as Kullgren Road?
A. I know the road from the yellow school house, all the way through there, travelled it by day and night. I got my wife out of it, Mr. Hall.
Q. Where did you come out of Route 7, when you used the road you are speaking of?
A. Where did I come out? I come out from where Mr. Payne is and come out by Mr. Gray's place.
Q. Would you pass what was known as the Cochrane place?
A. Yes, sir, the Cochrane place was on the left.
Q. Who all used that road, if you know?
A. Well, I drove it during them days. There were a good deal of people that would go up in there and look around for the views, and all such stuff as that. Mr. Will Coleman used to live there, and did a lot of travelling down there and out where I am living today.
Q. Where did those boarders go?
A. Go up to the view, go up to the Baulman place.

Vol. III 4/9/59 page 87 } Q. Where was that view? What do you call it?
A. I don't know what the Cochranes called it. It belonged to Mr. Cochrane.
Q. What kind of transportation used it?
A. Well, now, there was horses and buggies and a lot of wagons.
Q. Any automobiles ever use it in later years?
A. Yes, sir, automobiles used it right smart.

Walter Howard Peyton.

Q. Now please state whether or not the road was fenced on both sides?

A. The road, Mr. Gray had a road on one side. There was a wire fence part of the way on that side, and it was an all-stone road on the other side, and it was fenced all the way down to the main highway, at that time, Route 7.

Q. Did you ever see any gates or fences across what was known as the Kullgren Road?

A. No, sir.

Q. You say the Kullgren Road ran—where would it come out on the Aldie-Bluemont Turnpike?

A. Now, out on the Aldie-Bluemont Turnpike?

Q. Yes, sir.

A. That would come up, oh, yes, yes, sir. Why, it would come out right exactly at the school house.

Q. I don't think I asked you this. North of Route 7, did the Kullgren Road run onto what was known as Scotland Heights?

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A. Yes, sir.

Q. Did you ever travel over all of it?

A. Yes, sir. There was a colored fellow beyond in the house up there. His name was Harold Keene. The lot emptied out. It used to go through there. I can't think of the name of the place.

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Mr. White: I want to renew my question of counsel for the defendant, concerning whether or not I will be required to bring the District Highway Engineer in to establish that this road wasn't taken into the secondary system in March, 1932.

The Commissioner: Or since?

Mr. White: Or since, yes, sir. That is the date when the—under the Statute of Virginia—the county roads were taken into the secondary system. Of course, there have been others taken in since that time.

Mr. Pickett: I don't want to put you to the trouble of

bringing a witness here to prove it. I don't think it is material at all. I think it is immaterial and irrevelant.

Mr. White: As to whether this is a state secondary highway system?

Mr. Pickett: Yes, sir. As a matter of fact, I think there is a case in point on that.

Mr. Hill: You would have no objection to stipulating to it?

Vol. III 4/9/59 page 102 } Mr. Pickett: Except I object to it as being immaterial and irrelevant.

The Commissioner: As I understand it, in view of the other two stipulations, one, that there is no right of way of necessity involved, and second, that there is no easement of right of way of record south of Mr. Kullgren's boundary—

Mr. White: Or north of Mr. Kullgren's boundary.

The Commissioner: And north of Mr. Kullgren's southern boundary, in favor of Mr. Tracy or Mr. Sleeter, that boils the issue down to whether or not it is a public road, easement, or right of way, or by prescription.

Mr. Pickett: Yes, sir.

Mr. White: If that is the issue, then there is no need of our making the stipulation about the secondary road.

The Commissioner: It seems to me, Mr. White, since I was asked to determine whether it was a public road or not, or a right of way, that I am going to have some evidence one way or another as to whether or not it was in the public road system.

Mr. White: Well, your Honor, we have presented evidence here, including the man who was many years a supervisor or foreman of road maintenance in this section; that it never had been in the public system, county road system, but I am now talking about the state road system.

Vol. III 4/9/59 page 103 } The Commissioner: I think there is evidence indicating whether or not it is a public road and the proper decision will be reached on it. I just wonder if you would want to definitely stipulate as to whether or not it was ever in the state road system.

Mr. White: Well, I can get the state engineer here, your Honor, to establish that point, if it is essential. I don't think—

Mr. Pickett: I think the stipulation proved it in.

Mr. White: Did you enlarge the stipulation to say that this road is not in the state secondary system of highways?

Mr. Pickett: Subject to its being irrelevant and immaterial.

Mr. White: All right, sir.

The Commissioner: I have to determine what type it is.

Mr. White: We would like to submit a brief on this. So far as the evidence which has been completed, there are some very interesting points involved here.

The Commissioner: That concludes the taking of the deposition then?

Mr. White: I believe it does.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

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