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FILE COPY
Clerk, Supreme Court of Appeals
Richmond, Va.

Record No. 6780

In the Supreme Court of Appeals of Virginia at Richmond

HOWARD STRICKLAND, et al., t/a, etc., et al.

v.

JACK P. BARNES, et al.

FROM THE COURT OF HUSTINGS FOR THE CITY OF PORTSMOUTH

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 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. 6780

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 6th day of October, 1967.

HOWARD STRICKLAND AND J. C. STRICKLAND, TRADING AS STRICKLAND BROTHERS, AND JAMES L. SMITH, JR., Appellants,

against

JACK P. BARNES, MINNIE S. BARNES, CREED MINIARD AND WILLIAM T. PEARSON, Appellees.

From the Court of Hustings for the City of Portsmouth
Jerry G. Bray, Jr., Judge Designate

Upon the petition of Howard Strickland and J. C. Strickland, trading as Strickland Brothers, and James L. Smith, Jr., an appeal is awarded them from a decree entered by the Court of Hustings for the City of Portsmouth on the 17th day of February, 1966, in a certain chancery cause then therein depending, wherein Jack P. Barnes and another were plaintiffs and the petitioners were defendants; upon the petitioners, or some one for them, entering into bond with sufficient security before the clerk of the said hustings court in the penalty of $300, with condition as the law directs.

RECORD

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ORDER

This day came the petitioners, Jack P. Barnes and Minnie S. Barnes, by counsel, and asked leave of the Court to file their Amended Petition herein for the purpose of correcting certain errors and omissions in their original petition, and for good cause shown, it is ORDERED that the said Amended Petition for Injunction be, and the same hereby is, this day filed, and the defendants shall, if the same be necessary file responsive pleadings within 10 days from the date hereof.

ENTER this 11 day of Nov., 1966.

R. F. M., Judge

* * * * *

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* * * * *

AMENDED PETITION FOR INJUNCTION

TO THE HONORABLE ROBERT F. McMURRAN, JUDGE:

Plaintiffs respectfully represent the following:

1. That by deed dated March 23, 1951, plaintiffs herein purchased certain property from W. F. Magann, Incorporated, described as follows:

That certain lot of land, situate in the City of Portsmouth, Virginia, adjoining and immediately West of a parcel of land conveyed to O. L. Harcum, by the said party of the first part, and bounded and described as follows:

Beginning at the Northwest corner of the said parcel of land Forty-eight (48) feet by Forty (40) feet conveyed to

O. L. Harcum by deed dated February 1, 1950, and in the Southern line of a strip fifteen (15) feet wide reserved for an alley as shown on the map hereinafter referred to; thence running Southerly and parallel with Third Avenue along the Westerly line of said Harcum Forty-eight (48) feet to a strip reserved for a future railroad siding; thence west Fifty (50) feet, thence Northerly parallel with Third Avenue as shown on said plat Forty-eight (48) feet to the said strip reserved for an alley and thence Easterly along said alley Fifty (50) feet to the point of beginning. Being a part of Lot Six (6) on the Map of the property conveyed to J. Lawrence Smith by the Seaboard Airline Railway Company, Receivers by deed dated October 10, 1945 and of record in the Clerk's Office of the Court of Hustings for the City of page 28 } Portsmouth, in Deed Book 154, Page 480. Said portion of Lot Number Six (6) lying between the other portions thereof heretofore conveyed by said grantor to O. L. Harcum and "Twilley's", a partnership, by deed duly of record.

2. That said above described property was conveyed to the said W. F. Magann, Incorporated by the deed of J. L. Smith, et ux, bearing date on the 21st day of September, 1946, and of record in said Clerk's Office in Deed Book 166, Page 342.

3. That said property was purchased from the said W. F. Magann, Incorporated by plaintiffs herein subject to certain restrictions and easements as set forth in the deed to the plaintiffs, a copy of which is attached hereto and prayed to be made a part of this petition.

4. That as a part of the consideration of the purchase from the grantors by the petitioners was the reservation of a twenty-five (25) foot strip adjoining the property on the South of the same for a future railroad siding and for ingress and egress to said property of the petitioners, which said reservation is shown on a plat entitled, "Plat of Property conveyed to J. Lawrence Smith by the Seaboard Airline Railway Company, etc.", dated August 4, 1945, approved by the City Engineer for the City of Portsmouth, and recorded in the Clerk's Office of the Court of Hustings for the City of Portsmouth, Virginia, together with the deed from Seaboard Airline Railway, et als, to J. Lawrence Smith, in Deed Book 154, Pages 480 through 484, and again on a revised Plat of the same and other property, dated March 14, 1947, approved by said City Engineer and recorded in the aforesaid Clerk's Office in Deed Book 171, pages 313 through 315, which said plats were relied upon by the petitioners

herein. A copy of the latter plat was attached to and made a part of the original petition in this cause.

page 29 } 5. That plaintiffs have been advised of the intent of Howard Strickland and J. C. Strickland, T/A Strickland Brothers, and James L. Smith, Jr. to construct an anchor fence along the northern line of the said area which is shown on the Plat as being reserved for a railroad siding; that the construction of such fence will block ingress and egress on what is shown as Third Avenue on the said Plat and will further completely block the southern exit and entrance to the property of your plaintiffs; that such fence will render plaintiffs' property figuratively worthless for any practical use since their ingress and egress will be so severely restricted as to cause irreparable harm and damage; that the property is presently rented out and the northern exit and entrance to the building is a necessary part of the use thereof and the construction of such fence will completely block such exit and entrance.

6. That in addition thereto the blocking of Third Avenue by such fence will cause similar damage not only to your plaintiffs but to other property owners situated in a similar position.

WHEREFORE, your plaintiffs pray that the construction of such fence be temporarily enjoined and restrained, until such time as the rights of the parties may be determined; that on a final hearing the said injunction be made permanent; that an issue out of chancery be granted plaintiffs if the same appears appropriate, and that plaintiffs be granted such other, further and general relief as the nature of their cause may require.

JACK P. BARNES

MINNIE S. BARNES

Filed Court of Hustings Nov. 11, 1966 12:16 PM.

CECIL W. JOHNSON, Clerk

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ANSWER

Now come Howard Strickland, J. C. Strickland and James

L. Smith, Jr., for an answer to the amended petition for injunction filed against them and say:

1. Paragraph 1 of the amended petition for injunction is neither admitted or denied and your defendants call for strict proof of same.

2. Paragraph 2 is neither admitted or denied and the defendants call for strict proof of same.

3. Paragraph 3 is neither admitted or denied.

4. Paragraph 4 is denied as to the part that states that part of the consideration, the part which granted a reservation of a 25 foot strip adjoining the plaintiff's property on the south for future railroad siding, as your respondents hereto are *bona fide* purchasers of value, without notice of any such alleged agreement, they deny that any such agreement was ever made and deny that it would be binding on them even if it were made.

5. Paragraph 5, your respondents admit that they plan to construct a fence but state that it would in no way be on the property of the plaintiffs and that they have the perfect right to build the fence on their own property and that the petitioners have no right to use the property that the

page 36 } fence will be built on and that the plaintiffs have proper ingress and egress through the northern side of their property.

6. Paragraph 6 is denied.

Now having answered the respondents pray that the injunction issued against them be dissolved and that their costs and expenses be assessed against Jack P. Barnes and Minnie S. Barnes.

HOWARD STRICKLAND

J. C. STRICKLAND

JAMES L. SMITH, JR.

* * * * *

Filed the Court of Hustings Nov. 17 1966 12:04 PM.

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On motion of Creed Miniard and William T. Pearson by

counsel, Creed Miniard and William T. Pearson are hereby made parties to this suit.

Enter: September 23, 1966.

Nunc Pro Tunc
2-17-67. J. G. B., JR., Judge

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* * * * *

THE CORPORATION COURT
OF THE
CITY OF CHESAPEAKE
VIRGINIA

January 30, 1967

Gentlemen:

Re: Jack P. Barnes, et ux
v. Howard Strickland, et als

The court has reviewed the stipulation of the testimony of C. L. Taylor and is of the opinion that it should be considered as evidence in the case. After considering all the evidence and the memoranda of law submitted by counsel for the parties, I am of the opinion that the injunction heretofore granted should be made permanent.

Counsel for the plaintiff is requested to prepare an appropriate order and forward it to the court via opposing counsel.

Sincerely,
Jerry G. Bray, Jr., Judge

JGBJr:1

Hugh A. West, Esquire
Moody, Mattox, Young & West
704 Professional Bldg.
Portsmouth, Virginia

William H. Oast, Esquire
Oast & Livesay
New Kirn Building
Portsmouth, Virginia

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* * * * *

DECREE FOR PERMANENT INJUNCTION

This cause which has been regularly matured, set for hearing and docketed, came on this day to be heard upon the bill of complaint and exhibits therewith filed, the amended bill of complaint, the petitions and orders making Creed Miniard and William T. Pearson parties plaintiff in this cause, the answers of defendants to said bill of complaint, amended bill of complaint and petitions, upon defendants' motion to dissolve the injunction, and upon the evidence presented, and was argued by counsel.

Upon consideration whereof, the Court having maturely considered the evidence offered by the respective parties and the arguments and authorities submitted by counsel for the respective parties, the Court is of the opinion that the injunction heretofore granted should be made *parmanent,* wherefore;

It is ADJUDGED, ORDERED and DECREED that the injunction heretofore granted in this cause be made
page 41 } permanent and perpetual, and that defendants, Howard Strickland and J. C. Strickland, individually and trading as Strickland Brothers and James L. Smith, Jr., their agents, servants, employees, successors and assigns, be, and they hereby are perpetually enjoined and restrained from obstructing or in any way interfering with the free and convenient use for ingress and egress to their respective property by the plaintiffs, Jack P. Barnes, Minnie S. Barnes, Creed Miniard and William T. Pearson, their successors and assigns of Third Avenue and the twenty-five feet wide strip of land adjoining the South side of plaintiffs' property, said twenty-five feet strip of land running East and West from said Third Avenue to the Southwest corner of the property of Creed Miniard, said Third Avenue and a portion of said twenty-five feet strip of land being shown on a plat entitled "Plat of Property Conveyed to J. Lawrence Smith by the Seaboard Airline Railway Company", etc., dated August 4, 1945, and recorded in the Clerk's Office of the Court of Hustings for the City of Portsmouth, Virginia, in deed book 154, at pages 483 and 484, and again on a revision of said plat dated March 14, 1947, and recorded in said Clerk's Office in deed book 171, pages 313 through 315, said twenty-five feet strip of land being designated on said plats as "25

ft. Strip Reserved for Future R. R. Siding"; said use being subject to the aforesaid reservation for a future railroad siding as set out on said plat.

It is further ADJUDGED, ORDERED and DECREED that the plaintiffs recover from the defendants page 42 } their costs expended in and about the prosecution of this suit.

It is further ORDERED that the Clerk of this Court record, in the current deed book of his office, a copy of this decree and index the same in the names of the parties to this suit.

ENTER this 17 day of February, 1967.

J. G. B., JR., Judge

I ask for this:
HUGH A. WEST
Counsel for plaintiffs

Seen and excepted to:
WILLIAM H. OAST, JR.
Counsel for defendants

* * * * *

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* * * * *

STIPULATION

It is stipulated by and between counsel for plaintiff and counsel for defendant that Mr. C. L. Taylor, who resides at 218 Derby Road, Portsmouth, Virginia, who is 72 years of age, in ill health, and confined to his bed, if present in court and sworn would testify as follows:

He purchased a lot from J. Lawrence Smith in March, 1948, as described in the deed from J. Lawrence Smith and wife to Clarence L. Taylor, dated March 5, 1948, and recorded in the Clerk's Office of the Court of Hustings for the City of Portsmouth, Virginia, in Deed Book 183, page 140 (a copy of which deed was placed in evidence as plaintiff's exhibit 8). He intended to use the property for storage of his equipment, scaffolding and supplies used in his business as a brick mason, and did use the property for that purpose. He negotiated the purchase of the lot personally with Mr. J. L.

Smith, Sr. Mr. Smith showed him a plat of the property, upon which he relied in the purchase, but did not give him a copy of the plat. He does not recall just what plat was shown him by Mr. Smith, but does recall that page 44-B } the plat showed Third Avenue from County Street to a 25 foot wide extension of Columbia Street, and showed the extension of Columbia Street as running along the South side of the property purchased by Mr. Taylor. The plat was Mr. Smith's plat.

In his discussion with Mr. Smith, Mr. Smith "guaranteed him a right of way from County Street to Columbia Street by Third Avenue and down Columbia Street to his lot." Mr. Hart, who was in the concrete business bought the lot adjoining on the North side the lot bought by Mr. Taylor at about the same time Mr. Taylor bought his lot. Mr. Taylor constructed a building for himself and for Mr. Hart, which was partly on each lot. This is the building which is still on the property. Mr. Taylor and Mr. Hart then fenced in both lots together. Mr. Taylor had a gate on the South side on Columbia Street and Mr. Hart had a gate on the North side of his lot which opened on the alley or lane which cuts across from Third Avenue to Fourth Avenue. He does not recall anything in his discussion with Mr. Smith about a proposed railroad siding and does not recall whether or not it was on the plat. Mr. Hart later conveyed his lot to defendants Strickland Brothers. The buildings and fence were constructed soon after the property was acquired by Mr. Taylor and Mr. Hart.

At the time Taylor and Hart purchased their lots, Fourth Avenue (sometimes called Yorktown Avenue) was open only to the alley and the area to the West of Mr. Taylor's lot was covered with weeds; was not opened for use as a street, and he did not understand that it was a street. page 44-C } Fourth Avenue adjoining the Taylor lot, has never, since he owned his lot, been opened to traffic or used by traffic beyond the alley.

To the best of Mr. Taylor's recollection, Mr. Duke purchased the property at the end of Fourth Avenue from the Seaboard Airline Railroad Company and constructed his building there nine or ten years ago. He recalls at that time having a casual conversation with Mr. J. L. Smith, Sr. about the construction of the Duke Building across the end of Fourth Street, and Mr. Smith stated that Fourth Street stopped at the alley. Mr. Taylor was not concerned over the construction of the Duke building because it did not affect his use of his property.

Mr. Taylor, after acquiring his property, began using Third Avenue and the 25 foot strip, (which Mr. Taylor referred to

as Columbia Street) for ingress and egress to his property, and continued doing so for a considerable time. Mr. Hart asked Mr. Taylor to let the Stricklands put some timber and materials back on Columbia Street, and for Mr. Taylor to use Mr. Hart's gate while the timber and materials were on Columbia Street. Mr. Hart gave a key to his gate to Mr. Taylor and Mr. Taylor began going and coming through the Hart property. Mr. Hart and Mr. Taylor were good friends and worked together. This all occurred approximately 7 or 8 years ago.

Thereafter, Mr. Taylor continued going and coming to his property through the Hart property and gate, and then after Mr. Hart sold his lot to the Stricklands through the Strickland property. After the Stricklands acquired the property, Mr. Taylor often had trouble going and coming through their property and would find his way blocked by

page 44-D } Strickland's equipment and would have to get someone to move the equipment to get in and out. There was no agreement with the Stricklands on going and coming through their property and not using Columbia Street; it was merely a continuation of the agreement he made with Mr. Hart for the convenience of the Stricklands. Mr. Taylor complained to Mr. J. S. Smith, Sr. on a couple of occasions about the Strickland materials continuing on Columbia Street. Mr. Taylor had understood originally that the storage of the materials on Columbia Street was temporary, and they would be removed at such time as the Stricklands needed the material for use elsewhere. Mr. Taylor did not mind using a different way in and out of his property because of this understanding that it was to be temporary and because he knew he had the right of way out Columbia Street and could make the Stricklands open it up if he wanted or needed to.

Mr. Taylor went out of business in about 1961, and sold his business and thereafter rented his lot to Mr. Minard, who had been employed by him several years before he went out of business. In September, 1964, he sold the property to Mr. Minard.

HUGH A. WEST
Counsel for plaintiffs

WILLIAM H. OAST, JR., p.d.

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MEMO ON STIPULATION

* * * * *

William H. Oast, Jr., Attorney for Defendants believes that if Mr. C. L. Taylor testifies that he would in fact testify in accordance with the Stipulations presented by the Plaintiffs. However the Defendants would make the same objections to this testimony that has previously been made that it violates the Parole Evidence Rule.

2. That Mr. Taylor is vague and indefinite as to which if any plat was shown to him and it is the belief of the Attorney for the Defendants that Mr. Taylor's property is not on the Plat introduced in evidence.

3. Mr. Taylor's testimony concerns the property on Fourth Avenue which is not the subject of this litigation.

HOWARD STRICKLAND AND
J. C. STRICKLAND, T/A
STRICKLAND BROTHERS
AND JAMES L. SMITH, JR.,

BY: WILLIAM H. OAST, JR.
Counsel

* * * * *

page 3 } VIRGINIA:

IN THE COURT OF HUSTINGS
OF THE
CITY OF PORTSMOUTH

(Held in the courtroom of the Circuit Court of the City of Portsmouth)

JACK P. BARNES and MINNIE S. BARNES, Plaintiffs
vs
HOWARD STRICKLAND and J. C. STRICKLAND, T/A STRICKLAND BROTHERS and JAMES L. SMITH, JR., Defendants

CREED MINIARD and WILLIAM T. PEARSON, INTERVENING PETITIONERS

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Mr. West: Your Honor, we offer as Exhibit P-2 a deed from J. Lawrence Smith and wife to A. G. Pinkston dated November 7, 1965, or, rather, a certified true copy thereof.

Mr. Oast: Your Honor, we are going to object to the introduction of this one.

The Court: All right. Why?

Mr. Oast: No. 1, Mr. Pinkston I don't believe is a party to this suit. Of course, Mr. Smith, the one that gave this deed, is not a party to this suit; and there are other things in there that would be objectionable. I don't know what his purpose is for the introduction because these persons are not parties to the suit. The piece of property where we were going to put the fence up is not conveyed in that page 6 } deed. There is no reference in that deed to the piece of property—that may be stretching it a little bit, but we are not trying to put the fence around Mr. Pinkston's property.

The Court: Mr. West.

Mr. West: Your Honor, at the initial hearing that was held in this case when it was set down for the final hearing, Mr. Pinkston appeared and was called by Mr. Oast as a witness because this fence did affect him and he was affected by the bond to be given by my client to protect his property until something was completed about the fence. His property is concerned with where this fence goes and it is the first link, where Mr. Smith begins to convey this property and spells out what his intention was regarding this right of way; and we feel that we are entitled to show all the surrounding circumstances that clarify the intention and understanding of the parties. We cite as authorities specifically *Gordon Metal Company* versus *Kingan* in 132 Virginia at 229. The Court was speaking actually there of admitting parol evidence, but the language it used is this: "It is frequently helpful in determining the meaning of ob- page 7 } scure and doubtful language to consider the surrounding circumstances and the probable motives of the parties." Now, we will come up with some very doubtful language repeated in the rest of these deeds in the chain. This one is more specific than the others and it is the first conveyance. We believe that it does show surrounding circumstances and shows the probable motives of the parties

as they bought and sold this property, and we think it is vital to the understanding of the Court of the transactions.

The Court: All right, sir. It is admitted as P-2.

(The deed referred to was marked P-2.)

Mr. Oast: We note our exception, if Your Honor please.

* * * * *

page 11 } W. F. MAGANN, called as a witness on behalf of the plaintiffs and intervenors, and having been first duly sworn, testified as follows:

Examined By Mr. West:

Q. You are Mr. W. F. Magann?

A. That is right.

Q. Where do you reside, Mr. Magann?

A. Green Acres.

Q. Is that in Portsmouth?

A. No, it is in Chesapeake.

Q. What is your relationship to the W. F. Magann Corporation that owned property in the Smith tract here on County Street?

A. I am the president of the W. F. Magann Corporation.

Q. Are you still president of the corporation?

A. Yes, sir.

Q. Mr. Magann, I believe you purchased Lot 6 on a certain plat in the vicinity of County Street and Third Avenue in the city of Portsmouth from Mr. J. Lawrence Smith in September of 1946, is that correct, sir?

A. I can't confirm the number. If you would let me see the plat, I could recognize it.

Mr. West: I will show him a copy of that deed,
page 12 } Your Honor. I believe it is P-3.

By Mr. West:

Q. I show you Exhibit P-3 and ask you if that is a copy of the deed whereby you acquired the Lot 6 referred to.

A. I can't remember all these years, but if my signature is on here—and I don't see it. Couldn't you ask me this question some other way? If I could see the plat I would recognize it.

W. F. Magann

By The Court:
Q. Weren't you buying at this time?
A. Yes, sir.
Q. Your signature would not be on there, Mr. Magann. Doesn't it state it is conveyed to you from the corporation?
A. Yes, sir.

The Court: All right, sir. You see, you weren't selling, you were buying.
The Witness: O.K.

By Mr. West:
Q. This is the deed whereby you acquired the property?
A. It seems to be, yes, sir.
Q. All right, sir. I wonder if you would point out to the Court which piece of property that was, by referring to Exhibit A, being the plat of the property. This is Third Avenue here?

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A. Here (indicating).
Q. This piece right here you are indicating?
A. This is the lot here. (Indicating)
Q. I wonder if for the sake of the record you would take the pencil and mark that parcel—it is marked 6, isn't it?
A. That is right.
Q. That is the parcel marked 6 on this plat.
A. All right.
Q. All right, sir. Did you buy the property by plat?
A. Yes, sir.
Q. Do you know whether or not this is the particular plat by which you purchased it?
A. I recognize it, yes, sir.
Q. You would say that is either the plat or—
A. Similar to it.
Q. —similar to it. And is that the way the property showed on the plat—
A. Yes, sir.
Q. —by which you purchased it. Was specific reference made to the plat when you bought the property?

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A. You mean legal reference to—on the deed?
Q. Reference between you and Mr. Smith.
A. I can't remember conversations that long ago, but this looks like the plat. I am sure that it was platted. I am afraid I know what you are asking but I can't answer it precisely.
Q. All right, sir. With whom did you negotiate?

A. Mr. Smith.
Q. That is Mr. J. Lawrence Smith?
A. Yes, sir.
Q. Is he living now?
A. No, sir.
Q. Do you know approximately when he died?
A. Maybe six or seven years ago.
Q. Were you shown a plat—
A. Yes, sir.
Q. —during the time of your discussion about the purchase?
A. Yes, sir.
Q. By whom were you shown that plat?
A. Mr. Smith.
page 15 } Q. And did that plat show this 25-foot strip reserved for railroad siding as is shown on Exhibit A?
A. Yes, sir.
Q. What understanding did you—

Mr. Oast: Your Honor, I am going to object to any understanding.

The Court: Wait a minute until he gets the question. Just don't answer (to the witness). Let him ask the question. How do you (to Mr. Oast) know what you object to?

By Mr. West:
Q. What understanding did you have with Mr. Smith with regard to the purpose of this 25-foot strip shown on the plat as reserved for a future railroad siding?

Mr. Oast: Now, may I? Your Honor, I am going to object to this question because the deed would be conclusive and he is trying to bring in parol evidence, and you cannot alter the terms of a deed. The deed is specific. It is unambiguous and the description is right in it. He can't go into parol evidence with what Mr. Magann or Mr. Smith had an understanding about. I can cite authority on that.

The Court: Let's see what he is going to do
page 16 } for it on the other side.

Mr. Oast: All right, sir.

Mr. West: Your Honor, we contend that that falls squarely within the Virginia cases, the *Gordon* case that I previously mentioned; likewise the case of *Walters* VERSUS *Smith* in 186 Virginia 159.

W. F. Magann

The Court: You will have to take the cases out, read them to me. Here is a deed which really, as I read it briefly this morning, doesn't leave any doubt about what it is talking about and it states "easements and restrictions" and so forth "shown on said plat"—"made subject to the easements and restrictions shown on said plat." Apparently, you are going to get to some other agreement. You had better show me some law on this if you are going to proceed to bring in something other than what is on this deed.

Mr. West: Your Honor, we don't contend that anything we bring in will show you anything contrary to what is in that deed but will merely be an explanation thereof.

The Court: Well, you will have to show me some authority to do that.

page 17 } Mr. West: Your Honor, I do not have the case books here. I can get them in just a few minutes, unless they are in the library here. Do you have the citations? The *Gordon* case, 132.

Mr. Oast: I have the *Gordon* case right here.

Mr. West: 229.

The Court: Mr. West, do you want to read from the *Gordon* case?

Mr. Oast: I have some things in the *Gordon* case I like, Your Honor. (Handing to Mr. West)

Mr. West: Your Honor, reading from the *Gordon* case at 132 Virginia 229, at Page 236, the Court said in its opinion —in speaking of the obscure language in the deed and the parol evidence that had been admitted by the trial court, to explain, quote, "It is frequently helpful in determining the meaning of obscure and doubtful language to consider the surrounding circumstances and the probable motives of the parties, and, pursuing this inquiry, we find that the sidetrack here involved is a small part of a continuous track leading from the lines of the Southern, and, while the C. & O. has now

page 18 } no property interest either in the track or in the land upon which it is located, it was and is substantially interested in business of Kingan and Company."

The facts of this case are rather complicated and perhaps it would be helpful briefly to state them. The C. & O. Railway Company made an agreement with Kingan and Company to allow Kingan to construct and operate a railroad siding over C. & O. property for ten years and thereafter subject to cancellation on one year's notice by either. Later, C. & O. conveyed the plaintiff part of the property over which the

siding ran with a clause in that deed that C. & O. reserved from the operation of the deed all the rights of Kingan in any way connected with the agreement between Kingan and C. & O.

I believe actually, Your Honor, that somewhere in here the Court said really that the language it thought was quite clear but, even so, that it was often or "frequently," to use the words of the Court, "helpful in determining" just what was meant in this language of "reserving" from the operation of the deed the rights growing out of or in any way connected with the agreement for the operation of the sidetrack.

page 19 } The Court looked at the entire business operation that was carried on in the Kingan and Company packing plant and how it helped the C. & O. Railway; and that being the background and reason for the construction of the siding, that it was mutually beneficial. It went into parol evidence and all of this understanding, the operation of the business and everything, to show that the C. & O. had a specific purpose and reason for using this language and thereby indicating what they meant by the language; that they never intended to let the grantee be in a position where it could cut Kingan off from using this particular right of way.

In this *Walters* VERSUS *Smith*, at 186 Virginia 159, Your Honor, we have a case where this entire piece of property had been subdivided and the plaintiff and defendant had come through the chain of title to hold pieces that were near each other and between them there was a 20-foot right of way that was shown on the plat as being a street. Mrs. Smith was permitted to testify in detail as to the fact that she purchased the lots under a definite understanding with Mr. Banner, who sold it to her, that there was a 20-foot alley

page 20 } south of the property extending eastwardly to the Mill Road. She testified in detail as to what this understanding was and that she was taken out on the premises and shown that the alley was there, that if she built her house—incidentally, Your Honor, she was right on the street and the alley ran down off the street beside her property, and when the defendant tried to block the alley off she sought to enjoin them. They had already built the building, which the Court ordered them to tear down, a tremendous warehouse. Although she had road frontage, she bought it with the understanding that she could build something back on it, back of her lot, and have access by virtue of this 20-foot alley. The Court permitted her to go

into detail to show this understanding. I don't believe there is any more specific—

The Court: What will you show by this witness?

Mr. West: Here is what we propose to show, Your Honor, that when he bought this property he understood that this 25-foot reserved strip was to be used as a means of ingress and egress. That is not specifically spelled out in his deed but we suggest that it is implied in the language of the deed.

page 21 } And certainly when you read that in the light of the language in the Pinkston deed and that we intend to show that it was the understanding of the parties that that was the purpose of the right of way—

The Court: We don't have any jury. I will allow it in over objections.

Mr. Oast: Yes, sir, please (so noting exception).

The Court: All right; answer his question.

By Mr. West:

Q. Do you recall the question?

A. Yes. Mr. Smith and I did have a mutual understanding that there would be a railroad siding there and that is the reason we turned the building the way it is turned and had the opening on it, and it was the reason we bought the lot, that particular lot.

Q. What kind of railroad siding was to be there, sir?

A. There was no specific description of it. We—of course, we just started in business right after the war. We didn't know but what maybe we might need some carload shipments, thought this was a good thing.

Q. What kind of business were you in?

A. I am a contractor.

page 22 } Q. Did you construct the building on the property soon after you bought it?

A. Yes, sir.

Q. What kind of building?

A. It was a cinder block building.

Q. What was the purpose of the building?

A. For warehouse and keep trucks in.

Q. Which way did the building face?

A. It faced the south, which would be this easement that you are talking about, which we expected to be—the possibility—we recognized the economics of the situation but we assumed that if we wanted it there would be a railroad siding there, if it was a demand for it.

Q. Where was the main opening to and from your building?
A. On this railroad siding.
Q. What use did you make, after you constructed your building, of this part shown as reserved for railroad siding?
A. Used it for driveway and egress and ingress.
Q. And did you continue that use of it as long as you owned the building?
A. Yes.

Mr. Oast: I don't want to keep interrupting. It
page 23 } is understood that my objection goes to the whole line of questioning?
The Court: Yes, sir.

By Mr. West:
Q. I believe you later sold, in March of 1951, a part of your lot to Mr. Barnes?
A. Yes, sir.
Q. Did you pass on your understanding of the purpose of this right of way to him, or not?
A. I have no clear recollection.
Q. Do you own any land in this area now?
A. No, sir.
Q. In making your purchase of Lot 6 did you rely on the representations made you by Mr. Smith regarding the use of the 25-foot strip?
A. Yes, sir.
Q. Would you have purchased the property without that understanding?
A. We would not have bought that particular lot.
Q. Would it have made any difference in the value of the property you purchased?
A. I don't know whether it would or not.
Q. Would it have made a difference in the value of it as far as you were personally concerned?
page 24 } A. Yes, sir. It was important to us.
Q. Why was this area designated for a future railroad siding, Mr. Magann?
A. I have no idea what Mr. Smith had in mind, but it was logical; it was right easy to spur off their tracks and seemed reasonable that they would if there was a demand there for it. The assumption was that there had already been conversations with the Seaboard Railway.
Q. Has the Seaboard Railroad owned property near this tract of land?

A. They occupy the property near there, yes, sir.

Q. In which direction?

A. South of it.

Q. I wonder if you would be kind enough to indicate to the Court the area on Lot 6 where you constructed your building. Would you like to draw that in with pencil?

A. It was approximately here (indicating). It was approximately here and the doors line up, sliding doors, this way. We got to our building this way (indicating). I recollect we had a fence here and we did not have a fence—a gate—in our fence here at all.

Q. All right, sir. You built your building, then, on the southwest portion of your lot?

A. Yes, sir.

page 25 } Q. Fronting on the south side, on the 25-foot strip?

A. Yes, sir.

Q. And did you fence the rest of your lot in all the way around?

A. Yes, sir.

Q. Did you have a gate anywhere going into the fenced area?

A. My recollection was, the gate was here (indicating).

Q. The gate was near the building fronting on the 25-foot strip?

A. Yes, sir.

Q. All right, sir. Thank you, Mr. Magann.

CROSS EXAMINATION

By Mr. Oast:

Q. Although not waiving my objections, I would like to ask Mr. Magann a few questions. Mr. Magann, you answered Mr. West by saying this was the plat. You are sure this is the plat that you—

A. I didn't answer that question; I said it looks

page 26 } like.

Q. It looks like it?

A. Yes, sir.

Q. As a matter of fact, it could have been another plat that you bought your property from, isn't that true?

A. It is conceivable, yes, sir.

Q. You will note this plat has never been approved and has never been recorded, I don't believe; has it?

A. Well, it seems to be that way.

Q. When you bought yours, you bought yours on one that had been recorded or was going to be recorded?

A. I couldn't answer that really precisely.

Q. You are familiar with this 16 feet reserved for alley down here?

A. Yes, sir.

Q. Then, your building—is this your building here?

A. No. My building is further than this.

Q. Is your building, the one you built, still standing today?

A. I couldn't tell you.

Q. Does Mr. Barnes occupy the building?

A. I couldn't tell you.

page 27 } Q. You don't know anything about it?

A. No.

Q. Does it have a door on the alley?

A. No, sir.

Q. Could you get to it from the alley?

A. No, sir.

Q. You could not?

A. No, sir.

Q. Why couldn't you?

A. We put all the doors on the south side.

Q. But you could get to the building from the alley if you had wanted to?

A. You could have.

Q. I mean you are not blocked off? This alley goes up to the building, right?

A. I really don't know for sure.

Q. When was the last time you were back here?

A. I haven't been back there in several years.

Q. Have you been in Mr. Barnes's building?

A. No, sir.

Q. Do you know anything about Mr. Taylor's property, down here?

page 28 } A. Just that it was there, that is all.

Q. Just that it is there. You don't know anything about it at all?

A. No; no, sir.

Q. You bought your property I believe after Mr. Pinkston bought his, is that true?

A. Yes, sir.

Q. You don't know what plat he bought his off of?

A. No, sir.

Q. You don't have any idea?

A. No, sir.

Mr. Oast: That is all.

Mr. West: Your Honor, I wonder if I might ask the witness—

RE-DIRECT EXAMINATION

By Mr. West:

Q. You testified as to the discussion you had with Mr. Smith about the use of this property as a railroad siding. Was it ever used during the time you owned it by a railroad or as a railroad siding?

page 29 } A. No, sir.

Q. I don't get the connection between the understanding regarding the use as a railroad siding and the use made by you of the trucks. I wonder if you can explain that.

A. Well, we knew that there wasn't any siding there then and we didn't know whether it would be. We weren't even sure it ever would be but we were under the impression that the arrangement had been made to put one there and we would use it as we saw fit until it was put there.

Q. And if the railroad track had been put there, would that have prohibited your use?

A. It would have been accommodating to us and useful to us except when it was actually in use, which a siding like that is not used very much.

Q. That would still have been for ingress and egress?

A. Right.

Mr. West: All right, sir. That is all.

RE-CROSS EXAMINATION

By Mr. Oast:

Q. Mr. Magann—still reserving my objection—

page 30 } if a train had gone in there, how would you have gotten to your building, when a train was sitting on the siding?

A. We would have had to change our setup but we would have known that long before we would have been caught in a situation where it could happen, because when they laid the track in there we would have known we would have to do something else.

Q. You never had any ownership of this piece of property?
A. No, sir.
Q. When you conveyed it out, you conveyed it out to this strip, is that true? In your deed it said to the strip "reserved"?
A. We conveyed what we owned.
Q. In your description, it said to the 25-foot strip "reserved for future railroad siding"?
A. I assume it did.
Q. If I show you the exhibit—

Mr. Oast: May I see the exhibit, Your Honor?
The Court: Well, the deed speaks for itself. You have let the deed come in as a matter of record.
Mr. Oast: He was trying to alter by the parol evidence just then, over my objection. That is what I was
page 31 } objecting to.
The Court: He has not said, I didn't understand him to say that he claimed he personally owned the railroad siding land.
Mr. Oast: No, he never has said that.
The Court: All right.

* * * * *

JACK P. BARNES, a plaintiff, having been first duly sworn, testified as follows:

Examined By Mr. West:
Q. You are Jack Barnes, the owner of part of the property shown as Lot 6 on this plat—
A. Yes, sir.
page 32 } Q. —speaking of Exhibit A, Mr. Barnes. Where do you presently reside?
A. 17 Early Drive, in the city of Portsmouth.
Q. From whom did you purchase the parcel of property you own?
A. From Mr. W. F. Magann, president of W. F. Magann Corporation.
Q. Did Mr. Smith still own property in the area at the time you bought yours?
A. Yes, sir—not in that plat, to my knowledge—I mean that plat, the part that is 6—but he was in business in this particular area here.
Q. How about property to the south of the part that you purchased?

Jack P. Barnes

A. I am not sure whether he owned property at that particular time or not. He did have property that they were using back here, back of, south of this strip, that they had a fence running along this side of the strip. In fact, they constructed a fence here. Strickland Brothers' fence went right on down but it was on that side of the strip.

Q. Do you know when that fence was constructed, Mr. Barnes?

A. I am not sure of what year but it has been
page 33 } there for many years. If it wasn't there when I built the building, it was shortly thereafter.

Q. Now, the property which you own, that has your name, Jack P. Barnes, written in and is shown in blue lines on this plat, Exhibit A?

A. Yes, sir.

Q. At the time you purchased the property did you have any discussion with anyone concerning this 25-foot strip?

Mr. Oast: Your Honor, I want to make my objection.

The Court: I understand.

Mr. West: Subject to the same objection as previously stated, yes, sir.

The Court: At the moment, all he wants to know is whether he had the discussion or not. Get a little deeper in it. But I will overrule this part of it. We will start here.

A. Yes, sir.

By Mr. West:

Q. With whom did you discuss it?

A. I discussed it with Mr. Magann. I discussed it with Mr. O. L. Harcum, who was an adjoining neighbor of mine on the front part of the property, sold me my property in the front. And I discussed it with Mr. J. Lawrence
page 34 } Smith, Senior.

Q. Whom did you understand owned the fee in the 25-foot strip at the time you bought your property?

A. I wasn't sure of the ownership of it at that time, as far as who owned it.

Q. As a result of your conversations with Mr. Magann, Mr. Harcum and Mr. Smith, what understanding were you given regarding the use of the 25-foot strip?

Mr. Oast: Your Honor, I am going to have to object here. I think there is a lot of objection to this: "understanding";

"whom with?" and the deed speaks for itself in the absence of fraud or mistake. The deed is obvious. There is nothing in his deed—it takes him up to the line. He has introduced the deed. To alter that he has got to show some fraud or mistake.

The Court: Which is the deed? Here it is, 8.

Mr. West: I believe it is 8.

The Court: 8. All right. Restate your question.

By Mr. West:

Q. As a result of your conversation with Mr. Smith, Mr. Magann and Mr. Harcum, what understanding did you have regarding the possible use of the 25-foot strip?

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The Court: Wait a minute now. Smith, Magann and Harcum?

Mr. West: Yes, sir. Magann owned Lot 6. Harcum owned —I am not sure at that time whether he owned—yes, he did at that time; he owned a part of Lot 6.

The Witness: Next to it.

Mr. West: According to the deed here, Harcum owned the corner lot, Magann the entire piece and Smith the street.

The Court: Not what Mr. Harcum told him. Now, Mr. Smith—what Mr. Magann told him, what Mr. Harcum told him, and the third party is who?

Mr. West: Smith. He is the one who owned the overall tract and was selling off these various pieces.

Mr. Oast: I still object, but the Mr. Smith he is speaking of is not the Mr. Smith who is a party to this suit. It is his father, my client's father.

The Court: I understand.

Mr. West: He is the predecessor in the chain of title to all the parties in this case. I think we can agree on that.

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The Court: Not Harcum, but the conversation with the other two.

Mr. Oast: Note my exception.

By Mr. West:

Q. I want to make that clear to you. Not any understanding gained from Mr. Harcum; only from your conversation with Mr. Magann and Mr. Smith, please.

A. When I purchased the property from Mr. Magann, I discussed with him the 25-foot strip that is shown on that

plat. Now, that particular piece of paper right there the Judge has on his desk was given to me by Mr. J. Lawrence Smith, Senior.

Q. Which piece of paper are you referring to?

A. Exhibit A.

Q. That is the plat?

A. Yes, sir.

Q. All right, sir.

A. That was given to me by Mr. Smith because before I purchased it I went to his office and he gave me that particular plat.

Q. Did you rely on that plat?

A. And I relied on that plat because I, like Mr.
page 37 } Magann, have three doors of the building that I own there fronting on that siding.

Q. You mean on the south side?

A. Yes, sir, on the south side. I have two small doors and one overhead door fronting on that. I operated my business in that building for many years and used that for ingress and egress.

Q. I don't believe you have answered the original direct question, and that was the understanding you had with Mr.—

A. My understanding with Mr. Magann was that that had been reserved for a future railroad siding and that he had been using it for ingress and egress and that I could use it for ingress and egress. And Mr. Smith gave me the—this particular plat, which is Exhibit A, and my understanding with Mr. J. Lawrence Smith, Senior, was identical, that I could use that property there in addition to the railroad siding. It was also my understanding from Mr. Smith, Senior, that should a railroad siding be put in it would be put on grade level such as many railroad sidings are within the city, so that you could still drive a truck up and down without—if necessary, in this particular strip.

Q. Did you rely on this representation as made by Mr. Magann and Mr. Smith to you?

page 38 } A. Yes, sir.

Q. And did that have any part in your decision to purchase the property?

A. Yes, sir. Two reasons. Could I state the reasons?

Q. Yes, sir, please.

A. Two reasons was that I was cut off from what is shown on the plat as Third Avenue by the piece of property that was then owned by O. L. Harcum, the 40-foot piece of property here.

Q. That is indicating the—
A. East of my property.
Q. Southeast?
A. No, east.
Q. Well, the entire east—
A. Yes, strip.
Q. —portion of Lot 6?
A. I was cut off here and if I had to use the 16-foot strip for entrance with trucks that was already provided, this property owner here, along with Roland Hart didn't build back, but if they ever built back of the property line I would have been unable to even get a truck turned and backed into my building from this side. So I used—I put this siding up. I did put a door here because I owned this property, with a 10-foot alley behind it, so I could drive a

page 39 } truck in here.

Q. Wait a minute, Mr. Barnes. You say "I owned this property." You are indicating on Exhibit A—
A. Exhibit A.
Q. —a portion to the north of this Lot 6 and across the 16-foot—
A. Yes, sir.
Q. —alley, with your name, Jack P. Barnes, written in it?
A. Yes, sir. And I owned that; so that was 10 foot that I could come in here and swing in here and back in that door. But this particular part of the building here which has a center wall down it and has been at times rented or used by two different parties, the overhead door is over here because should Hart or Strickland ever build back to that point there, there would not be enough room to turn around and get in that building from that point.
Q. Would there be enough room to get into this?
A. It would be tight if Hart ever—if the present owner ever built back to that corner. I could possibly get into that alley—I mean that 10-foot strip, but that would be the only way.

Q. The 16-foot alley you referred to, if a vehicle

page 40 } is in there does it leave room enough for others to come and go?

A. No, sir.
Q. What use was Mr. Magann making of his property at the time you bought yours from him?
A. Mr. Magann had a building approximately close to Mr. Pat Taylor's, C. L. Taylor's property here.

Jack P. Barnes

Q. That is indicating—
A. Along in this area.
Q. —southwest—
A. Yes.
Q. —portion of Lot 6?
A. It fronted on—the overhead doors fronted on this strip.
Q. All right, sir.
A. He had this entire area fenced in because when I built my building I had to take fence posts down and the fence down in order to build the building.
Q. What use was he making of his building?
A. His building, he used it for equipment and supplies. He had the lot fenced in and was using it for storage.
Q. And you were aware of his use at the time you bought yours?
A. Yes, sir.
page 41 } Q. What use did you make of the lot you bought?
A. I constructed a building and used it for contracting supplies and had my truck and things of that kind in there.
Q. Were you in the contracting business—
A. Yes, sir.
Q. —at that time?
A. Painting contractor, yes, sir.
Q. Did the representation about the use of the 25-foot strip have any bearing on your decision to purchase the property?
A. Yes, sir. I wouldn't have bought the property if I hadn't had some way to get in other than the 16-foot alley.
Q. If the use of the 25-foot strip is now blocked, would it make any difference in the value of the property?
A. Yes, sir.
Q. And what difference would it make? I don't mean in dollars and cents but what effect would it have?
A. It would have an effect, whoever I may rent the building to wouldn't be able to use that strip and get into the building from that side where the overhead door
page 42 } is.
Q. Would that enhance or diminish the value of the property?
A. Diminish.

Mr. West: I believe the last exhibit I offered, Your Honor, was P-10. We have a group of photographs here, ten photographs showing the property in question from various angles,

which I offer as Plaintiff's Exhibits 11 through 20 and would like to have Mr. Barnes go through them one by one and point out to the Court the various things that have been testified to here, because I believe this will help the Court in understanding the physical layout of the premises and how it looks.

Mr. Oast: You are introducing them now?

Mr. West: Yes, sir.

Mr. Oast: I am going to object to them, and my client wants to go over them again before you take them one at a time.

Mr. West: Mr. Oast, would you want us to wait for you to go through them?

Mr. Oast: Yes, please.

The Court: Can't we go to something else? We are going to be at lunch. During the luncheon period you page 43 } can go through those. We have a long way to go yet.

Mr. West: That is a good idea. It is getting close to lunch-time. Let me go through the questioning of the witnesses and they can go through this at lunch time.

The Court: All right.

By Mr. West:

Q. I believe you indicated the property was fenced at the time you bought it and you had to remove the fence to build your building?

A. Yes, sir.

Q. Also you said something about a fence back here on the south side of the 25-foot strip—

A. Yes, sir.

Q. —that you believe existed at the time you bought your lot?

A. Yes, sir.

Q. What was the purpose of that fence, if you know?

A. I am not positive. It could have been at that time the fence that fenced in what may have been at that time, that particular time, the Seaboard property. I know at a later date Mr. Smith I think leased some of that property here. This may have been the—

page 44 } Q. You are indicating to the south of the 25-foot strip?

A. Yes, south. This is shown as Seaboard Air Line Railway Company. There was a fence here and Mr. Magann had his fence here (the witness was indicating). And Mr. Taylor and Mr. Magann, all of us used this. But this fence could

have been the Seaboard fence at that time. I am not positive. Or it could have been Mr. Smith and Mr. Strickland's fence.

Q. Was there any fence over the southern end of—

A. No.

Q. —Third Avenue as shown on the plat—

A. No, sir.

Q. —at the north side of the 25-foot strip?

A. No, sir. There was a fence here, running along—

Q. Which would be on the south side?

A. Yes, sir. And there was no fence except the fence that came from this point to this point (indicating) and fenced in this Lot 6, which was Mr. Magann's.

Q. When was the fence on the south side of the 25-foot strip changed?

page 45 } A. You mean recently? There was—the fence as was removed recently?

A. Yes, sir.

A. And they started erecting a fence running right along beside the building, right up against the building along this —and they had put a post in the center of what was shown here as Third Avenue, right there; but that fence was going along the north side, right up against the building.

Q. Is that the change that caused us to bring this proceeding here in court?

A. Yes, sir.

Q. Mr. Barnes, are you familiar with the general use that could have been made of this railroad right of way in 1945 as a railroad siding?

A. Well, in '45, of course, I didn't buy the property at that time; but at that time, of course, many railroads hauled less than carload lots. And all of us, even myself, at that time could have bought material—

Mr. Oast: Your Honor, he is speculating now.

The Court: Just don't go into that.

By Mr. West:

Q. Would it have been normal to expect a railroad—

page 46 } The Court: This is 1945 and he didn't own this property?

Mr. West: That is right.

The Court: He can't testify.

The Witness: Before I bought it.

Mr. West: Exception. Have you finished going over these pictures, Mr. Oast? Your Honor, these are the photographs that we previously—

Mr. Oast: Some of them are objectionable, Your Honor. If you want to take them one at a time, we will—

The Court: Can you pull out the ones you are going to object to?

Mr. Oast: It is just one.

The Court: Pull out the one, then.

Mr. Oast: I think he ought to lay the foundation as to when these were taken. This (indicating) is the one we are going to object to.

The Court: Lay it aside and let's go along with the others.

Mr. Oast: All right. We would like to know when they were taken, lay some foundation on them.

page 47 } Mr. West: Mr. Oast, we can tell you when they were taken. They were taken sometime between the time this suit was filed and the time we previously came to court. There would be some difficulty in giving you the exact date.

Mr. Oast: I just want to know about when they were taken.

Mr. West: They were taken by Mr. Albert of our office, if you want him to—

Mr. Oast: No. We don't want him.

Mr. West: I think you are entitled to know that.

Mr. Oast: I understand one is not the property in question.

The Court: They are Exhibits P-11 through 19, inclusive.

(The photographs referred to were marked P-11 to P-19, inclusive.)

By Mr. West:

Q. If you will take these in the order I have them, Mr. Barnes; and as you get to each one, indicate the exhibit number on the back of it and point out to His Honor what it depicts, please. If you would like to lay them up here, Mr. Barnes, it might be more convenient.

page 48 } A. This is P-12 and this particular picture here is looking from along in here on Third Avenue to this—right in this direction, which shows this—may I explain to you, sir, that 40 foot—20 of this 40 foot there is a building located on 20 feet of it, but the corner here is vacant which, as you see where this trash pile and this is looking in that direction right down there where—at this

Jack P. Barnes

particular time I can't tell here exactly whether there are fence posts on either side or not, from this particular picture, but I assume—well, this one shows you the fence posts clearly here as you get up closer (indicating another picture).

Q. What is the exhibit number on that?

A. This is P-13, Your Honor, and this is one of the original posts that Magann put up here beside Mr. Pearson's property, and this is looking from the corner of Third Avenue and down this 25-foot strip you see the new fence posts that they have erected right up beside the building here. You see the fence—over here is where Strickland's fence has been and it came to a point here and cut back and ran along the other side of this strip here where Mr. Smith had his storage back of that.

Q. Whose building is this?

A. That particular building there is Pearson's, and mine is just behind that. Now, this shows coming around the corner a little further, the same corner; you see the post

page 49 } here. This post is the same as this one. This is Pearson's building, the lower building, and mine is the—this entire building here, which is 40 by 50 feet and there is the overhead door and the windows and the two access doors, and this fence will come—cut through the center of this and Strickland will have the property, so I understand, on the other side where you see this piece of equipment. Now, this piece of equipment that is parked there in front of that door was only put there since the fence started, since they have started putting that fence up. It hasn't been there prior to this.

Q. This is P-14 you have been referring to, right?

A. Yes, I believe so; yes, sir. This would be divided. This would be the dividing line on the property, so I understand. This is coming further around, looking back Third Avenue. That is P-17. This is the corner where your fence post here. It doesn't tell too much of my property but this is going back into County Street. This is a clearer picture—this is P-15—showing the back of my building, with the doors that I put here, the windows. This is where I had my original office when I was in the contracting business, with the door going to the office here, and this was planned to be another office because the plumbing is right behind—right inside, right here. And this was the entrance door with the overhead door

page 50 } for trucks, right here, where you see this piece of equipment. Of course, this piece of equipment

hadn't been parked there prior to the time they started putting this fence up.

Q. Before you leave this exhibit, will you explain to the Court what these fence posts represent?

A. Well, these posts running through the center here cross this strip of land approximately right here, the center line of my building, which will be the dividing line, so I understand, between Mr. Strickland's, what he would take in here and what Mr. Smith would take in this direction.

Q. When was that fence put up?

A. Sometime this summer, I am not sure of the date.

Q. That is the time this suit was filed, when these posts were put up?

A. Yes, sir. That is when I got the injunction, when they took the fence down back here and started putting it up against the building.

Q. All right, sir. Go ahead.

A. This, again, is the same picture here with that door here—this is P-16—showing the door here and then this is Mr. Pearson's building where he had his overhead door for trucks. All of us had our own door on this par-
page 51 } ticular side. And this is looking further down this siding—this is Magann—that is P-19—this is the building that Mr. Magann operated from here, with the entrance on this same strip of land. This is the fence that Mr. Strickland has had up for many years along the side; had his equipment and, of course, some of his stuff has been back in here and some of it he has had scattered around. But this particular piece of equipment you see up in here, again is the front of my building. This is P-11. And that is the corner of the building that—let me see. I will get my bearings on this one. This is the one—no, this piece of property here is a piece of property right over—wait a minute now. Right here—

Mr. Oast: Your Honor, that is not even in the suit.

A. (Continuing) This is where Mr. Miniard, because of being blocked this way, has been coming through here to get to his property. His property is right in here.

Mr. Oast: As I understand, that is not even in the suit that we are trying. This wouldn't go anywhere near that piece of property.

Mr. West: Miniard is a party to this.

Mr. Oast: He is over on Fourth Avenue, though.
page 52 } The Witness: No Fourth Avenue there.
Mr. Oast: Well, the plat says it is. To make it short, Your Honor, we would object to this one. It is not even in the suit.

The Court: All right. I will refuse this one. P-11 is refused.

Mr. West: Your Honor, let me point out, this piece of property back here and this building on it are a part of the Miniard property and Miniard is a party whom we are contending is landlocked except for this permissive use through another piece of property. That is the purpose for offering this particular—

The Court: You will have to show a little more of it. It is refused as of now.

Mr. West: All right, Your Honor.

A. (Continuing) This exhibit—

By The Court:

Q. Exhibit—

A. —P-18, and this is looking from this point of Third Avenue down what you see here is 16 foot reserved for an alley. You see the narrowness of this. Of course, it is wide enough for about a truck to go through and that is about it. These people—

Mr. West: Does Your Honor understand which
page 53 } buildings are which?

(The Court indicated affirmatively.)

A. (Continuing) This particular fence you see here, sir, is a fence here behind Mr. Ely's property now, which was O. L. Harcum's, and any of these people that own this property here now, buildings are back, set back. But they at any time, of course, have a right to build right up to this particular point, which would make that alley narrow all the way through.

Mr. West: Now, Your Honor, we would like to offer Exhibit P-20, which is the one Mr. Oast indicated he would object to, showing the condition of Fourth Avenue as it currently exists.

The Court: All right. I will refuse it as of now. As I understand, this is Fourth Avenue.

Mr. West: Yes, sir. Let me state our purpose for offering that one, Your Honor, which is to show that the building is in the center of what is shown as Fourth Avenue on the plat and completely blocks Mr. Miniard's possible egress and ingress through Fourth Avenue.

The Court: It will be admitted; exception noted.

Mr. Oast: Yes, sir. We had nothing to do with page 54 } blocking Fourth Avenue.

Mr. West: We don't contend he did.

(The photograph referred to was marked P-20.)

A. (Continuing) This is looking down Fourth Avenue south.

By Mr. West:

Q. P-20.

A. On County Street, and the hedging you see on the left is at this point right here. (Indicating) You will note that the F. A. Duke Company's building and fence is built right through the center of Fourth Avenue. When you come—look down Fourth Avenue south from County Street, the F. A. Duke building is right in the center of this street.

Q. You are referring there in your testimony to Exhibit—

A. —P-20, yes, sir.

(At this point the Court recessed for lunch, after which the plaintiff Barnes resumed the stand and testified further as follows:)

By Mr. West:

Q. Mr. Barnes, is there a power line anywhere in the vicinity of the south side of your property?

A. Yes, sir. There is a power line running along page 55 } this 25-foot strip and the pole—there is a pole approximately at this—approximately at this point, which is due west of the corner of my property, the west corner of my property. Referring to Exhibit P-14, there is a pole right at this point which is out in the 25-foot strip of land in question that carries lines running both east and west. There is another pole further down west; and, of course, there is one back east towards the Pinkston property, in that area.

Jack P. Barnes

Q. And these poles are in the 25-foot strip?

A. Yes, sir, and they carry power to all of our buildings, my building and Mr. Pearson's, that I know of; and I believe they carry the power across this particular lot here to Strickland's building.

Q. Are there any other utilities involved in this 25-foot strip?

A. Yes, sir. Again referring to—actually, Exhibit A—there is a water line running up Third Avenue and down this 25-foot strip that the City put in when I built this building, serving—and it runs down the 25-foot strip going west from Third Avenue, and the meters are right outside of the—right south of our—of the building here, Mr. Pearson's meter and my meter, also.

Q. Is your property right up to the line—

page 56 } A. Yes, sir.

Q. —here between your lot and the strip?

A. Yes, sir.

Q. Who does the maintenance on Third Avenue and also on the 25-foot strip?

A. Well, the City has been over the years that I have had the property, they have been putting gravel and—both down Third Avenue and down this 25-foot strip they have put gravel there from time to time.

Q. When you bought this property did you anticipate that the railroad siding would thereafter be constructed?

A. I didn't at that particular time because most of the material that I had any dealings with were being hauled by truck, and most of the other people's materials, because it was beginning to be a change from rail hauling to truck hauling. Most of our materials were delivered on this—down this 25-foot strip in this rear door, paint and things that I used in my business at that time. And every tenant that I have had since then has used this same door for delivery of materials and for trucks going in and out, hauling materials in and out of the building.

Q. What kind of transportation egress and ingress did you anticipate over this strip?

page 57 } A. As far as I was personally concerned, trucks and cars. That is what we have been using it for ever since I have had it and that is all I have anticipated would ever be needed.

Q. Was anything said to you by Mr. Smith or Mr. Magann to the contrary?

A. No, sir.

Mr. West: Your witness, Mr. Oast.

Mr. Oast: Your Honor, without waiving my objections I would like to ask Mr. Barnes a few questions.

CROSS EXAMINATION

By Mr. Oast:

Q. Mr. Barnes, when they put the power line and the water line down there, did anybody ask your permission to put it down there?

A. No, sir.

Q. And this light pole, do you know when it was put in there?

A. Light pole, I assume—that light pole was put in before I bought the property.

page 58 } Q. Before you bought the property?

A. Yes, sir.

Q. And do you know when the water line was put in there?

A. After I bought the property.

Q. You said the City had dumped gravel around Third Avenue. How far back? Can you show us?

A. Yes, sir. On Exhibit P-14 they have dumped gravel down Third Avenue and they have dumped gravel right in this particular area here, which is in the 25-foot strip going back to—I know they have been back as far as this light pole, which is in the 25-foot strip. I know they have put gravel in there.

Q. Can you tell me when that was done, Mr. Barnes?

A. That has been done from time to time over the years. As a matter of fact, some of it was done when I—during the period of time that I leased it to Mr. Wall. A Mr. Wall leased it and the gravel was put in during that time. Gravel was put in there from time to time ever since I have owned it.

Q. Recently?

A. Yes, sir. Mr. Wall, I would say—now, I am not sure about the date. I can't guarantee it. It may have been two years ago but I feel it has been—

page 59 } Q. Who requested that it be done?

A. That I am not sure.

Q. Did you have anything to do with it?

A. Not that I—gravel was put in there before I—when I first owned the property. Yes, sir, I have had gravel put in there many years ago.

Q. And you have had gravel put in there in the last couple of years?

A. No, sir.

Q. You have asked the City to do it?

A. No, sir.

Q. And your capacity as vice mayor of the City of Portsmouth, do you know that they were taking care of that piece of property?

A. May I say this, sir, that they put gravel in there before I had any connection with the City, back as far back as in the fifties and before I even was in the city. I was living in the county at that time, Norfolk County.

A. After you took over ownership, they have been putting gravel back there in the last couple of years?

A. I would assume so, yes, sir, but I did not request it.

Q. How far back on Third Avenue did they go? Third Avenue—

page 60 } A. They have from time to time, various—a little on Third Avenue but I know they have put some in here. They have filled holes and things of that kind. Now, some of the contractors involved around here have dumped materials in holes in this street, also, sir.

Q. Now—

A. Mr. Ely and different ones have dumped things of that kind in the holes.

Q. You don't pay any tax on this piece of property back here, do you?

A. Not to my knowledge.

Q. You don't pay anything for this so-called ingress and egress that you have over it, do you?

A. Not to my knowledge.

Q. You have never paid anybody for any use of it?

A. No, sir.

Q. Let me ask you this, now.

Mr. Oast: I want still to keep my objection, Your Honor.

By Mr. Oast:

Q. Did Mr. James Smith, Jr., the gentleman sitting back there, did he come to you prior to putting the fence up and tell you he was going to put the fence up?

A. Yes, sir, approximately two or three weeks.

page 61 } Q. And he told you that if you had an agreement with his father he would honor the agreement, is that true?

A. No, sir.

Q. And did you say that you did not have an agreement with his father? Did he ask you for any agreement that you and Mr. Smith, Senior, had?

A. He may have. I can't recall.

The Court: Do you mean did he ask for a written agreement?

Mr. Oast: Written or oral. I am saving my objection; I am not waiving my objection. You have let it get in over my objection. I want to save my objection. But he said he had a conversation with Mr. Smith and now we are trying to prove he had another conversation with Mr. Smith, Jr.

The Court: Well, now, I permitted it to come in, the conversation with Mr. Smith, Senior.

Mr. Oast: Right. Iwant to know—

The Court: You are now inquiring about Mr. Smith, Jr., is that correct?

Mr. Oast: What we are trying to prove, Your Honor, he denied to Mr. Smith, Jr., that he had any agree-
page 62 } ment with Mr. Smith, Senior; that Mr. Smith, Jr., asked him point blank or went to him and said, "Mr. Barnes, if you can show me or prove to me you had any agreement with my father, I would be more than happy to honor it," and he said, "No, I had it with Mr. Magann."

The Court: You may ask the question.

By Mr. Oast:

Q. Did you have a conversation with Mr. Smith, Jr.?

A. Yes, sir.

Q. And did you tell him that you did not have an agreement with his father?

A. He may have asked me that question that way; I am not sure how the question was asked. But he indicated to me—it was my understanding from his question that he meant any written agreement: and I said I did not have any written agreement.

Q. And you told him that your agreement was with Mr. Magann?

A. No, sir, I didn't say that, sir.

Q. You didn't say that?

A. No, sir.

Q. And he said if you did he would honor his father's agreement?

A. If I had a written agreement, it was my un-
page 63 } derstanding with him.

Jack P. Barnes

Q. So you had no written agreement?

A. No, sir.

Q. And I believe you said that Mr. Smith, Senior, presented you with this exhibit that is marked A, is that true?

A. Mr. Smith, Senior, yes.

Q. Mr. Smith, Senior?

A. Yes, sir.

Q. And your title came through the chain of title of Mr. Magann, is that right?

A. Yes, sir.

Q. Do you know when Mr. Magann bought his property?

A. I am not sure. Mine was in '51, I believe, and I am not sure—Mr. Magann's was sometime in the forties, I am not sure which year, maybe '45, '46, '47, somewhere along in that period of time.

The Court: You want the deed from Smith to Magann?

Mr. Oast: Yes, sir, please.

The Court: That is Exhibit P-3 (handing to Mr. Oast.)

By Mr. Oast:

Q. You introduced this as Exhibit P-3. I believe page 64 } his son said—(counsel showing exhibit to witness)

The Court: Now, what is your question?

Mr. Oast: I want him to—(the witness was looking at the exhibit)

By Mr. Oast:

Q. Would you give me the date of that, please, sir?

A. This was dated September '46, 21st day of September 1946.

Q. Do you mind reading the date off your exhibit here, please?

A. March 14, '47.

Q. So the plat that Mr. Magann relied on and you say you relied on with Mr. Smith was made after Mr. Magann owned the property?

A. But prior to my purchasing, yes, sir.

Q. This could have been what Mr. Magann—this was made after he purchased this property, is that true?

A. I am not sure. All I can—that—that is the date on it; I am not sure when it was made or who made it.

Q. Mr. Barnes, you have introduced these pictures—

The Court: You are aware, are you not, that the
page 65 } deed from Smith to Magann makes reference to
Deed Book 154, Page 480?

Mr. Oast: That is a different plat, Your Honor. Yes, sir. It is a slightly different plat. We will get to that. I am familiar with that but it is a slightly different plat. At the time—I hope I can bring out what I am trying to drive at—when you said I was testifying just now, I don't want to keep on.

By Mr. Oast:

Q. These pictures show equipment parked back there, is that true?

A. Yes, sir. This is P-13. Yes, sir.

Q. And—

A. It showed one piece of equipment that I can see at this point.

Q. Did you ever have to move equipment or collision mats —I think it is what they call them—to get in and out of your door back there?

A. No, sir.

Q. Did any of your tenants have to?

A. Not to my knowledge, sir.

Q. You never went back and asked anybody to move anything?

A. No, sir, I never did.

page 66 } Q. Do you know how long these things were
stored back there, like these—

A. This particular piece of equipment shown in this picture right here was put at that particular point following the beginning of the construction of this fence. It was put in front of that door.

Q. All right, sir. How about these pieces back here?

A. The pieces—this is P-19—the pieces to the left or to the furthest away west could have been there; but the grading machine to the right of that picture is the same piece of equipment, it appears to me, that is sitting in front of the door to my building. That was put there just prior—at the time this fence, they started constructing this fence.

Q. No question, this is the storage yard? And this heavy steel—are these steel beams?

A. Sir, it appears they are the steel beams. I am not sure, of course, what the distance there that those particular pieces of equipment were stored in, whether they are within

that 25-foot strip or not. I am not sure whether they are beyond it.

Q. Were they of recent origin?

A. This picture, P-11, was taken at the same time the other pictures were taken. It is looking south from
page 67 } the alley, 16-foot alley at the intersection with Fourth Avenue, across Mr. Strickland's lot, looking at Mr. Miniard's lot.

Q. Are they on the 25-foot strip?

A. This equipment to the bottom of the picture, no, sir. But the equipment back in there in the background of the picture, some of it I assume could be. I can't tell by looking at this picture because I would have to look down the alley to tell whether it is actually in the 25-foot strip.

Q. There is no question, there has been a storage yard back there?

A. No, sir, this has never been a storage yard in the 25-foot strip that affected my building, sir, not in the years I have known it.

Q. You are sure of that?

A. Yes, sir. This end of it may have been. I am not going to mislead you. This end of it may have been from time to time; but even this end wasn't a storage yard that—during the years Mr. C. L. Taylor owned it, because he used to use that same right of way for ingress and egress with his equipment, because I was in business at the same time.

Q. You have introduced P-20 to show F. A. Duke and Company's building. Will you come here just a
page 68 } minute?

A. Yes, sir.

Q. Can you give me—

A. This is your alley going east off of what is shown as the center line of Fourth Avenue. This is the post and—Exhibit A here, this is Exhibit A, and this is the post. It is the corner post of the property originally owned by Roland Hart, purchased from Mr. J. Lawrence Smith, Senior, and later sold to Strickland Brothers.

The Court: Put an X to indicate approximately where the Duke building is located; just an X.

The Witness: I would say that the building is approximately here, sir, to allow cars to park south of the intersection of Fourth Avenue and the alley, which—the building would come somewhere in this particular area right here—right there.

By Mr. Oast:

Q. This is Mr. Taylor's property you are talking about at the end of the alley?

A. Yes, sir. It was his property, yes, sir. It is not his property now.

Q. Mr. Miniard's, I believe, now?

A. Yes, sir.

page 69 } Q. Taylor and Miniard are all the same, is that true?

A. They were in business—Mr. Miniard, I understand—I am not sure, but he would have to answer that, worked for Mr. Taylor at one time and has now had—taken over his business.

Q. This is the property in question. Now, is there a fence down this line right now?

A. No, sir; never been.

Q. Nothing?

A. No, sir. The fence that I explained to the Judge earlier, that runs along this side, has always continued on straight down; and this 25-foot strip has been used over the years for Mr. Pat Taylor, C. L. Taylor, and Mr. Miniard for awhile.

Q. Is there a fence along this strip?

A. If it is, it was Mr. Taylor's fence; but he had an opening in here because he has a building sitting along at this particular point that you see in P-11, at this particular point here, his building here with the entrance here that he came in from this 25-foot strip and came in and stored his equipment, his supplies.

The Court: Let the record show that the witness has indicated that there might have been a fence on the northern line of the right of way adjacent to the piece of

page 70 } property known as the C. L. Taylor property on Plat, Exhibit A, which is now the Miniard property, and that this is the fence in which the witness indicated there was an opening.

Mr. Oast: I may be wrong, Your Honor. I understood the right of way ends right here.

By Mr. Oast:

Q. Am I wrong on that? As I understand it, this is not a part of the right of way. The right of way ends here?

A. It wasn't my understanding. I understood that this had been used for many years for Mr. Taylor going all the way down.

Jack P. Barnes

The Court: All right. I don't know; what the plat shows, the plat shows a continuation of—

Mr. Oast: Does it show how many feet? I understand—

The Witness: I can explain this much. This piece of property here, of course, when this was originally purchased, Mr. Smith, it is my understanding, purchased this section later from the Cassell estate and from the Seaboard Railroad, and he later platted these two lots that were sold to Mr. C. L. Taylor and Roland Hart, at which time he corrected the line of this alley and at the same time extended the 25-foot strip to the point here that runs along the east side of Fourth Avenue. That is my understanding. Maybe I am wrong.

page 71

The Court: The witness has indicated that the right of way would continue to Fourth Street.

Mr. West: Your Honor, I might point out at this stage that Mr. Oast in questioning the witness has been referring frequently to the photograph, Exhibit P-11, which was refused by the Court, and has been questioning the witness with relation to it; and for that reason I would again at this point offer it as an exhibit. I think the importance of it has been shown by defense counsel's own questions.

Mr. Oast: All right. We are going to renew our objection.

The Court: I am going to allow Exhibit P-11. It is admitted.

Mr. Oast: All right, sir. We save our point.

(Exhibit P-11 was admitted into evidence.)

Mr. Oast: This hasn't been introduced. I am just trying to clear this matter up, Your Honor, because it is my understanding that the alley does not come all the way through here, and I will have to put my evidence through, that it is my understanding that the alley ends right here.

page 72

The Court: I understand, but you are now examining this witness.

By Mr. Oast:

Q. Mr. Barnes, do you know for a fact that the alley goes all the way through to Fourth Street—Fourth Avenue?

A. The only way I can know it is because of the fact that this particular plat and every plat that I have seen of this particular piece of property as subdivided by Mr. J. L. Smith,

Senior, did show an extension of the 25-foot strip for Mr. C. L. Taylor to use for ingress and egress of his property. It was the only way he could get to it because at that time Fourth Avenue had never been opened, sir, from the 16-foot alley south. It had been weeds and had grown up over a period of years. It was almost a jungle, and had never been used by anyone except this right of way that Mr. Taylor used to come in here to his property.

Q. Mr. Taylor can't get in and out of it there
page 73 } now on the 25-foot strip, can he?

A. He could if that equipment wasn't parked there.

Q. The equipment has been there how long?

A. This is something I have nothing to do with. This may be some agreement made. You are not looking down the alley, the 25-foot strip, sir, you are looking at a piece of property that shows equipment on Mr. Strickland's land. Now, this is looking down there now.

Q. Is the 25-foot alley shown on this—

A. I am sure it shows equipment. You can't distinguish it very well on P-11 but you can see it very well on P-19, which shows equipment parked in that particular area. How long that equipment has been sitting there I don't know. I don't go back there and check it. For many years it wasn't there, I can assure you that, because I am sure—and I am as sure as I am standing here that Mr. C. L. Taylor used this all the time for his trucks to go in and out and carry materials and workmen to his building on that particular lot shown on Exhibit A.

Q. You don't know that for a fact?

A. I know that for a fact.

Q. When was that?

A. In all the years that I had my contracting business
there from the time I purchased the property in
page 74 } '51.

Q. Until when?

A. Until I went out of business in probably '53, somewhere around there, I am not sure. For two years or more I know that Mr. Taylor used it.

Q. Do you know that Mr. Taylor went up there and asked them to let him through at times?

A. Mr. Taylor has told me different from that, sir. He has said he had told them to move it. He didn't say he asked it. That is all I am saying, what he has told me. What he will say himself I don't know.

Mr. Oast: That is all.

RE-DIRECT EXAMINATION

By Mr. West:

Q. Just a moment, sir. Just one question. Mr. Oast asked you if anyone asked your permission, from the power line, when the power line was put up. Was the power line put up since you got your property or before?

A. Prior to it, sir. It was—the power line—I am not sure but I assume the power line was put up when Magann built his building, many years ago, to serve for lights page 75 } for his building and Mr. C. L. Taylor's building, which were west of the property I purchased, along the same 25-foot strip of land.

Mr. West: All right, sir.

RE-CROSS EXAMINATION

By Mr. Oast:

Q. Just a minute. Does the power line serve Mr. C. L. Taylor's property?

A. I am not sure, sir. I said I assumed—I knew it did serve Mr. Magann's at one time. I am not sure whether there is any lights in his property or not. I don't know whether he has ever had any there. But I think Mr. Magann did—I am sure he did and I know Mr. Strickland, served from that particular pole shown in that plat—I mean that exhibit, Exhibit P-14; the pole there served Mr. Strickland, the rear of Mr. Strickland's property, before I built my building and before Mr. Pearson built his.

Mr. Oast: That is all.

page 76 } W. T. PEARSON, an intervenor, having been first duly sworn, testified as follows:

Examined By Mr. Hawks:

Q. Mr. Pearson, state your name, please.

A. W. T. Pearson.

Q. And your present address?

A. 404 Gannon Road.

Q. And you are a party in interest in this suit?

A. I would think so.

Q. I mean you have an interest in the suit?
A. Right.
Q. That is what I am trying to bring out. Did you purchase a piece of property in the general location of Third Avenue and County Street in the city of Portsmouth?
A. It was also referred to as Columbia Street; too; Third Avenue and Columbia Street and the alleyway there.

The Court: Is there any objection by the parties to Mr. Pearson pointing out on this plat what he owns?
Mr. Oast: No, sir, we don't have objection.

page 77 } By The Court:
Q. If you can, point out here what you own.
A. Yes, on this corner right here, 40 by 48.
The Court: If this is agreeable to counsel, the witness has referred to a piece of land running on Third Street 48 feet, bounded on the south 40 feet by the 25-foot right of way which is in question, and bounded on the north by the 16-foot strip reserved for an alley. All right. Let's go on from there.

By Mr. Hawks:
Q. From whom did you purchase this piece of property, Mr. Pearson?
A. From my mother-in-law, Mrs. Harcum, Mrs. O. L. Harcum.
Q. I see. And Mrs. Harcum, I believe, is the wife of Mr. O. L. Harcum?
A. (The witness nodded)
Q. In what business was he?
A. In the plastering business.
Q. Did Mr. Harcum have an opportunity to use this property in his plastering business?
A. Only for storage.
Q. And what types of material did he store there?
page 78 } A. Most of the time nothing but junk, debris, and so forth.
Q. When did you acquire this piece of property?
A. I will tell you the exact date in a minute. February 1, '52.
Q. When you acquired this property, were you aware or was it pointed out to you—excuse me; were any plats pointed out to you in reference to this deed?
A. No, sir.
Q. There were not?

A. No, sir.
Q. Were there any understandings as to the use of this 25-foot strip?

Mr. Oast: Now, Your Honor—
The Court: Let's get this first, yes or no.

A. I worked on this—

By The Court:
Q. Wait a minute. We just want to know first whether there were such understandings.
A. Yes, sir.

The Court: Now, you proceed. When you get to the point—

page 79 } By Mr. Hawks:
Q. What were these understandings?
A. Well—

The Court: With whom, and so forth.
Mr. Hawks: Excuse me.
The Court: And when made.

By Mr. Hawks:
Q. Do you know when this understanding was reached, and by whom?
A. Well, I—

Mr. Oast: I am going to object to that form. I still don't think he has laid the proper foundation, but I am going to object to this line of questioning, Your Honor. I think we have to have more than what he said there.
The Court: He hasn't answered any question about what his understanding was, yet. I am not going to admit it until I find out who made it with whom, when and so forth.
Mr. Oast: Yes, sir.

By Mr. Hawks:
Q. Do you know with whom this understanding was reached or between whom this understanding was reached?
A. On what are you referring to now?
Q. The understanding as to the use of this 25-
page 80 } foot strip bounding the property.

Mr. Oast: Now he is leading.

The Court: The question you originally started out with was: Did you have any understanding about the use of the property with anyone? And he said yes. Now, the next question that I am interested in is: With whom and when?

Mr. Hawks: That is what I was asking him, sir: when, who are the parties.

By The Court:

Q. With whom did you have any understanding?

A. Mr. O. L. Harcum.

Q. When was it made?

A. The dates I can't tell you. I worked out of his office when I first went in business.

Q. Was it before you purchased the land?

A. Yes, sir.

Q. What was the occasion for your having had any understanding or any conversation with him regarding—

A. Well, at one time this property was offered to me for a shop, for nothing; and at that time they said the railroad siding was there.

Q. Don't tell me what "they" said. I am trying to find out the circumstances surrounding any conversation you had with other people, without it—

page 81 } A. Well, the property was offered me free at one time. This is—my father-in-law owned this property.

The Court: Now, what would you show by him as to any conversation between him and Mr. Harcum?

Mr. Hawks: Well, he was working with Mr. Harcum at this time and he was aware of the understanding between Harcum and Harcum's predecessor in title as to the use of this land.

The Court: Who is that?

Mr. Hawks: That would be Mr. Smith, Mr. Smith, Senior; that is J. L. Smith. And then Magann. It was from Smith to Magann, then to Harcum.

The Court: Well, Magann is here. He has been on the stand.

Mr. Hawks: Yes, sir. I believe he is still outside. He has been on the stand.

The Court: If you object to that—

Mr. Oast: I do, Your Honor.

The Court: I will sustain the objection as to that, as to his conversation with a man who is now living and here and available to testify to whatever happened.

page 82 } By Mr. Hawks:

Q. When you purchased this property, you negotiated with the Harcums, both Mr. and Mrs. Harcum?

A. No, sir. Mrs. Harcum got this piece of property in the settlement and I bought it from her.

Q. Did you have any understanding with her as to this strip of land in question?

A. Other than reading the deed—

The Court: Now, the answer is just yes or no to that question. You needn't explain it.

A. Yes.

By Mr. Hawks:

Q. What was this understanding?

Mr. Oast: I am going to object, Your Honor.

The Court: Sustained.

(At this point the witness said something, the words of which were not distinguishable to the reporter.)

The Court: Mr. Pearson, you just a minute ago made a remark quite improper. I don't know whether the court reporter got that remark referring to counsel. You don't have to ask any questions. You are here on the stand.

page 83 } You just answer the questions that are asked of you.

The Witness: All right.

The Court: You have an attorney to represent you. You need not make these side remarks. Don't ever make a remark here again about other counsel.

The Witness: Sir, what I was referring to, were you going to ask me the question or was he.

The Court: A few minutes ago you referred to something Mr. Oast had to say here. Just don't make those kinds of remarks now. We are not dealing in personalities, we are trying a case here in law. All right, ask your question.

W. T. Pearson

By Mr. Hawks:

Q. All right, Mr. Pearson, what use do you make of this property at the present time?

A. A storage shop.

Q. Do you use it in your own line of work?

A. Yes.

Q. How do you get to and from this property?

A. From either Third Avenue or from the supposed easement around on the front.

page 84 } Q. Which one? On the south side of the property?

A. Yes, sir.

Q. Where are the doors in your building located?

A. I have one small door on the alley and I have one large sliding door facing the south side.

Q. Did you build this building?

A. Yes, I did.

Q. When was this building constructed?

A. I can't tell you the exact date.

Q. Can you give us the year?

A. No, I can't tell you the exact date. I would have to look it up to tell you.

Q. Why did you locate the overhead, the larger of the doors, on the 25-foot strip—rather, on the south side of the property?

A. I was under the impression that there was an opening or easement or an access to the big door.

Q. I see. You said there is a smaller door on the north of the property. Is this a door for just a man to pass through or is it larger, a freight door?

A. It is just a small door for people to go through.

page 85 } Q. Just a normal size door as we have in the courtroom?

A. Not that big.

Q. I see. You stated that the reason you built this building with the door facing the 25-foot strip was because of your reliance on an understanding. Where did you receive this understanding, your impression?

Mr. Oast: I thought we had been through this. I am going to renew my objection.

The Court: He only asked him with whom.

A. With my deed.

W. T. Pearson

By Mr. Hawks:
Q. With your deed?
A. (The witness nodded)
Q. And can you explain that in more detail?

The Court: With his deed?
Mr. Hawks: Yes, sir. I would like for him to explain that. I don't understand.
Mr. Oast: The deed has been introduced.
The Court: I thought he was inquiring about with whom, the name of the person.
Mr. West: You are correct, sir. He asked with whom and the answer was the deed.
Mr. Hawks: I want him to explain what he means by that.
Mr. Oast: Your Honor, the deed speaks for it-
page 86 } self. I think that is one of the deeds that have been introduced in evidence and I would renew my objection to any parol evidence trying to vary the terms of any specific deed.

By The Court:
Q. You mean that you received this agreement at the time you received the deed, is that what you are trying to say?
A. Yes, sir.

By Mr. Hawks:
Q. With whom did you have this understanding?
A. To—the reason I put the big door?
Q. Yes.
A. Only through the deed. I knew the easement was there. I had the understanding with Mr. Harcum that this easement was there before I ever bought the property, when the property was offered to me for nothing.
Q. And you bought this property with the reliance on that understanding then?
A. That the easement was there.
Q. All right. This right of way through the rear of the property had a value to you?

Mr. Oast: Your Honor, he is leading the witness now.
The Court: It is your witness.
page 87 } Mr. *Albert*: I will rephrase that question, then.

By Mr. Hawks:

Q. Would the closing of this alley affect the use of your property as it is presently arranged?

A. Yes, sir.

Q. In what way would it affect your property?

A. Well, I have some things in the building that I couldn't get out now if that alley is closed.

CROSS EXAMINATION

By Mr. Oast:

Q. Mr. Pearson, you have a way to get out on Third Avenue and on the 16-foot alley, is that true?

A. No, sir. The only way that I can get out of my present building is on the alley and on the proposed right of way.

Q. What you are saying is that you don't have a door facing on Third Avenue, but your property faces Third Avenue; you have an entrance if you wanted to physically knock one through the wall, is that true?

page 88 } A. Providing I didn't sell this portion, the other 20 foot. I only built on 20 foot. If I was to sell this to someone else, then I couldn't knock a door through there.

Q. Right. Now, do you come up to Third Avenue? Is this your building right here?

A. Yes, sir.

Q. And is this Third Avenue, right down here?

A. Yes, sir, here.

Q. All right. This is your building, you are on the corner?

A. Yes, sir.

Q. So you can get out on Third Avenue?

A. Not—well now—not now I couldn't; and if I sell that other 20 foot, I couldn't get out then, either, on Third Avenue.

Q. But your property right now goes to Third Avenue?

A. Yes, sir.

Q. No question about it?

A. That is right.

Q. And it goes down the alley, too; you are on the corner?

A. Right, yes, sir.

page 89 } RE-DIRECT EXAMINATION

By Mr. Hawks:

Q. Mr. Pearson, can you make any practical use of that

building if the 25-foot strip were closed, without any major alterations to that building?

A. What was that again, sir?

Q. I say are you able to make any practical use of that building for the purpose for which it is presently being used, without having to alter it, if this 25-foot strip were closed?

A. No, sir.

Q. That is all.

* * * * *

page 90 }

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CREED MINIARD, an intervenor, having been first duly sworn, testified as follows:

Examined By Mr. West:

Q. You are Mr. Creed Miniard?

A. Yes, sir.

Q. Mr. Miniard, would you step up here and show the Court where your property is located on this plat indicated as Exhibit A?

A. My property is located on this plot.

By The Court:

Q. In other words, you own the piece of property on Exhibit A referred to as C. L. Taylor?

A. That is right.

By Mr. West:

Q. Did you acquire that from Mr. C. L. Taylor?

A. Yes, I did.

Q. Was that in September 1964?

A. Yes, sir.

page 91 } Q. All right, sir. Were you familiar with this property and area before you bought it?

A. On the property I bought from Mr. Taylor, yes.

Q. I believe you had worked for Mr. Taylor, or with him?

A. Since 1948.

Q. Since 1948 until you bought the property in '64?

A. That is right.

Q. What kind of business was that?

A. Brick mason contractor.

Q. What use did Mr. Taylor make of the property at the time you worked with him?

A. He used it for storage and scaffold, block, brick materials.

Q. Was there a building on the property during that time?

A. Yes.

Q. What way did you and Mr. Taylor, at the time he owned the property, what way did you come and go, to and from your building?

A. At the beginning when I first started with him, we went around Third Avenue and down the easement.

Q. And how long did you continue that type of

page 92 } use?

A. I say anywhere from three to five years.

Q. Did your use of it change after that?

A. Well, yes.

Q. All right, sir. Why?

A. Well, it—it changed on account of the equipment which was in the alley in the back of—in the easement.

Q. Whose equipment?

A. Mr. Strickland's,

Q. Did you ever use Fourth Avenue as a means of ingress and egress to the Taylor property?

A. No.

Q. You said you changed your use, way of coming and going, because of Mr. Strickland's equipment. Where did you then begin coming and going to the outside?

A. Well, we started—we—Mr. Taylor got permission from Roland Hart which he owned the front piece of property on York Street.

Q. Would you show the Court on the map which piece you are talking about belonged to Roland Hart?

A. This piece of property right here. (Indicating)

Q. What is written on that?

A. "Roland B. Hart, Incorporated."

page 93 } Q. All right, sir. And this part was owned by Mr. Hart?

A. That is right.

Q. And Mr. Taylor got permission from Mr. Hart to do what?

A. To take his material in through, over his property to Mr. Taylor's.

Q. Now, at the time you bought the property, what way were you using to go and come?

Creed Miniard

A. Well, I was using—well, at the time I bought the property Mr. Strickland had bought Roland Hart's property, so I kept going over his property to get to mine.

Q. Is that the way you go and come now?

A. Yes.

Q. Through Mr. Strickland's property as indicated on Exhibit P-11?

A. Yes, sir.

By the Court:

Q. Where do you go to?

A. My building is this—

Q. On this plat, when you cross the Hart property where then do you go?

A. I go right here. (Indicating) My building and Hart's building, the one he had, connects together. They page 94 } were built together. And Hart's, the building Hart built projects out about 12, 15 feet. My building sits back behind it a little bit so I have to go around the front of that—around the side, come in the front of mine.

Q. Leaving your place, when you went to get out to the public way, how would you travel?

A. I travel over their property which I go in.

Q. Then, after you cross their property, where do you go?

A. That is the only place I can go is through their property.

Q. After you cross their property, where do you next go, what street or alley do you then follow?

A. York Street.

Q. Point on the map where you are talking about.

A. York Street is over here (indicating).

Q. You are calling the 16-foot alley York Street?

A. That is right.

Q. Trace with your finger where you travel.

A. I go across here(indicating).

Q. You have been that way. I want you to start page 95 } over here, come the other way.

A. I either come out Fourth Street or either I go down the 16-foot alleyway.

Q. All right. I take it that when you do get into Fourth Avenue, you enter Fourth Avenue at a point that is north of the 16-foot alley?

A. Yes, sir.

By Mr. West:

Q. Do you have any kind of agreement, written agreement

with Mr. Strickland that gives you a right of way over his property?

A. No.

Q. Did Mr. Taylor have any written agreement with Strickland?

A. Not as far as I know.

Q. Do you know when Fourth Street was closed off by the Duke building?

A. No.

Q. Was it before you got your property, or after?

A. It was before I got my property.

Q. Since you have been familiar with the area, has Fourth Street to the south of the Duke property ever been an open way?

A. No.

page 96 } Q. If the 25-foot strip we are talking about is closed off—and I believe according to your testimony it is now blocked by Mr. Strickland's equipment—what other ways do you have in getting out to a public right of way?

A. I wouldn't have no way of getting out if he was to stop me from going over his property here.

Q. What is back here to the south of the property that would prevent you from coming out?

A. The railroad.

Q. Did you have any kind of understanding with Mr. Taylor or Mr. Lawrence Smith concerning the use of this 25-foot strip at the time you acquired the property?

A. I had understanding from Mr. Taylor.

Q. What was that understanding?

Mr. Oast: Now, I am going to object to that, Your Honor.

The Court: Sustained.

By Mr. West:

Q. At the time you purchased the property, you were familiar with it and I believe stated that you knew this 25-foot right of way had been used for some time by Mr. Taylor?

A. Yes, sir.

page 97 } Q. Was he using the 25-foot strip at the time you acquired the property?

A. No.

Q. Why not?

A. Well, one reason on account of the equipment was in there; and, in fact, it is kind of complicated but I could explain it to you if you would like.

Q. I asked the question.

Mr. Oast: I object to the question because he might not know what somebody else was doing and why they were doing it. I think he should lay the foundation as to how he knows what Mr. Taylor was thinking.

By Mr. West:

Q. Do you know why Mr. Taylor was not using the 25-foot strip?

A. Yes. It was because of the equipment in the alley and the easement.

Q. Is there any kind of understanding between you and Mr. Strickland now as to his equipment remaining in this alley?

A. No.

Q. But there is a verbal understanding that you are now using his property for ingress and egress to the north?

page 98 } A. Yes.

Q. And no written agreement?

A. No written agreement.

Q. All right, sir. At the time you bought your property, was any reference made—I don't mean in the deed, but any verbal reference made by anyone to you concerning this or a similar plat?

A. Well, Mr. Taylor told me that he had—

Mr. Oast: Well—

A. (Continuing)—that—

The Court: Wait a minute.

Mr. Oast: That is not what he asked him.

Mr. West: Yes, it is, Your Honor.

Mr. Oast: I didn't want to object prematurely. You asked him was any made. He was going on to tell you what it was. I thought the answer would be yes or no. I am going to object to the question and his answer.

By The Court:

Q. All right. Yes or no.

A. Yes.

The Court: All right. Identify it.
Mr. West: We are speaking of Exhibit A as being a plat. There are two of those other plats, Your Honor.
page 99 } The Court: You go right on.

By Mr. West:
Q. All right, sir. Was any reference made by anyone to this or a similar plat?
A. Well, Mr. Taylor—

The Court: Wait just a minute. Just yes or no.

By Mr. West:
Q. You understand we are just asking was a reference made to this or a similar plat. Yes or no.
A. I would say no.
Q. No reference was made to a plat? We are not trying to confuse you, Mr. Miniard. Let me ask you this—

The Court: Let him take his time, think about it.
Mr. West: Fine, Your Honor.
The Court: Do you understand? If you don't understand the question, say so. You are talking now about the time when he purchased the property?
Mr .West: That is correct.
The Court: At that time you wanted to know
page 100 } whether there was any reference to this or any other plat?
Mr. West: Yes, sir.
The Court: Do you understand his question?
The Witness: Yes. Well, Mr. Taylor had a plat to that.

By Mr. West:
Q. Did you see the plat?
A. No.
Q. All right, sir. Were you shown a plat by anybody—
A. No.
Q. —at the time you purchased the property?
A. No.
Q. All right. Would it have any effect on the value of your property if this right of way is permanently closed off from you?

A. Yes.
Q. And what effect would it have?
A. Well, it means my property won't be worth anything.
Q. When you bought the property, were you relying on any use of this 25-foot strip as a right of way, or not?
A. Yes.

page 101 } Mr. West: All right, sir. Your witness.

CROSS EXAMINATION

By Mr. Oast:
Q. Let me ask you a couple of questions, sir. Come over here. I would like to refer to the plat. I am talking about the piece of property adjoining C. L. Taylor's property on the south. Who owns this strip right now, sir?
A. I will say no one owns it.
Q. Who uses it?
A. Strickland Brothers use it.
Q. How long have they been using it?
A. I will say they have been using it for the last 18 years.

Mr. West: Your Honor, I wonder if he could describe what area he is talking about for the record.
Mr. Oast: I thought I said the piece beyond C. L. Taylor's property on the south. That is what I said.
page 102 } Mr. West: I am sorry, Your Honor. I misunderstood.
Mr. Oast: He said Mr. Strickland had been using it for 18 years.
The Witness: Approximately 18 years.

By Mr.Oast:
Q. Do you know where this 25-foot strip reserved for future railroad siding, is?
A. Yes, I do. The right of way ended at the end of Mr. C. L. Taylor's property which I purchased from him.

Mr. West: Which end?
The Witness: The west.

By Mr. Oast:
Q. Since you have purchased it, you have never been up and down this strip, is that true, sir?

A. That is right.

Q. You say these things have been on here for 18 years?

A. Approximately 18 years.

Q. How about down further to the east? How long has that been blocked, to your knowledge? I am referring now, Your Honor, to the 25 feet reserved for future railroad siding.

page 103 } A. Well, since I have been using the front I don't have no occasion to go back in the back, couldn't answer that question.

Q. It was blocked before you purchased it, is that true?

A. That is right.

Q. And Mr. Taylor wasn't using it?

A. That is right.

Q. Do you know how many years before he sold it to you he had stopped using it?

A. I would say approximately 10 years.

Q. Ten years. So this has been blocked down here for 10 years, and this over here for 18 years?

A. No. The whole thing has been blocked the same amount of time.

Q. For 10 years?

A. (The witness nodded)

Q. How far east? Can you give us some idea with your finger how far east it has been blocked? I am talking about the 25-foot strip now.

A. No, I couldn't.

Q. Do you have any idea?

A. (The witness shook his head)

Q. What blocks it? Tell me what blocks it.

A. Equipment.

page 104 } Q. Equipment. All right. I show you these exhibits. Your Honor, I am not trying to trick him. Let's refer to P-19 now. When you refer to equipment, would you say this type of equipment has been on that strip for the last 10 years?

A. Yes.

Q. Equipment of the type that is on P-19 has been back there for the last 10 years?

A. No.

(At this point there was a brief interruption, after which the following occurred:)

A. I will say no.

By Mr. Oast:

Q. How long has this type of equipment been back there?

A. I couldn't say.

Q. Well, what blocked it for the past 10 years?

A. Different kinds of equipment.

Q. Different kinds of equipment?

A. Right.

Q. Would any be steel beams?

A. That is right, steel beams, big 12 by 12 railroad ties, stuff like that.

Q. Could you drive a truck across them?

page 105 } A. Oh, no.

Mr. Oast: That is all. No further questions.

Mr. West: Did you have a question, Your Honor?

The Court: You go ahead.

RE-DIRECT EXAMINATION

By Mr. West:

Q. If I understand your testimony on this cross-examination correctly, you are saying that the area of the 25-foot strip to the immediate south of the Taylor property and part of the adjoining property, which would be the Strickland property—right?

A. Yes, sir.

Q. —has been blocked for some time by this equipment?

A. Right.

Q. But you have not testified that any such equipment blocked the area back of the Pearson and Barnes property?

A. No.

page 106 } Q. Do you know whether or not it has?

A. No.

Q. You don't know?

A. That is right, I don't know.

* * * * *

ELLIS B. HILTON, JR., called as a witness on behalf of the plaintiffs and intervenors, and having been first duly sworn, testified as follows:

Examined By Mr. West:

Q. You are Mr. Ellis B. Hilton, Jr.?

A. Yes, sir.

Ellis B. Hilton, Jr.

Q. What is your occupation, Mr. Hilton?

A. Assistant Director of Public Works for the City of Portsmouth.

Q. What are your duties as such?

A. Under the Director, to generally supervise over all workings of the department.

page 107 } Q. Are you in charge of the maintenance of the streets in the city of Portsmouth as a part of your duties?

A. Yes, sir.

Q. Are you familiar with the area of Third Avenue and a 25-foot area behind it as shown on Exhibit A here?

A. Yes, sir.

Q. Who maintains the area shown on the plat as Third Avenue?

A. The City of Portsmouth has placed crusher run stone on there from time to time.

Q. Is Third Avenue a public street of the city of Portsmouth?

A. Yes, sir.

Q. Would you please indicate to the Court how far to the South Third Avenue is a public street?

A. It would go to this line here indicated, the center line of Columbia Street, extended.

Q. Now, Mr. Hilton, who maintains the area here shown as a 25-foot strip "reserved for future railroad siding" on this plat?

A. We have put stone in there.

Q. How far back in time has Third Avenue been considered a city street, if you know?

page 108 } A. I don't know.

Q. All right, sir. Could Third Avenue be closed off at any point from County Street back to the southernmost portion as you have indicated, without the approval of the City of Portsmouth?

A. It would have to go through the regular channels, which would be to go to the Planning Commission, then to the City Council.

Q. I believe, sir, that Fourth Avenue is closed as shown on this plat?

A. Yes, sir.

Q. Would that be about where the X is indicated in what is shown on the plat as Fourth Avenue?

A. It is just beyond the beginning of that alley, so I would presume that is the right location.

Ellis B. Hilton, Jr.

Q. Does that look about right to you?
A. Yes, sir.
Q. Do you know how long it has been closed?
A. No, sir, I don't.
Q. What is it closed with? What blocks it off?
A. Lee Duke has a building there.

Mr. West: All right, sir. That is all. Answer Mr. Oast.

page 109 } CROSS EXAMINATION

By Mr. Oast:
Q. Mr. Hilton, you said that you had put stone on this strip marked "reserved for future railroad siding"?
A. Yes, sir.
Q. Do your records show when the stone was put in there?
A. No, sir. I have talked with my men, the people that do the actual maintenance in—outside, and it has been placed in there but we have no record that I can produce which shows the time.
Q. You don't know that it has been put in there, is that true?
A. Only by talking to my men.

Mr. Oast: Then, I would ask that that be stricken from the record. Before, I didn't object because I thought he knew; but now he says he doesn't know.

By The Court:
Q. Any information you had, you obtained from your men?
A. Yes, sir.
Q. And not from any records that you had?
page 110 } A. No, sir, and I did not stand there and see them place the stone.

The Court: All right. It will be stricken.
Mr. Oast: Thank you, sir.

By Mr. Oast:
Q. Do you know how long the distance is from the south side of the curbline of County Street to the end of Third Avenue going south?
A. Do you mean the curbline, or the property line?
Q. Let's put it either way. You tell me.
A. 242 feet.

Ellis B. Hilton, Jr.

Q. Can you show us where that is on this plat? I am referring to Exhibit A, for the sake of the record.

A. This would be the right-of-way line of County Street; the 242 feet would go to this point.

Q. Have you stepped that off? What tells you that?

A. The addition of these figures as you go down through there.

Q. All right, sir. Now, being unfamiliar with maps, what does the broken line indicate?

A. The broken lines?

page 111 } Q. Yes, sir.

A. Generally that is when it crosses another area; in other words, to me it would signify that this street goes from here to here through, across this 25-foot strip "reserved for future railroad"—

Q. All right. Now I am looking at the dividing line between 2 and 3, A. G. Pinkston and J. L. Smith. There is a broken line there. Is that correct, sir?

A. Yes, sir.

Q. What does that indicate?

A. It would indicate an extension of that property line.

Q. Would indicate an extension of Pinkston's?

A. Whatever it is.

Q. Yes, I am referring to that line there. I call your attention to this number 6 over here, Exhibit A.

A. Yes, sir.

Q. The lines cross the 25-foot strip there?

A. No, sir.

Q. You don't see any of those lines? I am referring now to the corner, the line of C. L. Taylor's parcel, just south of "C. L. Taylor" and "reserved for 25-foot railroad siding." What does that line indicate?

Mr. West: Your Honor, I don't know that this witness has been qualified to indicate what that particular

page 112 } line is. He is in charge of the street, and the testimony up here regarding lines is regarding a street back here.

The Court: I sustain the objection.

By Mr. Oast:

Q. All right. Are you familiar with this in your capacity with the City?

The Court: With what, now?
Mr. Oast: With the streets and alleys and reservations.

A. Not with the reservations, no. I mean I know that this plat exists because I have seen it but as far as—

By Mr. Oast:
Q. You say you know this one exists?
A. Yes. I have been shown.
Q. All right. Do you know if this one is put to record or not?
A. Yes, sir.
Q. This particular plat is put to record?
A. I don't know, but a plat that looks like this is put to record.
Q. Yes, sir.

Mr. Oast: Judge, I have to confess that this has a lot of handwritten scribbling on it. I don't know who
page 113 } put it on there but I am not going to introduce it if I can help it. I am going to ask the witness if he has seen this one.
The Court: All right, you may ask him.

By Mr. Oast:
Q. Mr. Hilton, have you seen this plat before?
A. I don't know whether that is the same.
Q. They look very similar, don't they?
A. Well, they are similar. I don't know; I will be real frank with you; I have seen a plat that resembles both of them, with Mr. Bergeron's signature at the bottom.
Q. His signature is not on Exhibit A, is that true?
A. No, sir.

* * * * *

page 114 } X. D. MURDEN, called as a witness on behalf of the plaintiffs and intervenors, and having been first duly sworn, testified as follows:

Examined By Mr. Hawks:
Q. Mr. Murden, state your full name for the court reporter.
A. Xenophon Duke Murden.
Q. What is your occupation?
A. Director of Public Utilities.

Q. And what does it consist of in reference to the Water Department, primarily?

A. It is the Manager or Superintendent of Water Department, whichever the titles you want to use.

Q. Are you familiar with the general area of Columbia Street, Extended, between Third Avenue and Fourth Avenue, which I think is now called Yorktown?

A. Yes, sir.

Q. Do you have a water main in that area running down Columbia Street, Extended?

A. Yes, sir. We have a two-inch main goes in from County Street down Third Avenue and turns west on Columbia.

Q. Can you show us on this—I think it is Exhibit A, is it not, Your Honor?—show us the location.

A. Find out where we are. Is County—

page 115 } Q. This is Third; County would be down here; this would be Third Avenue. (Counsel indicating)

A. We come up here and turn right on Columbia.

Q. At this point in this area set out on this plat, "25-foot strip reserved for future railroad siding"?

A. Well, I can't tell you whether we are on this exact spot or not but we are on what we have always accepted to be Columbia Street, which is just to the rear of the warehouses or stores, buildings that are there.

Q. Does the City of Portsmouth have a right of way for the water mains through this area?

A. We have nothing except the fact that it is so far as we know a public street. It was when we put it in there.

Q. And the City, of course, doesn't put their water lines—or will the City of Portsmouth put their water mains through private property without acquiring rights of way?

A. No, sir.

Q. What effect would it have upon the City's position as to these water mains if this were not a public way and were in fact a strip of private property—referring now to this 25-foot strip?

page 116 } A. I would imagine we would have to abandon the line.

Mr. Oast: Your Honor—

A. (Continuing) If the—

X. D. Murden

Mr. Oast: Just a minute. I don't think it is responsive to his question. He is making a guess now. I think he is asking for facts. It is not responsive to his question, what the witness would imagine. I think counsel is dealing in facts. He has an expert witness on the stand.

Mr. Hawks: I think he has sufficient facts to testify what his course of action would be as to—.

The Court: I think Mr. Oast is objecting to the word "imagine," rather than Mr. Murden's stating as best he can what his position—

The Witness: Well, that is probably a poor choice of words but—can I put it this way?—if Columbia Street is closed west of Third Avenue, we would have to shut that water main off.

By Mr. Hawks:

Q. To clarify that further, the City could not maintain it if it were on private property?

A. No, sir, we would not.

page 117 } Q. I see. You can answer Mr. Oast now if you will.

CROSS EXAMINATION

By Mr. Oast:

Q. Mr. Murden, when did you put this water line down what you call Columbia Street?

A. 1952.

Q. 1952?

A. Yes, sir.

Q. And did you go to see someone about it? Did you yourself look into it?

A. No, we just took the maps that we had, which we assume—

Q. Do you have any maps with—

A. I have this map, which is our pipe map, distribution system in the city of Portsmouth of the Water Department propperty.

Q. Who drew this map?

A. At the time this was made in 1925 I wouldn't recall who it was.

Q. Now, locate it, Mr. Murden.

page 118 } A. Yes, I know; I have to look at it myself. Port Norfolk here; here we are down here. We are coming up High Street. This is County Street. We have

gotten up to Sixth. We have to back up. This is Second; here is Third.

Mr. West: I believe we are upside down.
The Witness: This is east?
Mr. West: Here we are. (Indicating)

A. Here is Second, here is Third, and Columbia goes up in here (indicating). See, of course, there isn't any main. This dark line is 10-inch main on County Street; nothing shown on Third or Columbia at that time because it wasn't on this map. Of course, it was put in after this map was out of date.

By Mr. Oast:
Q. When was this map made?
A. In '25.
Q. In 1925?
A. Yes, sir. I expect the date is on it. (Examining) Corrected to 1942. Here is the date, "11/1/25." 1942 there was a new map made, of course.
Q. But you don't know who prepared this map?
A. No, sir, I do not.
page 119 } Q. You all just took for granted and put the pipe down in what you thought was Columbia Street?
A. That is right.
Q. You have no title to it?
A. None other than to—except that it was a publicly dedicated street because it is shown on the map. The map is made from we assume reliable maps.
Q. And it was made in '42?
A. Made in—no, it was made in '25, revised in '42 as far as pipe lines are concerned.
Q. If you assumed it was a street, you just went, laid the pipe without asking any questions, is that true?
A. Well, it is entirely probable we would have consulted Public Works and asked them if it was a public street if there was any doubt. But I doubt at the time there was any doubt in our minds this was a public street.
Q. You could maintain it if you wanted to? You have ways to get a right of way, isn't that true?
A. Well, we wouldn't maintain it because it would not be accessible in the event of breakage or anything of the kind.
Q. What does it serve, Mr. Murden?

X. D. Murden

A. It serves those two buildings back on Co-
page 120 } lumbia Street.

Q. What two buildings are they?

A. One of them belongs to Mr. Barnes; one of them did belong to Mr.—I forget his name; Pearson, I believe.

Q. All right, sir. Will you take a look at Exhibit A, please, sir, and show me just where—I believe this would be Columbia Street I am pointing to. Could you come down Third Avenue and serve these people?

A. We are coming down—is this County Street again?

Q. Yes, sir, this is County down here.

A. We are coming up on the west side of Third Avenue to Columbia and down Columbia to the point of the second meter down there.

Q. Actually, it would be shorter if you came down Third Avenue, went up the 16-foot strip and served them, is that true?

A. Yes; you could lay a new main in there and serve them there.

Q. It would be shorter than what you have now?

A. It would be less pipe, yes, sir.

Q. That doesn't necessarily mean they would have their water cut off if this alley were closed or this—

page 121 } A. Well, it wouldn't unless somebody ran a new main in there, renewed the services, came in from the other side. There is some doubt as to who would pay the cost of the two-inch main because that would not be in the publicly dedicated street. We would not assume the cost of it.

Q. I beg your pardon. You say that is not a publicly dedicated street?

A. I don't know. I say if it is not a publicly dedicated street.

Q. Looking at this plat and seeing that it was dedicated on here, it was dedicated?

A. I don't know. That is a question I wouldn't want to answer because—

Q. Who took the bull by the horns and put the pipe down there?

A. We did.

Q. You didn't hesitate then, did you, Mr. Murden?

A. No, sir, because it showed as a street. We were under the impression it was a street. It was used as access to those buildings. The meters are out there on the street.

Q. When were they put there?

A. In 1952.
page 122 } Q. 1952?
A. The main was put there in '52.
Q. That is all.
A. The two meters were put there in '54 and '55.

RE-DIRECT EXAMINATION

By Mr. Hawks:
Q. Just one more question, Mr. Murden, if I may. Did anyone object to the City placing these water mains down the center line of Columbia Street when the lines were made?
A. No, sir. The main, to keep the record straight, is not in the center of Columbia Street, it is on the north side.
Q. All right. But on the north side of Columbia Street—I am sorry—were any objections made by any parties at the time these lines were made?
A. No, sir, not that I know of.
Q. Thank you.

page 123 } RE-CROSS EXAMINATION

By Mr. Oast:
Q. One other question, Mr. Murden. Suppose in fact a railroad track was put down this strip that said "25-foot strip reserved for future railroad," what would you do then?
A. If the man wanted the railroad—
Q. If they occupy the same space.
A. I would imagine we would have to remove the main if the railroad had the right there. It is my belief we would have to move the main if they were going to lay a railroad and the railroad company had the right.
Q. If this plat was dated '47 and you put these on in '52, '54?
A. We didn't have this map. As far as we were concerned, it wasn't in existence. It may have been.
Q. Did you look for it?
A. No, sir.
Q. Did you go over to the Clerk's office, look anywhere?
A. No, sir.
Q. Where did you go to look?
A. We looked on our maps. It showed there was a street there. We put the water main in.
page 124 } Q. It didn't show "reserved for railroad"?
A. No, sir. Our maps didn't show that.

Q. Would you have put it there if you had known it was reserved for a railroad? Would you have put the water main there?

A. I don't think we would have, no, sir, not unless we got clearance to be sure it was proper to put it there and the railroad was not going to require us to move it.

Q. When did you find out that this was on land reserved for a railroad?

A. Right now, first I have heard about the railroad being on there.

The Court: Anything further?

RE-DIRECT EXAMINATION II

By Mr. Hawks:

Q. Mr. Murden, do you know how far this water main is located in relation to the buildings which are placed on land just adjacent to this 25-foot strip reserved for the railroad siding?

A. No, sir. I would have to make an estimate
page 125 } of that. I would say they are probably five or
six feet from the building line, and the meters within maybe three feet of the building, or less.

Q. So if a railroad track were built in there, this water line would be beside the railroad track?

A. It could be; depends on where the railroad track was put. There is room for both on the 25-foot strip, though.

Q. I see. Doesn't the City of Portsmouth bring water in from Suffolk alongside the railroad tracks?

A. Yes, sir.

Q. How far from the railroad tracks is that pipe?

A. 35, 40 feet most of the way.

Q. Thank you. That is all.

RE-CROSS EXAMINATION II

By Mr. Oast:

Q. How large is that line, the water you are bringing down from Suffolk?

A. There are three of them in there. Some of them 20, some
of them are 24, 16.

page 126 } Q. You are speaking of a two-inch line now,
aren't you?

A. Yes, sir.

* * * * *

page 127 } JACK P. BARNES, a plaintiff, being an adverse witness recalled by the defendants, testified further as follows:

Examined By Mr. Oast:

Q. Mr. Barnes, you have filed as your paper Exhibit A. Is there any place on there showing that has ever been recorded or signed by anybody?

A. No, sir, not to my knowledge.

Q. And this is the one that shows the 25-foot strip reserved for future railroad siding going over to Fourth Avenue?

A. Yes, sir.

Q. That has never been recorded?

A. No, sir, not to my knowledge. Now, I am not sure. I haven't been in the courthouse to check it but it doesn't show on here that it has been.

Q. That is all right. Let's put that aside just a moment and refer to Exhibit P-4, which is attached to a deed.

The Court: Bearing what date?

Mr. Oast: Bearing the date, 12th day of May, 1947.

By Mr. Oast:

Q. This is deed of J. Lawrence Smith to O. L. Harcum?

page 128 } A. Yes, sir.

Q. And this is your exhibit, is that right, sir?

A. That is one of the exhibits, I assume.

Q. This one has been recorded?

A. It shows here. I assume it has been, yes, sir.

Q. Can you show me on this—I am pointing now to the 25-foot strip reserved for future railroad siding—how far west of Third Avenue does it go?

A. It goes to a point east of the property that was later sold to Mr. Taylor.

Q. It stops before it goes to Mr. Taylor's property, is that what you are saying?

A. What I am saying is that this particular exhibit here shows the end of the right of way and the end of all of this property that Mr. Smith owned abutting the property of the Seaboard Railroad that was purchased and added to this same plat subdivision.

Jack P. Barnes

Q. Does this go through to Fourth Avenue?

A. Not according to this exhibit here.

Q. Is there an exhibit that does go through to Fourth Avenue—

A. That I am not sure, sir.

Q. —that has been recorded?

page 129 } A. There has been a lot of exhibits recorded and I am not sure whether one of them shows it goes through or not.

Q. There is no question, this one doesn't show it going through to Fourth Avenue?

A. That one doesn't even show Mr. Taylor's property or Mr. Hart's property, which they had built on prior to my even buying my property, way back, so they had to be subdivided prior to my purchasing the property.

Q. And this one is dated March 14, 1947 (indicating). I believe this one (indicating) is, too, isn't it?

A. The same date, yes, sir.

Q. But they are not the same plat?

A. No, sir, but they are recorded the same day. I mean they are dated the same day.

Q. But this one, Exhibit P-4, was the one actually put to record?

A. As far as it shows there. This is—the other one, Exhibit A, is the one given to me by Mr. J. Lawrence Smith, Senior, in '51, sir, which was a later date.

Mr. Oast: That is all.

page 130 } By Mr. West:

Q. You testified that Exhibit A was given to you by Mr. Smith when you bought the property?

A. Senior, yes, sir.

Q. Mr. Smith, Senior.

A. I went to him after—

Q. Is that the only plat that was shown or given to you at that time?

A. It is the only plat I have ever seen of the property, sir.

Q. Other than here in court, you mean?

A. Yes, sir.

* * * * *

T. Ray Hassell

T. RAY HASSELL, called as a witness on behalf of the defendants, and having been first duly sworn, testified as follows:

Examined By Mr. Oast:

Q. State your name, please, sir.

A. T. Ray Hassell.

page 131 } Q. And what business or profession are you in, Mr. Hassell?

A. I am a certified land surveyor and I am in the surveying and engineering business, located in Portsmouth, Virginia.

Q. What is your background for that business?

A. Well, I attended VPI and William and Mary College.

Mr. West: Your Honor, we will stipulate that Mr. Hassell is a qualified surveyor. I think he is pretty well known to all of us.

Mr. Oast: Thank you.

By Mr. Oast:

Q. And you are familiar with the properties in the city of Portsmouth, is that correct?

A. Yes, sir.

Q. And we have some exhibits here. Are you familiar yourself with these, sir?

A. Yes, sir, I am familiar.

Q. Have you seen these exhibits before?

A. No. Well, I saw this exhibit a few minutes ago.

Q. Have you ever seen this exhibit before, to your knowledge?

page 132 } A. No, sir.

Q. Now, are you familiar with this location? This is County Street, Third Avenue (indicating).

A. Yes.

Q. Beg pardon?

A. Yes, sir. I am familiar with it.

Q. Did you have an occasion to go down and make a survey for Mr. J. Lawrence Smith, Jr.?

A. Yes, I did.

Q. Can you tell us when that was?

A. I have my file over here, if I might have that to refer to.

Q. Is this (handing to witness) your file?

A. Yes, sir. I made a survey on May 11, 1964, for J. L. Smith Corporation and Mrs. J. L. Smith, at which time that

survey dealt with this piece of property noted here as 25-foot strip reserved for the railroad siding.

Q. Yes, sir.

A. This was a piece of property that we were concerned with as well as the property that was south of that, which would be—that would be separated by this notation "Center line of Columbia Street to the Seaboard Air Line Railroad right of way." We prepared a plat of that prop-
page 133 } erty at that time for him and on July 29, 1964, we revised the plat to subdivide this 25-foot strip noted as a railroad siding.

Q. All right, sir. Now, tell us what you found. Did you yourself go on the site?

A. Yes, I did.

Q. And you did some work yourself?

A. Yes, I did. It was a rather complicated survey and I went down myself on it.

Q. Tell His Honor exactly what you found physically when you got there.

A. Insofar as what?

Q. The conditions of the 25-foot strip reserved for future railroad siding.

A. All right. Well, of course, we had to reestablish the boundary lines of that strip in order to subdivide them and it was also necessary for us to establish a part of the Columbia Street right of way that ties into this property. And it was my observation, my recollection of what I did observe at that time, that that area was covered by what looked to me like leftover contractors' materials such as lumber and timber and it seems to me that there were some bulldozers, cranes and other things in there.

Q. Can you tell us, looking at Exhibit A, where
page 134 } they were, roughly?

A. Well, no, sir, because I didn't pay that much attention. I do know that it was fairly well cluttered, the whole area generally was fairly well cluttered with this type of thing because I know we could not run a straight survey line through there because of some of this equipment.

Q. Was it passable for your equipment, vehicularly?

A. Could we go through?

Q. Yes, sir.

A. I don't believe we could. No, sir. In fact, I know we did not, but I can't certify to you that it could not be enough—done maybe by enough turning and maneuvering, but it certainly was not any thoroughfare there.

Q. And did you make the survey?
A. Yes, sir.
Q. Can you tell me from Exhibit P-4 how far west the 25-foot strip reserved for future railroad siding goes? How far west does it go from the western corner or western side of Third Avenue?
A. 190 feet.
Q. 190 feet. Looking at the same plat, can you tell me how far from that same corner of Third Avenue and
page 135 } the 25-foot strip it is to Fourth Avenue?
A. Well, I can tell you—no. Let's see. I can tell—yes, I can tell you. Let's see. 292 feet. I will check that. (Witness again looking at plat) 292; 292 feet is the distance between Third Avenue and Fourth Avenue.
Q. Did you make a plat? May I see the plat you made?
A. (Witness handing to Mr. Oast)

Mr. Oast: Would you like to look at this? (Handing to Mr. West, who examined it.)

By Mr. Oast:
Q. Mr. Hassell, would you take a pencil and mark on this plat that you made showing us where the 25-foot strip ends west of Third Avenue, if you can?

Mr. West: Now, Your Honor, if this is being done for the benefit of the Court, I object to it. It is not in evidence. You haven't offered that as an exhibit.
Mr. Oast: I am going to offer it in just a minute. Well, I will offer it.
Mr. West: I object to any testimony until the plat gets in.
Mr. Oast: I will offer it.
Mr. West: We object to this exhibit, Your
page 136 } Honor. This appears to be a plat that was made in July of 1964. I don't see what possible bearing it could have on the property in question here. It covers the strip and the property to the rear of it. I don't see where it has any relevancy to the issues here.
The Court: Well, the witness is a surveyor. He has testified that he made the plat. Now, the only thing I can do at this point is to mark it D-1 and see what is going to happen to the plat.
Mr. West: I think you are entirely correct, Your Honor.
The Court: Let's see what happens to it.

Mr. West: We save the point.
The Court: I am just identifying it.

(The plat in question was marked D-1 for the defendants.)

By Mr. Oast:
Q. Make an X.
A. It is 190 feet west of the western right of way of Third Avenue.
Q. All right.

Mr. Oast: Can we agree that Yorktown used page 137 } to be Fourth Avenue?

(At this point there was an off-the-record discussion, after which the following occurred:)

Mr. West: Yes, sir, I think we can agree.

By Mr. Oast:
Q. You yourself surveyed this?
A. Yes, sir.
Q. All right; answer Mr. West.

Mr. West: No questions, Your Honor. There has been no testimony here that makes that material to this controversy that I can see.

By The Court:
Q. Mr. Hassell, from what sources did you gather the information on which you based your plat?
A. Well, actually from two sources, Your Honor. There were two plats that I had the prints of, both of which are recorded in the Clerk's office, and one of them, of course, is this photostat which you have here, this plat.
Q. You are now referring to—
A. —Exhibit P-4.
Q. That is the one you referred to?
A. Yes, sir. And then I had another plat which page 138 } I don't know whether it has ever been admitted to evidence. I have it with me here. That was prepared by the Seaboard Air Line Railroad, which showed the property that was conveyed to Mr. Smith and is also of record in the Clerk's office, and this was the other source of information we had.

Q. Where is that recorded in the Clerk's office?
A. It is recorded, Map Book 4 at Page 85.
Q. Map Book 4, Page 85. That is in which court?
A. Well, it is this court.
Q. In this one?
A. Yes, sir.

Mr. Oast: Court of Hustings.

A. And I keep using that word "Circuit"—Circuit—County Court.

By The Court:
Q. And also referred to—
A. —Exhibit P-4.
Q. —Exhibit P-4. All right.

The Court: If he referred to those two plats and this is made on the basis of those two plats—

page 139 } The Witness: That is correct. As a matter of fact there is no change in boundary lines insofar as my plat is concerned; simply a matter of dividing property shown on plats that are—one of the plats which you have before you.

The Court: It will be admitted.
Mr. West: Exception.

CROSS EXAMINATION

By Mr. West:
Q. And you didn't do anything to establish these boundary lines? You accepted them as you found them?
A. I reestablished them on the ground—
Q. Right.
A. —using the plats of record.
Q. You used the plats of record?
A. That is correct.
Q. And located the points on the ground?
A. That is correct.
Q. But did not verify the legality of any rights of way, did you?
A. Well, no. All I had was the deed and the plats. I had the deeds of the property.

page 140 } By The Court:

Q. There is nothing shown on the plat that you made that varies from the two plats that are of record to which you have referred?

A. Well, other than description of—for example, I think this plat, the photostat P-4 exhibit, refers to a 25-foot strip reserved for railroad siding. Well, of course we don't use that language. We have actually subdivided that strip of land and have titled it Lot 1-A, 2-A and 3-A.

Q. 1-A, 2-A and 3-A are referred to on Exhibit P-4 as right of way reserved for railroad?

A. That is correct.

The Court: That verifies it in my mind.

Mr. West: Your Honor, without waiving our exception to the admission of this exhibit we would like to ask a couple of questions from it.

By Mr. West:

Q. I believe you have shown here on the plat, Exhibit D-1, that you have made a chain link fence to the south of this area you have subdivided, is that correct, sir?

A. Yes, sir.

Q. And what kind of boundary is there over here on Yorktown or Fourth Street? Is that an open way?

A. No, sir.

page 141 } Q. Then—

A. Well, a part of it is. I mean a part of it is open. It seems to me there is a building sits in here, partly on this Yorktown.

Q. You would not be able to get back in this area that you designated as 3 through Yorktown?

A. Well, by using offsets you could, yes, sir.

Q. You would have to go over somebody's private property, wouldn't you?

A. Well, you would have to offset either in the street or over on this property or over on this property. (The witness was indicating)

Q. Do you know who owns this property?

A. Do I know who owns this property?

Q. Yes, sir.

A. I can tell you. I can't cite you right offhand. I have got that information, I think. I believe that is the plat right here (referring to a plat handed him at this point by Mr. Oast).

Q. That is the piece that—

A. Mr. Duke, I believe, is the one and Roland Hart, I believe. Duke, I believe, is the one that owns this property right in here.

Q. All right. And Mr. Duke had a building built

page 142 } right across this street?

A. That is right, in that street.

Q. So to get back here to Lot 3, you would have to cut across the corner of the property that is shown as C. L. Taylor's on Exhibit A, wouldn't you?

A. You wouldn't have to but that would be certainly logic to.

Q. How—

A. You can survey down the Seaboard Air Line, come up Third Avenue and—or come up Williamsburg Avenue, get to it.

Q. There is a fence across the end of Columbia Street?

A. There was no fence there at the time I made that survey.

Q. There was no—

A. No, sir.

Q. There is a fence there now?

A. That is right.

Q. There has been a fence somewhere along this 25-foot strip here behind the Pinkston property for some time, hasn't there?

A. I can't—I don't know. I know there is fences there now. I don't recall whether there was a fence there at that time or not. This is a subdivision of Goshen right

page 143 } here, which we had to use in order to establish this boundary line, which is the old creek bed there.

Mr. West: That is all.

Mr. Oast: You may be excused as far as I am concerned.

The Court: Do you need Mr. Hassell any further?

(As the witness was leaving the following occurred:)

By Mr. West:

Q. Wait a minute, Ray. Let me ask you this right where you are, before you go. On the plats that you used as a basis for your work, the property now owned by Mr. Miniard, formerly owned by Mr. C. L. Taylor, didn't show on either of those plats, did it?

T. Ray Hassell

A. I will have to examine my plats to see whether that is —to see what name did show. We have—just my way of explanation to that—we have a right extensive file of many of the plats that are recorded in Portsmouth and Chesapeake, and as a result of using them from time to time we put penciled notations on them, which do not appear, of course, in the record. Such is the case here.

Q. That is right.

page 144 } A. And it so happens I had the name Clarence L. Taylor and Roland B. Hart noted in that general area that you asked me about.

Q. But you testified that you went by the recorded plat as shown here on Exhibit P-4?

A. That is correct.

Q. That recorded plat does not show Mr. Miniard's property and the Taylor property?

A. No, sir. This plat, you see I have added this in with pencil here.

Q. All right. Wait just a minute. You have also testified you went by this P-4 plat and by a Seaboard Air Line plat—

A. That is right.

Q. —that you had in your file that was recorded and that Seaboard Air Line plat that you have referred to does not show the Taylor-Miniard property, does it?

A. No, sir.

Mr. West: That is all.

RE-DIRECT EXAMINATION

By Mr. Oast:

Q. Does it show that the building owned by Mr. Duke is in the middle of Yorktown or Fourth Avenue?

page 145 } A. No, sir.

Q. Is it in the middle of the street?

A. I can't say it is in the middle of the street. It is in the street, I will say that to you.

Q. Does it block Fourth Avenue?

A. Well, that is as far as you can drive when you get to Mr. Lee Duke's front door.

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

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