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Record No. 7121

In the Supreme Court of Appeals of Virginia at Richmond

J. MURPHY THOMPSON, ET AL.

v.

SHAW REAL ESTATE, INC., ET AL.

FROM THE CIRCUIT COURT OF KING GEORGE COUNTY

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. 7121

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 December, 1968.

J. MURPHY THOMPSON, NEWELL THOMPSON AND EARL THOMPSON, Plaintiffs in error,

against

SHAW REAL ESTATE, INC.; HOMER A. BACAS, TRUSTEE; HOMER A. BACAS, INDIVIDUALLY; AND HOMER A. BACAS, T/A THE BACAS COMPANY; Defendants in error.

From the Circuit Court of King George County
S. Bernard Coleman, Judge

Upon the petition of J. Murphy Thompson, Newell Thompson and Earl Thompson, a writ of error is awarded them to a judgment rendered by the Circuit Court of King George County on the 17th day of June, 1968, in a certain proceeding then therein depending, wherein the said petitioners were plaintiffs and Shaw Real Estate, Inc., and others were defendants; upon the petitioners, or some one for them, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of $300, with condition as the law directs.

* * * * *

RECORD

* * * * *

MOTION FOR DECLARATORY JUDGMENT AND COERCIVE RELIEF

To:
Shaw Real Estate, Inc.
c/o Ronald L. Walutes
Registered Agent
718 Jefferson Street
Alexandria, Virginia

Homer A. Bacas, Trustee
121 S. Washington Street (Lee Highway)
Falls Church, Virginia

Homer A. Bacas
121 S. Washington Street (Lee Highway)
Falls Church, Virginia

Homer A. Bacas, T/A
The Bacas Company
121 S. Washington Street (Lee Highway)
Falls Church, Virginia

1. We, J. Murphy Thompson, Newell Thompson and Earl Thompson, hereby move the Circuit Court of King George County, Virginia for a declaratory judgment and
page 2 } coercive relief in the form of a judgment against Shaw Real Estate, Inc., Homer A. Bacas, Trustee, Homer A. Bacas and Homer A. Bacas, T/A The Bacas Company, jointly and severally. The declaratory judgment is *sort* under the declaratory judgment statutes made and provided and existing in and for the State of Virginia. The grounds of such relief being set out as follows, to-wit:

2. That the plaintiffs, J. Murphy Thompson, Newell Thompson and Earl Thompson, are the owners in fee simple of the following real estate:

(a) All that tract or parcel of land, containing an area of 405 acres, more or less, lying and being in the Potomac Magisterial District, King George County, Virginia that

was conveyed to the plaintiffs by Page Kirk, widow, by deed dated the 1st day of May, 1956 and duly recorded among the land records of King George County, Virginia in Deed Book 68 at page 499.

(b) All that tract or parcel of land, containing an area of 14.48 acres, more or less, lying and being in the Potomac Magisterial District, King George County, Virginia that was conveyed to J. Murphy Thompson (as J. M. Thompson), Newell Thompson and Earl Thompson, by Albert H. Grenadier, Special Commissioner, by deed dated the 27th day of June, 1957 and duly recorded among the land records of King George County, Virginia in Deed Book 71 at page 269.

3. That by sales contract dated the 4th day of November, 1966 the plaintiffs contracted to sell the above described real estate to Homer A. Bacas, Trustee, or his assigns, for $300,000.00, on terms set forth in the sales contract. Homer A. Bacas, Trustee, on execution of the said sales contract, and as provided in said contract, paid to the defendant, Shaw Real Estate, Inc., who was the real estate broker in this transaction, the sum of Ten Thousand Dollars, ($10,000.00). The contract was ratified by all parties on the 14th day of November, 1966 and the said contract provided for closing within 120 days and further provided that if the purchaser failed to make settlement within 120 days the deposit of $10,000.00 should be forfeited. A photostatic copy of the sales contract is filed herewith, made a part hereof by reference and marked Exhibit "A".

page 3 } 4. The said purchaser, Homer A. Bacas, Trustee, did not make settlement and close, and was not prepared to make settlement and close within the 120 day period provided in the contract of November 4, 1966 and the said Homer A. Bacas, Trustee, requested and obtained from the plaintiffs in this matter an extension of time for 30 days. A photostatic copy of the unexecuted copy of the 30 days extension which was dated March 13, 1967 is filed herewith made a part hereof by reference and marked Exhibit "B".

5. The purchaser, Homer A. Bacas, Trustee did not make settlement and close and was not prepared to make settlement and close within the 30 days extension granted to him by the plaintiffs by instrument dated March 13, 1967 and filed herewith as Exhibit "B".

6. On April 12, 1967, the said Homer A. Bacas, Trustee, requested of the plaintiffs and additional extension of 60 days. The request of April 12, 1967, for the said 60 days extension was in the form of a letter addressed to Mr. Earl

Thompson, et al from Homer A. Bacas, Trustee, written on stationery of the defendant, The Bacas Company. A copy of said letter was sent to the defendant, Shaw Real Estate, Inc. At the end of said letter was a space for the plaintiff Earl Thompson to sign, for himself and the other plaintiffs, to indicate approval of and granting of the requested 60 day extension. The plaintiff, Earl Thompson, for himself and the other plaintiffs, and with the approval of the other plaintiffs who are his father and brother, signed in the designated place at the end of the said letter and granted the requested 60 day extension, which was an extension to June 12, 1967 to permit the defendant, Homer A. Bacas, Trustee, to purchase the said property. As consideration for the 60 day extension to June 12, 1967, the defendant Homer A. Bacas, Trustee, agreed to put up an additional $5,000.00 deposit on the contract, all of which was to go to the plaintiffs in the event of a forfeiture; also, Homer A. Bacas, Trustee agreed not to ask for an additional extension and agreed that in the event settlement did not occur on or before June 12, 1967, then, and in that event his deposits to the contract shall be forfeited, and the contract considered null and void and no longer in effect. A photostatic page 4 } copy of said agreement of April 12, 1967, is filed herewith, made a part hereof by reference and marked Exhibit "C".

7. The purchaser did not make settlement on or before June 12, 1967, nor make any explanation to the plaintiffs for his failure so to do.

8. On June 12, 1967 the plaintiffs, by counsel, made demand on Shaw Real Estate, Inc. through its counsel, for the sum of $10,000.00, being one-half of the original deposit made by Homer A. Bacas, Trustee and all of the second deposit Homer A. Bacas, Trustee agreed to put up in his said letter of April 12, 1967. It having been previously agreed between the plaintiffs and the defendant Shaw Real Estate, Inc. that in the event of a forfeiture the plaintiffs would receive one-half of the original deposit of $10,000.00 and Shaw Real Estate, Inc. would receive one-half of the original deposit of $10,000.00. Homer A. Bacas, Trustee by letter of July 31, 1967 addressed to the defendant, Shaw Real Estate, Inc. demanded a return of the entire deposit.

9. The plaintiffs allege that the real estate described in Paragraph 2 above is now free of the said contract dated November 4, 1966, the said extension dated March 13, 1967 and the said agreement dated April 12, 1967, and that the

defendant, Homer A. Bacas, Trustee, nor his assigns have now, nor will they have in the future, any right of specific performance as to the said real estate by virtue of the said contract dated November 4, 1966, the extension dated March 13, 1967, or the agreement dated April 12, 1967.

10. The plaintiffs state and allege that they are now entitled to receive from the defendant Shaw Real Estate, Inc., the sum of $10,000.00 from the sums deposited or agreed to be deposited with Shaw Real Estate, Inc. by Homer A. Bacas, Trustee, or if same is not forthcoming that they are entitled to a judgment against Shaw Real Estate, Inc., Homer A. Bacas, Trustee, Homer A. Bacas and Homer A. Bacas, T/A The Bacas Company, jointly and severally, for the sum of $10,000.00, plus interest from June 12, 1967, plus the cost of this action.

11. That the defendant Homer A. Bacas does business under the name of and trades as the defendant, The Bacas Company and as Homer A. Bacas, Trustee and is in this case liable in all three capacities.

page 5 } 12. That the defendant, Shaw Real Estate, Inc. is the holder of the $15,000.00 deposit made by Homer A. Bacas, Trustee or should have received the same from Homer A. Bacas, Trustee and is obligated to pay to the plaintiffs the sum of $10,000.00.

13. That an actual controversy exists between the plaintiffs and the defendants.

14. That the actual controversy existing leads to the duties and obligations of the parties in the future as well as the past due and accrued obligations.

Wherefore the plaintiffs, J. Murphy Thompson, Newell Thompson and Earl Thompson move this court for a declaratory judgment to establish the rights of the parties hereto in the real estate above described and under the contract dated November 4, 1966, the extension dated March 13, 1967 and the agreement dated April 12, 1967, and the plaintiffs hereto further move this court for a judgment against Shaw Real Estate, Inc., Homer A. Bacas, Trustee, Homer A. Bacas, and Homer A. Bacas, T/A The Bacas Company, jointly and severally, for the sum of Ten Thousand Dollars, ($10,000.00) plus interest from the 12th day of June, 1967, plus costs.

J. Murphy Thompson
Newell Thompson
Earl Thompson

By Jos. A. Billingsley, Jr.
Counsel

Filed in the Clerk's Office the 11th day of August, 1967.
Teste:

V. Elwood Mason, Clerk
by Ellamae H. Clare, C.D.C.

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* * * * *

ANSWER

COMES NOW the Defendant Shaw Real Estate, Inc., by and through its undersigned attorney, and in response to the allegations of the Motion for Declaratory Judgment and Coercive Relief heretofore filed herein, states as follows:

1) Defendant Shaw Real Estate, Inc. neither admits nor denies the allegations contained in paragraph 2; having no knowledge thereof.

2) Defendant Shaw Real Estate, Inc. admits the allegatons contained in paragraph 3 of the Motion.

3) Defendant admits that the said purchaser, Homer A. Bacas, Trustee, did not make settlement and close; but neither admits nor denies that the said Homer A. Bacas was not prepared to make settlement and close within the 120 day period provided in the contract of November 4, 1966; having no knowledge thereof. Defendant admits that an extension was requested and obtained; as set forth in paragraph 4 of the Motion.

4) Defendnat admits the allegation contained in paragraph 5, that the purchaser Homer A. Bacas, Trustee did not make settlement and close and neither admits nor denies that said Homer A. Bacas was not prepared to make settlement and close; having no knowledge thereof.

5) Defendant admits receipt of a copy of the letter of April 12, 1967, requesting an extension; defendant neither admits nor denies as to whether Earl Thompson signed for himself and with the approval of the other plaintiffs; having no knowledge thereof; and further state in answer to paragraph 6 that the original contract contained cer-
page 17 } tain contingencies and conditions to be met before the defendants were obigated to make settle-

ment.

6) Defendant admits that settlement was not made on or before June 12, 1967; and in further answer to allegations contained in paragraph 7, states that by letter dated July 31, 1967, from Homer A. Bacas, Trustee, Defendant Shaw Real Estate, Inc. was informed of the reason why the settlement was not had on or before June 12, 1967; a copy of which letter is attached hereto as Exhibit A, and made a part hereof.

7) As to the allegations contained in paragraph 8, defendant denies that demand was made on June 12, 1967, but rather, states that demand was made on July 12, 1967.

8) Defendant neither admits nor denies the allegations contained in paragraph 9; having no knowledge thereof.

9) Defendant denies each and every allegation contained in paragraph 10.

10) Defendant neither admits nor denies the allegations contained in paragraph 11; having no knowledge thereof.

11) Defendant admits the allegation contained in paragraph 12 that it is the holder of the $15,000.00 deposit made by Homer A. Bacas, Trustee; but defendant denies being obligated to pay to the plaintiffs the sum of $10,000.00.

12) Defendant denies each and every allegation contained in paragraph 13.

13) Defendant denies each and every allegation contained in paragraph 14.

WHEREFORE, defendant prays that this case be dismissed, and that the Court order the parties to enter into a release agreement.

Taylor & Clemente
Attorneys for Defendant Shaw Real Estate, Inc.
5850 Leesburg Pike
Falls Church, Virginia

By Charles Edward Taylor

* * * * *

Filed Sept. 7, 1967, V. E. Mason, Clerk.

* * * * *

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* * * * *

GROUNDS OF DEFENSE

NOW COME, the Defendants, Homer A. Bacas, Trustee, Homer A. Bacas and Homer A. Bacas T/A The Bacas Company, only, by Counsel and in answer to and as Grounds of Defense to the Motion for Declaratory Judgment and Coercive Relief heretofore filed against them in this court, respectfully shows to said Court as follows:

1. In answer to paragraph one, of the said Motion hereinabove referred to, your said Defendants deny the allegations of said paragraph one, and by way of fur-
page 22 } ther answering said paragraph one, allege that Homer A. Bacas individually and Homer A. Bacas, t/a The Bacas Company are not proper parties to said suit and should accordingly be dismissed therefrom and further allege, for the reasons and allegations hereinafter set forth in Count II of the answer that the relief sought by the Plaintiffs is not proper and/or in conformance with the existing statutes in the State of Virginia in such cases made and provided.

2. Your Defendants admit that the Plaintiffs, as designated in said paragraph two are the owners in fee simple of the tracts of land as described under sub-paragraphs (a & (b of said paragraph two in accordance with the description as set forth for said tracts among the land records of King George County, Virginia, but by way of further answering said paragraph two, your said defendants allege that there are exceptions under the descriptions of the land owned in fee simple which vitiate and void any contract between the parties, the details of which are hereinafter set forth in paragraph seventeen of this answer.

3. Your said Defendants deny the allegations of paragraph three in the manner and form alleged and in any event, state that the original of the contract is the best evedence of the terms and conditions thereof, reference in this connection being made to the Plaintiffs exhibit "A" attached to the said pleadings of the Plaintiffs.

4. Your Defendants deny the allegations of paragraph four, of the Plaintiffs pleading and by way of
page 23 } further answering said paragraph four, state that Exhibit "B", is unexecuted and should

accordingly be stricken from the pleadings on the grounds that it is irrelevant and immaterial in its present form and in violation of the Statute of Frauds.

5. Your Defendants for the reasons above stated deny the allegations of said paragraph five.

6. Your Defendants deny the allegations of paragraph six in the manner and form alleged and by way of further answering said paragraph six, state that in any event, your Defendants executed said extension agreement upon a misrepresentation in the inducement to execute said contract on the part of the Plaintiffs and accordingly the extension agreement is null and void and the terms thereof immaterial for the reasons hereinafter set forth in paragraph seventeen of this answer.

7. Your Defendants admit that they did not effect settlement on or before June 7, 1967, but categorically deny that they failed to explain to the Plaintiffs the reason for failure to do so, and further allege that failure to effect such settlement was entirely due to the conduct of the Plaintiffs.

8. For lack of sufficient information your Defendants can neither admit nor deny whether or not demand was made on Shaw Real Estate, Inc., through its counsel for the sum of $10,000.00 as alleged in paragraph eight of the Plaintiffs pleadings. By way of further answering said paragraph eight your Defendant Homer A. Bacas, Trustee, admits that by letter dated July 31, 1967, addressed to the Defendant, Shaw Real Estate, Inc., demand was made for the

page 24 } return of the entire deposit as alleged in paragraph eight.

9. Your Defendants state that the allegations of paragraph nine are merely a conclusion of law, by the Plaintiffs and accordingly require no answer of these defendants but nevertheless further state that they are willing to stipulate that they will not attempt to exercise any rights they may have to specific performance of the contract and/or alleged agreements set forth in said paragraph nine.

10. Your Defendants in answer to the allegations of paragraph ten on their behalf only, deny that they are indebted to the Plaintiff in any amount whatsoever as alleged in paragraph ten of the Plaintiffs pleadings and further state that paragraph ten likewise is a conclusion of law and a unilateral predetermination of fact prior to any hearing of the cause, but in any event, your said Defendants categorically deny the allegations set forth in paragraph ten as to said Defendants only.

11. Your Defendants admit that Homer A. Bacas does business under the name of and trades as the Defendant, The Bacas Company, and as Homer A. Bacas, Trustee in real estate transactions, but categorically denies that the said Defendants are liable in all three of these capacities as alleged in paragraph eleven and by way of further answering said paragraph eleven, allege that the contract itself for the sale of the realty involved and all of the allegations of the Motion for Declaratory Judgment and Coercive Relief so heretofore filed against said Defendants in

page 25 } no way contain any allegations nor sets forth any facts upon which the Defendants, Homer A. Bacas, individually and/or The Bacas Company are proper defendants in this cause, and that the only proper party thereto is Homer A. Bacas, Trustee who executed said contract and accordingly said Defendants Homer A. Bacas, and Homer A. Bacas t/a The Bacas Company should be dismissed as Defendants hereto and further that paragraph eleven is likewise a mere conclusion of law and should likewise be stricken from the Plaintiffs pleadings.

12. Your Defendants deny the allegations of paragraph twelve in the manner and form alleged and further state that the allegations in said paragraph twelve are redundant in that the allegations of said paragraph twelve state that Homer A. Bacas, Trustee is the only party obligated to pay the Plaintiff the sum sued for, whereas, in paragraph eleven immediately preceding the allegation is made that the several defendants answering this pleading were jointly and severally liable.

13. Your Defendants admit that an actual controversy exists as to the issue of facts which are determinative of the issues involved, but denies that any construction or interpretation of law of the rights status and/or relief prayed for exists in this cause.

14. Your Defendants state that the allegations of paragraph fourteen are so indefinite and lacking in detail as to make proper answer thereto impossible, but in any event, your defendants assert the same allegations as hereinabove in paragraph thirteen set forth, to wit, that any controversy which may exist involves issues of fact and not construction of the instruments.

page 26 } 15. Your Defendants allege that the prayer of relief is redundant in that in the rights of the parties and any damage or wrongs that may have been suffered by either of them under the facts of this cause have

already been incurred or suffered, and accordingly the customary processes of this court should be adopted are ample and adequate and not supplanted in lieu of the pleadings filed herein against them by the Plaintiffs, and that the Plaintiffs not only seek relief under a Motion for Declaratory Judgment but in such prayer for relief asks this court to render ancillary relief in a liquidated amount, contrary to the interest and purpose of said statute which is essential preventative relief.

16. By way of further answering the entire motion for Declaratory Judgment and as a further Grounds of Defense thereto the Defendant Homer A. Bacas, Trustee by letter dated July 31, 1967, copy of which is attached hereto marked Defendants Exhibit "A", advised the Plaintiffs that the purchasers were exercising their option to declare the contract null and void for the reasons specifically stated therein and by reference hereby made a part hereof.

17. Your Defendants further allege that there was misrepresentation in the inducement to enter into the contract sued upon by the Plaintiffs, and that they were fully aware of the intentions of the purchasers as to the development and proper use of the real estate hereinabove referred to and failed to advise the purchasers of the existence of the easement rights which completely rendered the property unusable for such purposes, reference in this connection page 27 } being made to the paragraph in the contract of sale attached as an exhibit to the Plaintiffs pleading entitled "Title", the terms of which are selfexplanatory and speak for themselves and by reference are hereby made a part of this answer.

Now having stated their Grounds of Defense the Defendant moves this honorable court to dismiss the Motion for Declaratory Judgment and Coercive Relief with reasonable cost to them in this behalf expended.

Homer A. Bacas, Trustee
Homer A. Bacas
Homer A. Bacas, T/A
The Bacas Company

By: Homer A. Bacas

* * * * *

Filed Oct. 14, 1967, V. E. Mason, Clerk.

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MEMORANDUM

Plaintiffs entered into a contract with Defendant, Bacas, whereby Plaintiffs contracted to sell and Defendant contracted to buy a tract of land in King George County for a consideration of $260,000.00. The contract was executed November 14, 1966, and extended 120 days for settlement. Pursuant to the terms of the contract the proposed purchaser deposited $10,000.00 with Shaw Real Estates, Inc., agent, to be applied on the purchased price. By letter of March 13, 1967, the Plaintiff confirmed an oral agreement extending the time for settlement for an additional thirty days. By agreement in letter form, of April 12, 1967, the settlement date was further extended for sixty days. This letter provided, that if settlement was not made in the stated period, Plaintiffs would forfeit the deposit of 10,000.00.

Settlement was not accomplished within the time specified and by letter of July 31, 1967, the Defendant, Bacas, notified Defendants, Shaw Real Estate, Inc., that he would not go further with the contract due to the discovery of the terms of a recorded power transmission line easement in favor of the property, and requested refund of the $10,000.00 deposit.

The clause in the sales contract, referred to in this letter, is as follows:

page 34 } "TITLE: The property is sold free of encumbrances except as aforsaid; title is to be good of record and in fact, fully insurable by a title company of purchasers' selection, and mercantible; the property covered by this contract, shall be subject to no easements, covenants, conditions or restrictions, recorded or unrecorded as could, in purchasers' judgment in any manor whatsoever affect or interfere with the development and/or use of the same under existing and applicable building regulations.

The easement to which the Defendant, Bacas, objects is set forth in a deed and plat attached and recorded in deed book 43 at page 179 of the land records of King George County and was admitted in evidence by reference. A copy

of this deed is attached to this memorandum and made a part hereof.

Plaintiff takes the position that the power line across the property was open and obvious, and observed by the Defendant, Bacas, before entering into the contract and that the easement for the line is not an encumbrance covered by a covenant against encumbrances, See: *Jordan* v. *Eive,* 31 *Gratt* 1; *Sachs* v. *Owning,* 121 *Va.* 162, 92 SE. 997; *Riner* v. *Lester,* 121 Va. 563, 93 SE 594.

The Defendant, Bacas, contends that the rule announced by the court in *Jordan* v. *Eive, supra; Sachs* v. *Owning, supra,* and *Riner* v. *Lester, supra, is* not controlling here because the extent and dimensions of the easement were not observable from a visual inspection of the line itself, and because the covenant contained in the contract in issue is not the usual *"Covenant against encumbrances,"* but is specific as to any easement which in the judgment of the purchaser would interfere with the development or use of the land under existing zoning and applicable building regulations. See: *Luce* v. *Kayton,* 84 Va. 217 SE 377; *Adams* v. *Sigman,* 191 Va. 372, 61 SE 2d 23.

The court finds from the evidence:

(1) That power line easement is not a service line for the benefit of the property in question, but is a line
page 35 } which transgresses the property to serve others.

(2) That the Defendant, Bacas, had visual and actual knowledge of the power line prior to entering into the sale contract.

(3) That the dimensions and extent of the easement held by the Virginia Electric and Power Company could not have been ascertained from a visual inspection of the power line on the property.

(4) That the dimensions of the easement cannot be ascertained from the recorded deed of easement.

(5) That this easement would seriously interfere with the proposed development and use of the property.

(6) That the easement of the Power Company was not considered by either the seller or the purchaser in arriving at a sale price for the property.

(7) That the Plaintiffs did not know either the dimensions or the extent of the easement.

The question presented is whether, under the facts as found by the court from the evidence, precludes the Defendant, Bacas, from invoking the covenant against encumbrances, expressly specifying easements, in the sales con-

tract, as a defense to the Plaintiffs motion for judgment to recover the $10,000.00 deposit.

The power line here, while obvious to visual inspection, does not convey information of the companys right to unlimited erection of lines and poles on the easement granted. From visual inspection one could not be informed that the company could permit use of the easement to other utility companies. Actually one could not be informed either, by visual inspection or by reading the deed, the width of the easement.

I am of the opinion, that in order for the rule, as announced in *Jordan* v. *Eive, supra,* to apply the full extent of the encumbrance must be apparent to observa-
page 36 } tion. This is not true under the facts of this case.

Here the extent of the easement rights of the Power Company can neither be determined from observation nor from the deed itself. Also, it is to be remembered that the covenant in the sales contract under consideration is both express and explicit and is not to be ignored.

This Court is of the opinion, that the Power Company easement here does not fall within the rule of the "open and obvious" encumbrance, but does fall within that class of cases which hold that a grantee may rely for protection on the covenants in his contract, even though he had constructive or actual notice of the encumbrance. Knowledge of the existences of an outstanding encumbrance may be the very reason for insisting on a covenant against it. See: *Adams* v. *Sigman, supra,* at Va. P 380 and cases there cited.

The court concludes that the Defendant, Bacas, is not precluded from the protection of the covenant in the contract.

The Plaintiff further contends, that by the extention agreements of March 13th and April 12th, 1967, the agreement between the parties was modified and covenant in issue was waived.

These documents do nothing more than extend the time of settlement under the terms and conditions of the original contract. It is also provided that if settlement is not made on or before June 12, 1967, the deposit should be forfeited and the contract stand null and void.

The question here, is whether the Thompsons could have conveyed the property to meet the terms and conditions of the sales contract on June 12, 1967. If they were unable to do so they would not be entitled to the forfeiture provision for they, and not Bacas, would have been unable to comply with the terms of the contract.

page 37 } Certainly the Thompson's could not have conveyed the property free of encumbrances and expressly free of easements as provided for in the contract and therefore, they were unable to comply with the terms of their contract.

The Court is of the opinion:

(1) That under the facts of this case the Plaintiffs are not entitled to receive the deposit now held by Shaw Real Estate, Inc.

(2) That the sales contract of November 9, 1966, and the extention thereof of March 13th and April 12th, 1967, is of no further force or effect and shall not be considered an encumbrance or the real estate described therein.

S. Bernard Coleman
Judge

April 12, 1968

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* * * * *

ORDER

This case came on to be heard on the evidence transcribed and upon argument of counsel.

It is ordered that under the facts of the case the plaintiffs are not entitled to receive the $5,000.00 deposit deposited by Homer A Bacas, Trustee, with Shaw Real Estate, Inc. on the date of the original contract, nor are the plaintiffs entitled to receive the $5,000.00 deposit referred to in the instrument dated April 12, 1967.

It is ordered that the sales contract of November 9, 1966 and the extension thereof of March 13th and April 12, 1967, is of no further force or effect and shall not be considered an encumbrance on the real estate described therein.

It is further ordered that this matter be and the same hereby is dismissed and stricken from the docket of the court.

The plaintiffs object and except to this order wherein they are denied the $5,000.00 deposit deposited by Homer A. Bacas, Trustee, with Shaw Real Estate, Inc. on the date of the original contract, and wherein they are denied the $5,000.00 deposit referred to in the instrument dated

April 12, 1967 on the grounds that the same is contrary to the law and evidence and without evidence to support it, and for the reasons stated in oral argument before the court; and for the further reason that this order does
page 39 } not provide for the payment to the plaintiffs of the sum of $5,000.00 which was the consideration for the extension of April 12, 1967.

Enter: S. Bernard Coleman, Judge, June 17, 1968.

* * * * *

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* * * * *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

To: V. Elwood Mason, Clerk of the Circuit Court of King George County, Clerk's Office, King George, Virginia

Notice is hereby given that the plaintiffs, J. Murphy Thompson, Newell Thompson and Earl Thompson, appeal from a final judgment rendered by this Court on the 17th day of June, 1968, and announce their intention of applying for a Writ of Error and *Supersedeas* to the Supreme Court of Appeals of Virginia.

ASSIGNMENTS OF ERROR

1. That the judgment entered against the plaintiffs is contrary to the law and the evidence in this case.

2. That the trial court erred in holding that the plaintiffs were not entitled to one-half of the $10,000.00 deposit, (in the amount of $5,000.00) deposited by Homer A. Bacas, trustee, with Shaw Real Estate, Inc. on the 4th day of November, 1966, the date of the original contract.

3. That the trial court erred in holding that the plaintiffs were not entitled to recover the $5,000.00 deposit referred to in the instrument dated April 12, 1967.

page 45 } 4. That the trial court erred in holding that the agreement dated April 12, 1967 was not a revision of the agreements theretobefore entered into and that the plaintiffs were not entitled to recover the sum of $10,000.00 from the defendants.

Homer A. Bacas

5. That the trial court erred in holding that the $5,000.00 deposit referred to in the instrument dated April 12, 1967 was not consideration for that agreement which should be recovered by the plaintiffs.

Given under my hand this 15th day of July, 1968.

J. Murphy Thompson
Newell Thompson
Earl Thompson

By Jos. A. Billingsley, Jr.
Counsel

* * * * *

Filed July 15, 1968, V. E. Mason, Clerk.

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* * * * *

HOMER A. BACAS, called as an adverse witness, first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Billingsley:

Q. Now, you are Mr. Homer A. Bacas?

page 5 } A. Right, sir.

Q. You are the Homer A. Bacas who is Homer A. Bacas, Trustee, of the party to the contract which is Exhibit A in the pleadings. Have you seen a copy of this contract?

A. I think so, yes, sir.

Q. At the time that contract was executed back in November of 1966, you deposited $10,000.00 with the Shaw Real Estate firm in Alexandria, is that correct?

A. I gave them a $10,000.00 check.

Q. You gave it to Shaw Realty?

A. (Indicating in the affirmative).

Q. Before you signed this contract you went on this property, isn't this correct?

A. Yes, sir.

Q. And you went all over the property?

Homer A. Bacas

A. (Indicating in the affirmative).
Q. You went down to the river?
A. Yes, sir.
Q. You examined the property?
A. I walked the property and looked at the property.
Q. This contract calls for 120 days in which to close, this original contract?
A. I think so.
Q. Near the end of that time in March of '67, March 13, you obtained a 30 day extension, isn't that correct?
page 6 } A. Yes, sir.
Q. From the Thompsons?
A. Yes, sir.
Q. At the end of that 30 day extension you did not close?
A. No, sir.
Q. You then went to see Mr. Earl Thompson and sought an additional extension of time, isn't that correct?
A. Yes, sir.
Q. At that time you and Mr. Thompson entered into this agreement?
A. (Observing agreement) I think that looks like the same one, yes, sir.
Q. This handwriting part, you initialed that?
A. Yes, I think so.
Q. Mr. Thompson initialed right under it?
A. I don't know if he did or not.
Q. Well, you initialed it anyhow?
A. I initialed it, yes, sir.
Q. You signed it here?
A. Yes, sir.
Q. Of course, this is Mr. Thompson's signature?
A. I don't know that.
Q. You don't know that. Mr. Robert Wright was with Shaw Realty, he was the broker?
page 7 } A. Yes, sir.

Mr. Billingsley: We offer this as an exhibit.
Mr. McGinnis: We have no objection, Your Honor.
The Court: Very well.
Mr. Billingsley: It's the same as Exhibit C. Filed as the same.
The Court: The agreement dated April 12, 1967 between

Mr. Earl Thompson and others will be admitted and identified as Plaintiff's Exhibit No. 1.

Note: The above-referred-to agreement dated April 12, 1967 was marked and filed as Plaintiff's Exhibit No. 1.

Q. Mr. Bacas, you as Mr. Bacas or as Homer A. Bacas, Trustee, when this agreement was entered into, that last one I just put in evidence, put up $5,000.00 with Shaw Realty as provided in that agreement, isn't that correct?
A. No, sir, I didn't.
Q. You agreed to put up $5,000.00?
A. Yes, sir.
Q. You agreed to put it up?
A. Yes, sir.
Q. Did you put it up with Shaw Realty?
page 8 } A. No, sir.
Q. You never put that $5,000.00 up?
A. No.
Q. But you admit you agreed to do it?
A. Yes, sir.

Mr. Billingsley: That's all I wanted to ask him.
Mr. McGinnis: I reserve cross examination, Your Honor.
The Court: All right.

Witness stood aside.

EARL THOMPSON, a Plaintiff, first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Billingsley:
Q. Please state your name, residence and occupation.
A. Earl Thompson, Huntington, Maryland, lumberman.
Q. Mr. Thompson, is J. Murphy Thompson any relationship to you?
A. He's my father.
page 9 } Q. Is he sitting here at the end?
A. Yes, sir.
Q. Mr. Newell Thompson, is he any relation to you?
A. Brother.

Earl Thompson

Q. Did you and your father and brother purchase a piece of property on the Potomac River of 405 acres by deed dated the first of May, 1956, which is the subject of this suit?

A. Yes.

Q. The three of you purchased it together?

A. Yes, sir. 405 acres.

Q. Did you later purchase another piece of property from Mr. Albert H. Grenadier of 14.48 acres?

A. Yes, sir.

Q. That adjoined the larger tract, is this correct?

A. Yes.

Q. And you and your said brother and father were the owners of this piece of property?

A. That's right.

Q. Was there any deed of trust on it?

A. No.

Q. Now, did the three of you by a sales contract dated November 4, 1966, which is filed in the papers as Exhibit A, enter into a contract to sell that property?

A. Yes, sir.

page 10 } Q. Is that the contract (tendering paper writing)?

A. Yes, sir, that's it.

Q. That was executed by you, your wife, your brother and his wife, and your father and mother?

A. Right.

Q. And the terms of that were to sell it to Mr. Bacas, Homer A. Bacas, Trustee?

A. Yes, sir.

Q. That is the contract as executed and agreed to?

A. That's it.

Mr. Billingsley: Your Honor, we would offer that to be filed in evidence.

Mr. McGinnis: No objection, Your Honor.

The Court: Very well. Admit it and identify it as Plaintiff's Exhibit No. 2.

Note: The above-referred-to contract is marked and filed as Plaintiff's Exhibit No. 2.

* * * * *

Earl Thompson

Q. Now, Mr. Thompson, I believe that contract page 11 } calls for closing within 121 days.

Did the purchaser close, offer to close, within the 120-day period?

A. No, he did not.

Q. Were you contacted prior to the end of the 120-day period for an extension?

A. Yes. He contacted me a day or two before. I don't remember just what day.

Q. I ask you to examine this and ask you if that is the paper that you signed for an extension?

A. Yeah, this is it.

Q. That copy is not signed, but did you sign the original?

A. I signed, yes. I signed a copy like this.

Q. You sent it to Mr. Bacas?

A. Yes.

Q. There is some handwriting on there. How did that get on there?

A. Well, they put that in at the time they gave me an extension. Wasn't any time limit on the letter when they brought it, so he added this in while he was there.

Q. Was that put in at your request, the 30-day extension?

A. Yes.

Q. Did you sign that, you say, for other mem- page 12 } bers of the partnership?

A. Yes, sir, I did.

Q. Who do you mean you signed it for?

A. My brother and father—Newell and my father.

Q. Did you have authority of your father and brother to sign that for them?

A. Yes.

* * * * *

Q. Now, I hand you this signed copy and ask you if that is the one you signed?

A. Yes, that's it.

Q. Whose initials are written where?

A. That is mine and Homer A. Bacas.

Mr. Billingsley: We offer this.

The Court: Any objection?

Mr. McGinnis: No, sir, none whatever, Your page 13 } Honor.

Earl Thompson

The Court: Letter dated March 18, 1967 addressed to Mr. H. A. Bacas will be admitted and identified as Plaintiff's Exhibit No. 3.

Note: The above-referred-to letter dated March 18, 1967 was marked and filed as Plaintiff's Exhibit No. 3.

Q. Now, Mr. Thompson, did Mr. Bacas and Mr. Bacas, as Trustee, settle and close by the end of this 30-day extension given him by your letter of March 13?
A. No, sir, he didn't.
Q. Did Mr. Bacas contact you toward the end of that 30-day period?
A. Yes, sir. He contacted me a day or two before the 30 days expired.
Q. For what purpose did he contact you?
A. For another 60-day extension.
Q. Where were you when he came to see you?
A. I was at my home.
Q. Where?
A. At Huntington, Maryland.
Q. Was this the paper by which you agreed to give him that extension?
A. Yes, sir, it is. It's the extension.
page 14 } Q. Was the consideration for $5,000.00 for that extension?
A. Yes.
Q. When this was agreed upon was there a representative of Shaw Real Estate present?
A. Robert Wright.
Q. He was there at the time?
A. Yes, sir.
Q. He agreed to that?
A. Yes.
Q. Is that the man who witnessed your signature?
A. Yes, sir.
Q. He was a representative of Shaw Realty?
A. Yes, sir.
Q. Did Homer A. Bacas settle and close by the end of that 60-day extension given him by this agreement that is in evidence?
A. No.
Q. Has he ever offered to settle and close according to the terms of the contract?

Earl Thompson

A. No.

Q. Have you or your brother ever received any of the money that was paid or to be paid to Shaw Realty?

A. No.

Q. Is there a power line across this property?

page 15 } A. Yes, sir.

Q. Is it an open and visible power line?

A. Yes, sir, yes. It runs across the field, wide open field.

Q. Does it run through the woods on either side?

A. Runs through the woods on each side. It's a cut right-of-way through the woods and it's an open space on each side.

Q. The property borders on the Potomac River?

A. That's right.

Q. Does it border on any road or highway?

A. 218 highway.

Q. Is it possible to go from 218 to the river without going under the power line?

A. No.

Mr. Billingsley: That's all. Witness with you.

CROSS EXAMINATION

By Mr. McGinnis:

Q. Mr. Thompson, you say that your business or occupation is a lumberman. What phase of the lumber business are you particularly involved in, sir?

A. Cutting manufacturing lumber.

Q. Cutting manufacturing lumber?

A. Cutting manufacturing.

page 16 } Q. You mean you go out and buy standing timber and cut it?

A. That's right.

Q. In this particular occupation or profession, you have the necessity of dealing in land, I believe?

A. Sometimes, yes.

Q. How long have you been a lumberman?

A. About 20 years.

Q. Over that period of 20 years how many different tracts of land have you bought or leased?

A. I don't know.

Q. Would it be one or two or 100 or 200 or 1000 or 50 or—

A. Maybe—8 or 10 probably.

Earl Thompson

Q. Now, when you purchased this land, did you have the title examined?

A. Yes, sir.

Q. Do you do this in each instance?

A. Sir?

Q. Do you do this in each instance, each time you buy property?

A. Yes.

Q. Have you had occasion to be acquainted with right-of-way?

A. Some, yes.

page 17 } Q. And easements?

A. I have some, some.

Q. So that as a professional lumberman you are fully acquainted with what a right-of-way or easement means?

A. (Indicating in the affirmative) I think so.

Q. Now, when did you buy this second parcel of land?

A. I'm not sure. It was probably around 1954 or something.

Q. Well, let's see.

A. I'm not sure.

Q. You bought the 405 acres I believe in 1956?

A. 1956? Well, that was after we bought this. The 14 acres was purchased after the 405 acres.

Q. So it would have been some time subsequent to 1956?

A. Yes.

Q. Sometime after 1956?

A. That's right.

Q. Now, when you purchased that acreage did you have the title examined?

A. I assume we did. I'm sure we did.

Q. Were you advised that there was a right-of-way along the Potomac River?

A. What type of right-of-way?

page 18 } Q. A power right-of-way.

A. I don't know whether I was advised. I imagine I was, if it has been that long—I'm sure.

Q. In fact, isn't it true that the whole river front is taken up by Vepco rights-of-way?

A. What do you mean by the whole river front?

Q. That the entire length of the frontage on the river is covered by a Vepco right-of-way?

A. Well, the power line runs across diagonally with the road—parallel with the river.

Earl Thompson

Q. Right at the river?

A. Well, one end would be 150 yards from the river. The other end approximately 100 yards, something like that. So that the right-of-way is between this property and the river, between it running across this property.

Q. Are you familiar with the wording of that right-of-way?

A. No, I'm not. I'm not familiar with it.

Q. Well, at the time that you purchased this property why did you purchase it?

A. Well, I purchased it for investment and growing timber, and we buy land other than doesn't have timber on it too. Real estate.

Q. So you deal in land other than timber land?

page 19 } A. Well, not at that time we didn't. When we did buy land here in King George that's all we bought is timber land.

Q. But you buy land in other areas?

A. I have bought.

Q. How many pieces of land would you say you have bought?

A. I'd say 8 or 10.

Q. Oh, total 8 or 10 all over?

A. Uh huh.

* * * * *

Q. You are not familiar with the terms of this particular right-of-way?

A. No, I'm not familiar with it.

Q. Now, in accordance with the terms of the contract that was entered into on November 4, 1966, you were to furnish a survey, were you not?

A. I believe that was in the contract, yes.

Q. Did you furnish the survey?

page 20 } A. (Pause) No. Mr. Bacas said that he was going to—when he came back for the extension, he has that in the letter, that he was going to pay for the survey at no expense to us.

Q. And it was never a time that you furnished a survey?

A. That I furnished a survey? No, I gave him the plat I had.

Q. Gave him a plat?

Earl Thompson

A. Yes, sir.

Q. Well, that's a survey, isn't it?

A. I assume it was surveyed. It had to be a survey to have a plat.

Q. I show you this piece of paper, Mr. Thompson and ask you if you have ever seen that before?

A. (Observing paper) Yes.

Mr. McGinnis: If Your Honor please, I would like this marked for identification purposes only as the paper referred to in the cross examination of Mr. Thompson.

The Court: Very well. A plat made by J. R. McCrone, Jr., Inc., Registered Professional Engineer, will be identified only as Defendant's Exhibit No. 1.

Note: The above-referred-to plat was marked for identi*fication purposes* only as *Defendant's Exhibit No. 1.*

page 21 } Mr. McGinnis: Thank you, Your Honor.

Q. Now, Mr. Thompson, when did you first see this piece of paper?

A. I had McCrone to make it from the deed. Make that plat from the deed.

Q. So this was made up at your institution, I mean, you ordered this made up?

A. That's right.

Q. And it shows 419.873 acres?

A. Yes.

Q. Now, Mr. Thompson, would you show me on this plat where the right-of-way is shown.

A. (Observing plat) I don't see any.

Q. Did you ever discuss with Mr. Bacas or with any of his employees—or any of his agents, or your agents, the existence of this right-of-way?

A. No.

Q. Mr. Thompson, was it made known to you what this property was to be used for?

A. Well, when it came back for an extension the last time he told me what it was going to be used for. When he came back for the 30-day extension and came back for the 60-day extension, he brought the architect's map or something, showed me the plans that he had to do with it, but up until

that time I didn't know what it was going to be used for.

page 22 } Q. Now, the contract says that "lot or acreage can be released".

A. That's right.

Q. Isn't it true, Mr. Thompson, that you were told from the beginning it was to be developed into a subdivision?

A. No. I didn't know what it was going to be used for. I wasn't concerned.

Q. What reason were you given for the release provision in the deed of trust?

A. No reason.

Q. Well, then why did you agree to it?

A. Well, most any piece of property you sell they require a release clause, and I don't sell, but what little I have sold there is a release clause of some sort. So you don't question what they are going to do with it. I guess they tell you.

Q. I believe this contract has a paragraph in it entitled "Title". It says it's not subject to any existing easement or rights-of-way, is this correct?

A. I don't know.

Q. Mr. Thompson, I show you Plaintiff's Exhibit A, and refer to the second paragraph at the bottom of the page and ask you if you are familiar with that paragraph.

The Court: Just a minute. I believe I marked it Plaintiff's Exhibit 2.

page 23 } Q. (Continued) Plaintiff's Exhibit 2, which is the contract of sale referred to and dated November 4.

A. (reading contract to himself).

Q. Now, after reading that paragraph, did you not at the time of the signing of the contract feel that you had a duty to disclose this right-of-way?

A. It was on record.

Q. But you didn't say anything about it?

A. No, I didn't say anything about it.

Q. And the plat that you furnished didn't show it?

A. No.

Q. Now, the contract says that you will furnish the survey, or they can accept the existing survey.

Did they ever accept this survey?

Earl Thompson

A. No. He told me, he said he would survey at his own expense. That was in the letter that I signed, that he would—surveying would be done at his own expense. That was when I gave him that extension. It's no expense to the seller.

Q. Which letter was that, first one or second one?

A. I'm not sure. It was one of them.

Q. I show you Plaintiff's Exhibit 1 and Plaintiff's Exhibit 3, being the two extension letters, and ask you if you can point out to me where that agreement was made.

page 24 } A. (Pointing to something on letter).

Q. That was on April 12 when he agreed to pay for the survey?

A. That's right.

Q. And were you not advised at that time that mathematically the property would not close?

A. Said had some difficulty in the survey.

Q. At this time did you call to the attention of Mr. Bacas or any of his agents the existence of the right-of-way?

A. No, sir. The first time I gave him an extension that was the purpose of the extension, to finish surveying then.

Q. As an experienced land purchaser who is familiar with rights-of-way and easements and things of this sort, didn't this paragraph in the contract turn on a red light for you or something so that you would feel a duty to bring this right-of-way to their attention?

A. No. It's on record.

Q. Now, at the time that you were informed about what the property was to be used for, did you advise them of the right-of-way?

A. No, sir.

Q. So never at any time did you advise them of the right-of-way?

page 25 } A. (Pause) No.

Q. Now, within the 120 days as called for in the original contract, what effort did you make to furnish the survey?

A. I gave them the plats on them.

Q. And were you told that was unacceptable?

A. No.

Q. When did the survey question next come up?

A. Well, when he came back for the 30-day extension that was the excuse for an extension, to finish the survey. The weather had been bad or something. Survey, couldn't finish it.

Earl Thompson

Q. That was the first time you heard about his getting a survey?

A. That he was surveying, yes.

Q. That was the first time you heard your survey was unacceptable?

A. Right.

Q. Mr. Thompson, were you ever advised as to who the settlement attorneys would be?

A. No.

Q. How did you find out that settlement was not to be had?

A. Mr. Robert Wright, he came down and told me the sale for Shaw Real Estate.

page 26 } Q. And what reason did he give you?

A. Don't remember.

Q. Now, to your knowledge has an accurate survey ever been made?

A. Well, it would have to be a survey to make a plat. That plat was made from a deed.

Q. But there was no physical survey made?

A. No physical survey? It would have to be a physical survey to draw a plat.

Q. I mean but no one went to the property and surveyed it.

A. Not since we had it. That is the plat that was platted from the deed.

Q. When is the first time you met Mr. Bacas?

A. When he came down for an extension.

Q. Was that the first extension or second extension?

A. I don't remember whether he came the first time. I know he came the second time. I'm not sure about the first time, I'm not sure Mr. Bacas came or not.

Q. Was the second letter signed in the presence of everyone?

A. Yes.

Q. Was Mr. Bacas there, you there, and the agent there?

A. (Indicating in the affirmative). Yes.

page 27 } Q. Where was that signed?

A. Sir?

Q. Where was that signed?

A. In my home.

Q. By what authority did you sign it, sir?

A. As a part owner and for father and brother.

Earl Thompson

Q. Now, Mr. Thompson, I believe your wives joined in the original contract. Is there any reason why they didn't join in the subsequent extensions?

A. They didn't ask for it.

Q. Now, are there one or two rights-of-way across this property?

A. One or two? I don't know. One is all I know of. One is power line and one line leading off that to the dwelling house.

Q. But the main power line is for high tension wires along the river, isn't it?

A. I don't know. It's for a power line. I don't know whether it's high tension line or what it is. I never checked it.

Q. At the time you bought this property did you have a survey, did the seller give you a plat of any kind?

A. No, sir.

Q. At the time you bought the property what did the title report say?

page 28 } A. What did the title report say? Parallel across it.

Q. Did it give you a description of the right-of-way?

A. Description of the right-of-way?

Q. Uh huh.

A. I assume it did. I don't know. It's been a long time.

Q. Did you go on the property and check the right-of-way?

A. Check the right-of-way?

Q. Uh huh.

A. Well, I didn't have to check the right-of-way. It's visible. You don't have to check it. It goes through the open field. You have to go under it to get to the—to the house and to the water front.

Q. You never discussed this right-of-way with anyone?

A. No. I didn't discuss it with anyone.

Mr. McGinnis: No further questions, Your Honor.

Mr. Billingsley: One question.

REDIRECT EXAMINATION

By Mr. Billingsley:

page 29 } Q. Mr. Thompson, did Mr. Bacas at any time

before the last 60 days extension expired ever say anything to you about the power line?

A. No, sir.

Q. Ever raise any objection as to a power line or easement?

A. No.

Q. Is the line now the same as it was when the original contract was entered into?

A. Yes, it's the same.

Witness stood aside.

NEWELL THOMPSON, a plaintiff, first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Billingsley:

Q. You are Mr. Newell Thompson, brother to Earl Thompson, who just testified?

A. That's right.

Q. You and your father and Earl are the owners of this property?

page 30 } A. That's right.

Q. Mr. Thompson, did you give your brother authority to execute these extensions extending for you and your wife?

A. I did.

Q. Are you familiar with this power line that goes across this property?

A. Yes.

Q. Is it an open and obvious line across the property?

A. Yes, sir.

Q. Can you go from the highway to the river without going right up under it?

A. No, you have got to go under it to get to the river or to the dwelling house on the property.

Q. Does it go through open fields, woods, or how does it go?

A. Well, it goes through open fields on one side on our property, on this property we are speaking of, and on the other end it's woodland for 300 or 400 yards.

Q. Is there a road that runs from the highway to the river?

Newell Thompson

A. That's right.
Q. Through the property?
A. That's right.
Q. Is it a private road?
page 31 } A. Right.
Q. Where this road goes under the power line is that open fields or woods?
A. Open field.

Mr. Billingsley: That's all.

CROSS EXAMINATION

By Mr. McGinnis:
Q. Mr. Thompson, is your testimony that this power line does not run along the frontage of the river?
A. No. It runs from 150 to 200 yards on one end from the river and 150 to—100 to 150 on the other end from the river.
Q. How do you know that?
A. By guess. I judge, say, 150 to 200. I was giving some leeway. Sometimes—I can judge distance fairly well, I think.
Q. By that, you made this conclusion by going on the property and seeing the cleared right-of-way, is that correct?
A. Well, cleared right-of-way. On part of it doesn't have to be cleared. It's open field.
Q. But by seeing—what did you say there?
A. Well, I say the open filed with the power line running across it, and the other end there is woodland
page 32 } with a right-of-way cut.
Q. Was this power line leading into a house or anything?
A. It's a power line that furnishes power to the house on the property and also on the adjoining property on either side.
Q. But, now, calling your attention—How did you know this was there?
A. I can see it.
Q. But you didn't check the deed book, didn't check the right-of-way that was given to you at the time of settlement?
A. No.

J. Murphy Thompson

Q. Can you tell me if there was more than one right-of-way?

A. No. I don't know.

Q. You don't know whether there was or not? Did you ever check the river bank, along the river, to see if there was a right-of-way?

A. No—

Q. Visibly or legally?

A. There is none along the river that you can see except one that leads down to the house that's on the property. That's less than 25 yards of river shore.

page 33 } Q. So, if I told you that there was a high tension or right-of-way going along parallel to the river bank you wouldn't be able to say yes or no?

A. Well, I assume it wouldn't be, not right on the river shore.

Q. Are you familiar with the deed recorded in Deed Book 43 at page 179?

A. No, not without checking it.

Q. Have you bought property before, sir?

A. Yes, sir.

Q. Approximately how many times?

A. Oh, six or seven.

Q. Do you always have the title examined?

A. Yes.

Q. Have you run into rights-of-way before?

A. Not that I recollect. I don't remember running into any rights-of-way across the land that we bought.

Q. Now, when you signed this original contract, Mr. Thompson, and it called for no rights-of-way or easements to prevent the development, did you advise the purpose of existence of a right-of-way?

A. No.

Mr. McGinnis: No further questions, Your Honor.

Mr. Billingsley: That's all.

page 34 } Witness stood aside.

J. MURPHY THOMPSON, a plaintiff, first being duly sworn, testified as follows:

J. G. Powell

DIRECT EXAMINATION

By Mr. Billingsley:

Q. Please state your name.

A. Murphy Thompson.

Q. Where do you live, Mr. Thompson?

A. I live in Floyd County, Virginia.

Q. You are the father of Earl and Newell Thompson, who just testified, and own an interest in this property?

A. I tell you, I can't hear.

Q. Are you the father of Earl and Newell Thompson who just testified and own an interest in this property?

A. Yes.

Q. Did you authorize your son Earl to give these extensions of time?

A. I did.

Mr. Billingsley: That's all.

CROSS EXAMINATION

By Mr. McGinnis:

page 35 } Q. Mr. Thompson, you put the matter solely in the hands of your son?

A. Biggest part of it, yes. I live about 200 miles from here and they look after it.

Q. You just sort of left it up to him?

A. That's right.

Mr. McGinnis: No further questions.

Witness stood aside.

J. G. POWELL, first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Billingsley:

Q. You are Sheriff J. G. Powell of King George County?

A. Yes, sir.

Q. Mr. Powell, are you familiar with the property which is the subject of this suit?

A. Yes. Very close to me where I live.

Q. Have you been over the property, into the property a number of times?

page 36 } A. I have hunted over it, been swimming there, used to keep a boat there.

Q. Do you know of any power line crossing the property?

A. Yeah. One goes from Fairview Beach to Mrs. Morton's.

Q. Is it open and obvious—

A. Yes, sir.

Q. —power line?

A. Power line. It's on a power pole all the way across.

Q. Can you get from Route 218 to the river without going under it?

A. No, sir.

Q. Where the road goes under it, is it open fields or woods?

A. It's open. It's a hedge right on the other side of it, from the river and the power line. Part of it has got a little hedgerow between the river and the power line, but it's open, you can see the power line when you go under it, go through there.

Mr. Billingsley: That's all.

CROSS EXAMINATION

By Mr. McGinnis:

page 37 } Q. Now, Sheriff, is that one or two power lines you see through there?

A. I have only seen one line of poles going across there.

Q. What kind of poles are these?

A. Virginia Electric Power Company.

Q. I mean, but are they poles like serving a regular house or are they like would be high tension wires?

A. It's not exactly high tension wires. High tension wire is a hundred foot pole. These poles are about 35 to 40 feet, I'd say. I'd say a secondary line.

Q. That doesn't run parallel with the river, does it?

A. Not exactly, because up at the north end it's a little further away from the river than at the lower end.

Q. Would you say how far away it is from the river?

A. I have never measured it. I have seen it hundreds of times, but I never paid much attention to measure how far it was.

Q. How wide is this right-of-way, do you know?

A. I don't know. I see Mr. Gallahan farming right around

the poles, so I know that, because clover and corn are planted right around there. I know the right-of-way there. They walk under it.

page 38 } Q. That is where these houses on this property and the adjoining property get their power?

A. It's one house on this property gets power from there. Below that Mrs. Morton's place comes in.

Q. Have you noticed a right-of-way running along the river?

A. I didn't notice any right-of-way along the river. I never heard of any right-of-way, never saw anybody using any right-of-way along the river.

Mr. McGinnis: No further questions.

By the Court:

Q. Sheriff, is this a Virginia Electric and Power Company power line?

A. Yes, sir, Your Honor. Vepco goes through there.

Q. Does this line extend to Fredericksburg?

A. It comes off Fairview Beach. The main line comes into Fairview Beach, then this line feeds the Fowlkes place and Morton's place, and Mrs. George Grymes, Eagle's Nest, and Forrest Tolson. Dead ends at Forrest Tolson's.

Q. Do you know how much voltage?

A. I think it's a 440 line through there. I'm not positive of that, but I believe it's—It's three big wires which would be a 440 line, probably.

The Court: All right.

page 39 } Mr. McGinnis: No further questions.

Witness stood aside.

Mr. Billingsley: We rest.

* * * * *

Mr. McGinnis: We would like to recall the sheriff and ask him to bring Deed Book 43 into court.

J. G. POWELL, having been previously duly sworn, testified further as follows:

J. G. Powell

DIRECT EXAMINATION

By Mr. McGinnis:

Q. Sheriff, you have already been sworn.

A. Yes, sir.

page 40 } Q. Now, due to the weight of the book, let me ask you to step right over here and look at this page.

I refer to page No. 180 in Deed Book 43 among the land records of King George County.

Mr. McGinnis: Your Honor, would you prefer us to move it up here.

The Court: Let me come down there.

Note: The Court and the witness move to counsel tabie and the witness testifies from the deed book as follows.

Q. Now, Sheriff, will you look at this plat and show us where on the plat you have seen the power line.

A. Highway coming in, 218. When you come in from 218 into the beach, when you get down there to the road that goes to the beach, right at the top of the hill where you go under the power line it's a landing. It's another down here. I used this landing all the time. The roadway goes down out to the beach. You can see this power line all the way across. See here—This is now Fairview Beach. This is Morton's place.

Q. Now, would you locate on this map where this power line is that you see on the property?

A. I would say this red line here would be the

page 41 } power line going through here.

Q. Can you see another power line as indicated here?

A. That is the beach out there.

Q. Calling your attention, Sheriff, to this sort of dash line here with the letters P. L. Did you see a power line running there?

A. Only one power line down there. I have been on it I say two or three hundred times. I never paid any attention to it. Mr. Billingsley asked me about it this morning. I said yes, I have seen it.

C. Daniel Clemente

Q. Was the power line on the river side of the house or on this land side of the house?

A. The land side. Field side.

Q. And this is an area that has been used by people in the county and in the area for beach purposes?

A. That's right.

Q. In fact, this would be the most useful part of the property, is that not true?

A. If you are going to play on the beach. If you are going to farm you would farm back here. This is the water, see, coming in here.

Q. Are the channels in that area deep enough for small craft?

A. I don't know how deep the channels are. I page 42 } used to keep a boat in there.

Q. What amount of water does your boat draw?

A. I have an outboard. About 2 feet.

Mr. McGinnis: I have no further questions, Your Honor.

Witness stood aside.

Mr. McGinnis: If Your Honor please, I would like to call Mr. Clemente as my next witness.

C. DANIEL CLEMENTE, first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. McGinnis:

Q. Mr. Clemente, will you state your full name and profession.

A. C. Daniel Clemente. An attorney in Virginia.

Q. What is your principal practice, Mr. Clemente?

A. Real estate transactions.

Q. Title examinations?

A. Yes, sir.

page 43 } Q. Mr. Clemente, did you have occasion to examine or peruse the title to the property that is the subject of this litigation?

A. Yes, I did.

Q. In that, sir, what did you find in regard to rights-of-way or easements?

A. Well, we found this Vepco right-of-way in Deed Book 43 at page 179 with the plat on 180.

Q. What were the terms and all of this easement?

A. Well, it was an extremely broad easement in that it gave the power company full access to the property. It went so far as to grant the right to any subsequent company or companies that might be involved, and the main point that we objected to in that easement was the fact that the width of the easement was not delineated, and it ran across the entire water front of the property.

Mr. McGinnis: If Your Honor please, I would like to introduce into evidence as Defendant's Exhibit #2 the right-of-way recorded in Deed Book 43 at page 179 of the land records of King George County, and introduce it by reference rather than introducing a copy.

The Court: Very well.

page 44 } Note: The above-referred-to-right-of-way recorded in Deed Book 43 at page 179 was introduced by reference as *Defendant's Exhibit No. 2*

Q. Is a part of that easement the plat that was recorded on page 180?

Now, for the purpose of saving time, Mr. Clemente, what does that right-of-way say, in effect, as to its position?

A. Well, it starts 525 feet back—

Mr. Billingsley: If Your Honor please, I believe the easement and the plat would speak for itself and be the best evidence.

The Court: The easement deed describes it. Does the deed of easement describe it?

The Witness: The deed refers to the plat, Your Honor.

The Court: Very well.

Q. Mr. Clemente, in your statement that the deed of right-of -way refers to the plat, there is no established width of right-of-way in the deed granting the right-of-way, is it?

A. No, sir.

C. Daniel Clemente

Mr. Billingsley: That speaks for itself, which is the best evidence.

page 45 } The Court: Ask whether the body of the deed was in reference to the width or anything of that sort.

By the Court:

Q. Is it in the deed?

A. Yes, sir. The deed stated that the red line on the plat attached is the center line of the easement, but there is no indication as to the width.

By Mr. McGinnis: (Continued)

Q. Now, Mr. Clemente, as an experienced title examiner, could you certify title to this property with such a right-of-way in existence?

A. We would have to make an exception as to the existence of that right-of-way.

Q. What do you mean by way of exception?

A. Well, I mean that any title insurance policy that would be issued would except to the terms and conditions of that right-of-way as stated in the deed book. It would be a defect in the title as far as we were concerned.

Q. Are there any land records in this county that are available to you that would let you accurately locate this right-of-way?

A. Not to my knowledge. Other than the plat that is on record? I just don't know. I think what you are asking me

page 46 } is there another source other than that plat to determine the width or location. I don't believe so.

Q. Is there any information available to you from any source which permits you to establish the width of this right-of-way?

A. (Pause) Not to my knowledge.

Q. Is there a term characterizing this type of right-of-way in the title business, like a run away right-of-way or something like that?

A. Wild easement, is that what you are referring to?

Q. Uh huh.

A. I would say that was fair.

Q. Now, Mr. Clemente, when did you first see this contract?

C. Daniel Clemente

A. (Pause) It was—could you tell me the date on the contract? I can't recall.

Q. Mr. Clemente, I show you the paper marked Plaintiff's Exhibit 2 and ask you if you have seen this contract before?

A. Yes, sir, I have.

Q. When did you first see this contract?

A. (Observing same). I can't remember exactly. I'd say it would have been probably sometime in December of '66.

Q. Do you remember what was said at the time
page 47 } you first saw the contract?

Mr. Billingsley: Objection.

Q. Under waht condition was this contract delivered to you?

A. Mr. Wright brought it into this office and handed it to me and said that we would probably be the settlement attorneys on this, that we should hold on to that until he got the approval of the purchaser.

Q. Did you hold the contract?

A. Yes, we did. I told Mr. Wright at the time that we would like a survey of the property before we started our title examination.

Q. Did you ever receive a survey?

A. No, we never did.

Mr. McGinnis: No further questions, Your Honor.

CROSS EXAMINATION

By Mr. Billingsley:

Q. Mr. Clemente, I believe you are a law partner of Mr. Taylor, who represents Shaw Realty in this transaction?

A. Yes, sir.

Q. When did you examine the title to this property?

A. I can't remember the exact date. I tried to find out
that before I came in here today, and I just don't
page 48 } have a notation of the exact date that we examined the title.

The reason for that is that the title examiner in our office was not able to come down this far and I had to come down and do it myself, and I just fitted it in.

Q. You received it in December. Did you do it in December or January?

A. No, sir. It was not December or January.

C. Daniel Clemente

Q. You don't know when you did it?

A. I can't remember the exact date, Mr. Billingsley. It seemed to me it was after—it was after January, it was 1966.

Q. But you do not know when?

A. No, I don't.

Q. Who did you make a report on the title to?

A. To Mr. Bacas and Mr. Wright.

Q. Do you know when you made that?

A. It seems that I recall it was during the warm weather when I came down here. I do recall that.

Q. You don't have any notes or any title certificate of any dates on it as to when you made it?

A. Well, we never gave them a written report on the title.

Q. You never gave it to them?

A. No, sir.

Q. You just called them up and told them?

page 49 } A. Yes, sir.

Q. And talk to them?

A. Right. I think they came into the office and I told them.

Q. Do you have any idea of when that was?

A. It was during the warmer season. I recall that.

Q. Mr. Clemente, is this the letter that you wrote me about this property?

A. Yes, sir.

Q. You wrote this letter dated June 27, 1967?

A. Yes, sir.

The Court: Any objection?

Mr. McGinnis: No, sir, no objection, Your Honor.

The Court: Very well. It will be admitted in evidence as Plaintiff's Exhibit No. 4. That is the letter signed by C. Daniel Clemente dated June 27, 1967.

Note: The above-referred-to letter dated June 27, 1967 was marked and filed as *Plaintiff's Exhibit No. 4.*

Q. Now, you had discussed prior to writing this

page 50 } letter the property with Mr. Wright of Shaw and Mr. Bacas?

A. Yes, sir.

Q. And the sole reason set out in this letter was relative

to securing authorization from the Army Corps of Engineers to permit building out into the Potomac?

A. That's what it says.

Q. That is the sole reason?

A. Yes, sir.

Mr. Billingsley: That's all I want to ask you.

REDIRECT EXAMINATION

By Mr. McGinnis:

Q. Mr. Clemente, do you usually give a permit and ttile?

A. Yes, sir.

Q. Why didn't you give one in this instance?

Mr. Billingsley: I'm going to object to that. He's going back to things—

Mr. McGinnis: If Your Honor please, he delved into this rather thoroughly on cross examination.

The Court: I'll let you go ahead.

Q. Why didn't you give one in this case?

A. Well, I was aware of the intended use of the property, and when I came across this easement I came page 51 } back to my office and called them and advised them of it. I though that I would like them to tell me that they wanted me to go ahead with our work in spite of the fact of this easement. I thought it was severe enough to interfere with the development of the property.

Witness stood aside.

HOMER A. BACAS, a defendant, first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. McGinnis:

Q. Would you state your full name, Mr. Bacas.

A. Homer A. Bacas.

Q. Are you one of the defendants in this case?

A. Yes, sir.

Q. You have previously been examined by the plaintiff?

Homer A. Bacas

A. Yes, sir.

Q. Now, Mr. Bacas, when did this property first come to your attention?

A. Oh, it was sometime around October or
page 52 } November of 1965, I think it was. I think it was.
I am not sure what the date of the contract was. I'll tell you it was '66 or '65. I think it was '65.

Q. Did you subsequently enter into a contract for the purchase of this property?

A. I entered into the contract as trustee, yes, sir.

Q. I show you Plaintiff's Exhibit No. 2 and I ask you if this is the copy of the contract you entered into?

A. Yes, sir.

Q. Now, with particular attention to the date on that contract can you tell us when in relationship to time in signing the contract you first saw the property?

A. I would imagaine, when I say I would imagine, I think I saw the property sometime during the month prior to this contract, so it must have been October of 1966.

Q. Under what circumstances did you see the property?

A. Gene Charles, a real estate salesman, called me and told me that he had a beautiful piece of property that he would like to me to see. He took me down to what we later began referring to as King George Landing, the Thompson property, and he showed it to me.

We stopped off in a place called—I think Mr. Wright was
with us too, Bob Wright. We stopped off, picked
page 53 } up a key in Fredericksburg to, it was a chain
gate going in there, and we unlocked it, went on in and looked at it.

We finally probably visited the property probably two, maybe three times before we signed the contract.

Q. In these visits to the property did you walk over the property?

A. Yes, sir.

Q. In walking over the property did you have occasion to notice the power lines?

A. Yes, sir.

Q. What type of power lines were they?

A. They appeared to me to be some light power lines going to either a house or maybe two houses across the property. It was one of these Vepco or Vepco poles in intervals for I don't know how many yards, but they were the small poles

that you normally see in a could have been, even been, private power line. You know, it was a type of pole like it was going to a house.

Q. With how many cross pieces?

A. When you say cross pieces, what do you mean? I think—

Q. Little piece up at the top.

A. Looking back, I think it only had one. I am not sure there. I think it only had one across there at the time.

page 54 } Q. Did you in any way determine the width of this roadway?

A. No, sir. Listening to testimony today, it's true we drove underneath these lines going in toward the beach. After you pass these lines there was a sort of light scrub brush going across the property, then there was an awful wide section of it looked like an open road, I don't know how wide it was, must have been maybe a hundred foot wide, a roadway like, but it was a field that separated that from another pile of scrub brush, then the beach.

I asked about this a couple of times and no one seemed to really know. Seemed like it was maybe an old breakwater of some sort. I had no idea what it was. But this was also in addition to the power line.

Q. Now, upon signing the contract, did you make known to Mr. Charles what you were planning to use the property for?

A. Yes, sir.

Q. What were you going to use the property for?

A. We were going to develop it into a second-home-type resort. We were going to put in a marina, two marinas, and develop the property into lots.

Q. Mr. Charles was fully informed of this?

A. Yes, sir. Mr. Charles and Mr. Wright and myself, we discussed this many times.

page 55 } Q. And the contract provided for a release clause?

A. Yes, sir.

Q. Mr. Bacas, the contract known as Plaintiff's Exhibit No. 2 called for seller to provide a survey made by registered engineer.

Did you ever receive such a survey?

A. No, sir. Not an acceptable—only thing I ever saw was an old plat that was taken off of a legal or deed description of the property.

Homer A. Bacas

Q. I show you this paper and ask you if you have ever seen this before?

A. This appears to be the plat, yes, sir.

Mr. McGinnis: I offer this as Defendant's Exhibit 3, Your Honor.

The Court: Any objection?

Now, the paper heretofore identified as Defendant's Exhibit No. 1—

Mr. McGinnis: If Your Honor please, this is another, please.

The Court: —will be admitted and identified as Defendant's Exhibit No. 3.

This plat is by Rodgers Brothers and Associates, Engineers.

The Witness: No, sir, no, sir.

The Court: What did you say?

page 56 } The Witness: I was just commenting that Rodgers Brothers and Associates just received that plat. I don't think they made that plat.

The Court: Very well. Bearing the name of Rodgers Brothers and Associates. It will admitted and identified as Defendant's Exhibit No. 3.

Note: The above-referred-to plat was marked and filed as Defendant's Exhibit No. 3.

Q. Now, Mr. Bacas, from whom did you receive this plat?

A. I received that—I don't remember who gave it to me. It was either one of two people. It was either Mr. Gene Charles or Mr. Bob Wright gave me that plat.

Q. What did you do with this plat when you received it?

A. I gave the plat to my engineers, Rodgers Brothers Associates, and told them to check this thing out. No, right away, I didn't. I imagine, I guess right away I might have held the plat and tried to correlate that with the property itself. We saw that plat before we signed that contract, so I imagine what we probably did with the plat was try to check the various points on the property.

Q. Does this plat show right-of-way any place?

page 57 } A. No, sir, not at all.

Q. Mr. Bacas, I ask you if you have ever seen this paper before?

Homer A. Bacas

A. I don't remember this plat. I remember the other plat. I remember the existence, the possible existence, of another plat, but I don't remember that one.

Mr. McGinnis: If Your Honor please, this was the plat that was marked for identification purposes which we now wish to present.

The Court: No objection. The plat heretofore identified as Defendant's Exhibit No. 1 will now be admitted.

Note: The above-referred-to plat is marked and filed by the Court as Defendant's Exhibit No. 1.

Q. Mr. Bacas, after you received the plat, which is identified as Defendant's Exhibit No. 3, you entered into the contract, is this correct?

A. Yes, sir.

Q. At that time did you meet either of the Mr. Thompsons?

A. No, sir.

Q. At what time did you meet any of the Thompson family?

page 58 } A. I only met Mr. Earl Thompson and only time I ever met Mr. Earl Thompson was the time when I drove to his home with Mr. Charles to get—to discuss the second extension on the contract. That's the only time I ever met the gentleman.

Q. At that time did you have a discussion with Mr. Thompson as to what you were going to do with the propety?

A. Yes, sir. I brought some renderings and architectural plans and engineering layouts, and we had a large color rendering that the architect had made for us. We had the makings of a brochure for showing how the property would be developed and in what form. I think we still had at that time, if I'm not mistaken, I think we had the topographical plat, or map, made from the geodetic maps of survey to superimpose over what we assumed to be the map of the property, and told him, if you will, what we were going to do. I think he understood we were going to develop the property.

Q. Do you have any of those renderings with you today in the courtroom?

A. Yes, sir, I brought them with me.

Q. Would you get them, please?

A. Yes, sir. (doing so.

Homer A. Bacas

* * * * *

page 59 }

* * * * *

Q. Now, Mr. Bacas, I show you this rendering and ask you if you would identify that.

A. This is a rendering that Rodgers—I mean, Barkley and Pierce Associates, Architects and Planners, made for me and my group to show the—how the eventual develop ment would be, but this is giving a picture of what we intended to do.

page 60 } Mr. McGinnis: If Your Honor please, I know this is big and bulky. We would like for identification purposes to present it by reference. We would like to have it marked as Defendant's Exhibit 4, being a rendering of King George Landing, Virginia made by Barkley and Pierce, Associates, Architects and Planners.

The Court: So ordered.

Note: The above-referred-to rendering was marked and filed by the Court as *Defendant's Exhibit No. 4.*

Q. Mr. Bacas, with reference to this Defendant's Exhibit No. 4, the rendering, did you have this with you at the time that the second extension was granted?

A. Yes, sir, I did.

Q. Did you show this to Mr. Thompson at that time?

A. Yes, sir.

Q. Which Mr. Thompson?

A. Mr. Earl Thompson. That's the only one I have met, Mr. Earl Thompson.

Q. Was this discussed at any length?

A. Yes, sir. Discussed the eventual development and explained how we were trying to take advantage of the natural terrain, the slope of the property, the various page 61 } draws it had, the streams on it, and especially these two streams coming off the property. We had planned to develop one into a major marina for the area. We had made a study of the area. We felt we could do this, successfully open and install and operate a marina there.

Homer A. Bacas

We would have lots on the other side. We would have lots that would open on another stream going off the property. We were to have our drag lines in, have engineers give us their ideas on how it should be done, and the contention was it should be done this way. We should take advantage of the two streams on the property, and the value of these lots would be much higher than the value of the lots in the back.

Q. Why?

A. Because of the access to the water. And what we were trying to develop was a water-type community and enjoyment of the beach.

This beach is beautiful. It's got snow white sand that is very hard to find. The natural two streams coming off of the property are very difficult to find. Something that would actually take a boat.

If we draglined the property, we felt the drag itself, whatever the expense, it would take you out from the muck or whatever, and this would be an ideal setting for a marina-type community.

Q. Did you discuss all this with Mr. Thompson?

page 62 } A. Yes, sir.

Q. When you first visited the property did you see signs where people had been using this beach?

A. Yes, sir.

Q. For this purpose?

A. Yes, sir. No, not quite. No, that old house on the property on this side as you look at the beach, on the left hand side, the drive comes up here, the street, you drive, you keep basically the same street coming up as it comes in here. There was a house coming in here, too. The drive went to the house.

On that beach was evidence of many people that had picnicked there, maybe dragged boats up there to go fishing. It's a beach right next to it called Fairview where any number of boats are put in there.

Of course, right outside of this water line here on the water there are a number of poles in the water that people have taken advantage of and put boats, moored boats there, so forth. There seems to be a need for it.

Q. So, generally, this had been a recreation area up to this time?

A. I think so. Not a fancy beach, but a place something like that.

Homer A. Bacas

Q. At the time you showed this to Mr. Thompson, did he say, wait a minute, there is a right-of-way there?

page 63 } A. No, sir.

Q. Did he in any way bring to your attention the right-of-way?

A. No, sir.

Q. Didn't discuss it in any manner?

A. No, sir.

Q. He didn't discuss the right-of-way at the time you entered into that April 12 extension?

A. No, sir.

Mr. McGinnis: Your Honor, rather than clutter the record I would just like to refer to these as a group of drawings of the property.

The Court: These are just drawings?

Mr. McGinnis: Yes, sir.

Q. Mr. Bacas, I show you a group of drawings that I have here, and while I don't wish to offer them in evidence I ask if you have ever seen them?

A. Yes, yes, sir. These are all I brought with me. These are it. I tried to bring them and place them in chronological order. These are the ones.

Q. Mr. Bacas, did you have this group of drawings with you on the day that you met with Mr. Earl Thompson and the extension of April 12 was signed?

A. I don't think I had the larger drawing with me. I think at the time I may have had the smaller—I had—

page 64 } I had some in my file there. The smaller—the same drawings done in a smaller size.

Q. Would you show us what you showed Mr. Thompson that day?

A. I had a picture and it was another one I can't find now. This is a black and white. I also had a color rendering of that also.

Q. A picture of the architectural rendering?

A. Yes, sir. This is a picture of some of the homes that we intended to develop the site with. This was the one that would show the site plan, general site plan, the view of the marina that we would have on the water front.

Here's a view of what we call the east channel going in, and also a rendering—basically, that's it.

Homer A. Bacas

Q. Now, are these the papers that you had with you?

A. I think so. I don't remember if I had these in the folder. I think I had made up a brochure, very basic type thing, and I had put these in, then stapled it together. We had the color photo and everything.

Q. Now, Mr. Bacas, did these things cost you money?

A. Yes, sir.

Q. Do you know approximately how much you spent on the preparation of these papers?

A. Oh, I don't know. There must have been in
page 65 } excess of $3,000.00 just for the layout that I am showing you here.

Q. This was all before you found out about the right-of-way?

A. Yes, sir.

Q. Now, what did you do when you found out about the right-of-way?

A. Well, when I found out about the right-of-way, a few questions had been raised in my mind toward it after the third extension. I think it was about that time. We had had a friend of mine who was also interested in going to this thing and helping develop it spend quite a few days down there from time to time and give me the benefit of his experience and his knowledge of developing marina-type property, and wood-land-type property, and he came across a few survey pegs, and he came across, he asked me about the right-of-way. When I say right-of-way, I asked him about the little power lines going through there. He told me, he said I don't think they are too important. Said I think that's a private line going to a man's house, but I'll let you know.

And I asked a question about that time, and I had asked two or three times, no one seemed to know, so didn't anyone seem to know about a wide path of land that went through it. It was bare, vacant, and just about that time is when

Mr. Clemente—no, excuse me. We had, also we had
page 66 } the problem of survey with Mr. Rodgers. I had talked to my engineer and surveyor and gave him a copy of the survey plat that I had and told him that wasn't sufficient, I would like to have him check it out and see if this thing is mathematically sound. By mathematically sound, that it closed, that the property closed out.

He checked it out, and it didn't. So I asked for another plat. And time went by. We never received the plat, and

then—I asked Mr. Rodgers, I said, look, to save time why don't you go down and survey the property? Well, he didn't go. Springtime was coming up. He was busy. He told me he would as soon as he possibly could.

Just about a little after that is when Mr. Clemente called me in, told me he had checked the title and come across the right-of-way. And when this happened, I said let's stop everything and check this thing out, the information he gave me. I told him too many problems were arising.

Mr. Billingsley: I object to this hearsay and self-serving declarations, all of them.

The Court: The objection will be sustained.

Mr. Billingsley: I move to strike all this testimony as being self-serving.

The Court: Very well. That portion of the testimony as to statements made to him by people other than the plaintiffs in this case will be stricken.

page 67 } Q. Now, Mr. Bacas, had you known of the right-of-way at the time of the signing of the extension on April 12, would you have signed that extension?

A. Definitely no, no, sir.

Mr. Billingsley: Objection.

The Court: Overruled.

Mr. Billingsley: The objection would be because the document itself is the best evidence as to what his intention was.

Mr. McGinnis: Did Your Honor sustain it or overrule the objection?

The Court: I overruled the objection. This doesn't change the theory of the terms, of the status.

Q. So that at the time of the signing of the April 12 extension you had shown all of these things to Mr. Thompson, he had not brought to your attention the existence of the right-of-way, and you would not have signed that extension had you known, is that correct?

A. That is correct, yes, sir. Definitely.

Q. Now, in your judgment as purchaser, is this right-of-way?

A. (Pause) It must have been sometime in June, I think. It was either sometime prior to the expiration of the 60-day extension.

Homer A. Bacas

I don't know how the question arose or why he
page 68 } went down that time and searched the title to
come up with this right-of-way. I have—I don't remember this, but I do know that just about that time is when I received this information.

Q. Now, in your judgment as purchaser, is this right-of-way such as to in any manner whatsoever affect or interfere with the development and use of the property?

Mr. Billingsley: Objection.

A. Yes, sir.

The Court: Objection sustained. The question of the right-of-way is if it's in violation of the contract.

Mr. McGinnis: If Your Honor please, the paragraph of the contract says—

The Court: Up until now, you would have been pretty stupid to say that it wouldn't have affected it.

Mr. McGinnis: I withdraw that question. I have no further questions, Your Honor.

CROSS EXAMINATION

By Mr. Billingsley:

Q. Mr. Bacas, how long have you been dealing with real estate?

A. I would say over ten years.

Q. How many pieces of real estate have you
page 69 } bought and sold that period of time?

A. About 20, maybe 25.

Q. You had title examinations run on this real estate, did you not?

A. Yes, sir.

Q. You have title examinations run on it before closing?

A. Yes, sir.

Q. Now, you signed this first contract on November 4th?

A. I think so, whatever that date was, yes.

Q. You had 120 days in which to close?

A. (Indicating in the affirmative).

Q. Is that correct?

A. (Indicating in the affirmative).

Q. Just a few days before the expiration of that 120 days you went and asked for an extension?

A. That's right, that's correct, sir.

Q. You didn't have a title examination in that 120 days?

A. I didn't have a survey, sir. It was no title examination to have. These things cost money, you know. I had to order that, so rather than order a title examination and expend money at that time, I had not received a survey that I had to have in order to do that anyway.

page 70 } Q. So you went back in April and got a 60-day extension?

A. I would have to look at it. I don't remember the dates, no, sir.

Q. And this contract, this extension has in it: "And in the unlikely event settlement does not occur on or before June 12, then and in that event the deposit of our contract shall be forfeited." That is in there?

A. It says it, it's in there.

Q. You still haven't had a title search made?

A. No, sir.

Q. Now, sir, after the extension, the second extension, had expired you were still negotiating on possibly purchasing this property, weren't you?

A. (No answer.).

Q. After the second, the 60-day extension had expired, you were still talking about purchasing this property and negotitating on it, were you not?

A. I don't know what you mean. I had signed a contract as Homer Bacas, Trustee, to buy.

Q. Did you talk to Mr. Clemente about purchasing the property after June 12?

A. I don't understand what you are trying to say, sir. I have talked to Mr. Clemente about this contract, yes, sir.

page 71 } Q. After June 12?

A. I talked to him about it after June 12. I imagine I talked before June 12.

Q. Was your explanation at that time you were having trouble with the Army Engineers to get rights to build out in the river?

A. I wasn't having any trouble with the Army Engineers. I was first of all having trouble with the survery, A, and B, we had not received any word from the Army Engineers one way or the other as to whether we could use the beach as we intended to use it.

Q. Didn't you instruct Mr. Clemente to write me that that was the thing that was holding you up, the Army Engineers?

A. I don't remember that, sir.

Q. You deny that?

A. I can't deny it. I just don't remember it. I can't remember instructing Mr. Clemente to write a letter for me at all.

Q. Did you ever go to Vepco or contact Vepco about this right-of-way to see if it could be adjusted to your plans?

A. I didn't know it was Vepco Company's or the telephone company's either.

Mr. Billingsley: That's all I wish to ask him.

page 72 } Witness stood aside.

JAMES P. WARE, first being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. McGinnis:

Q. Mr. Ware, would you state your full name and occupation, please.

A. James P. Ware, General Superintendent E. E. Lyons Construction Company, Vienna, Virginia.

Q. What is your line of work, Mr. Ware?

A. I have been in the land improvement, road building, and in various related types of work for approximately 37 years.

Q. Mr. Ware, in order to save time you are familiar with the property that is the subject of this legal action, aren't you?

A. Well, no, I'm not as to the legal action, I'm not involved, I don't believe, in what is going on here today. My involvement in this would be to the extent of the time that I put in in the development end of this property.

page 73 } Q. Right, but you are familiar with this particular piece of property?

A. Yes, I am.

Q. Regardless of this litigation, you are familiar with that property?

A. Yes, I am.

James P. Ware

Q. How do you happen to be familiar with it?

A. Through an invitation from Mr. Bacas to visit the property, I would say, and, if the Court pleases, I have no records of dates, but I do have a general concept of the period of time. I would say in late October of '66 he took me for a visit to the property. At such time we came to this gate which was locked, and Mr. Bacas said, well, I don't have the key, so we drove around the gate. There is a place there where people had been. We got stuck. I helped get him out.

We went on down through the property on a general tour. At that time he had no plat, or he didn't know the general description of the property.

To me, it was a very beautiful piece of property, and I was somewhat enthused by it.

We left and went on across it.

Q. Let me interrupt you. You say a beautiful piece of property?

A. Yes, sir.

Q. Was it prettier than some other property, page 74 } did it have special characteristics?

A. It had characteristics that I thought would be good to develop this into a resort area.

Q. What were those characteristics?

A. Well, coming from, if I may ask, Route 218—I'm not familiar with that road that goes down. I think it's Route 218 coming through there. You run across a very nice ridge. The land goes both ways. You go down a rather nice drive, you come out into the open land, and then you proceed on down to the shore line, and then from then on you have wide expanse of space that you can go either way from the road I went in on.

Q. And this is land that was to be readily developed?

A. I would say.

Q. Develop or build?

A. I would say this is prime type of land for this—to be used for this purpose.

Q. Did you examine the beach line in regard to recreation facilities?

A. Not on this visit with Mr. Bacas.

Q. How many visits did you have to the property?

A. I made five visits there.

Q. Over what period, sir?

James P. Ware

A. Over a period of, say, six months, from early
page 75 } spring.

Q. What would you call early spring, would that be February, March?

A. Well, the last time I was there, I think we dug earth worms and fished for perch that was going up the river on the spring run, so we did that the last time.

Q. Sometime in March?

A. I believe it was the first of April, if I'm—that would be, say, either the latter part of March or first part of April, somewhere along in that area.

Q. Why did you make five visits to the property?

A. The second trip, I—Well, after the first trip I discussed this with my wife and she expressed her interest in the investment possibility.

I then took her on a second trip, which I would say was in November, sometime around frost, because we had taken pictures of the colorful trees and the deep open land and the different things that we wanted to have a record of.

At that time, we both walked the property to the extent of from the beach, following the existing road, all way back to the gate.

On this particular visit I took note of the development that had been done there prior to anything that I knew anything about, under the road there with concrete culvert, pipes, that had been installed.

page 76 } Further on up as you come off the flat land going up the hill, across from the stream there was a very sturdy bridge that had been constructed, and as we proceeded on up the hill and going back to this ridge where the property run, I noticed on the, should we say the east side, there was evidence of an old gravel pit, which I thought could be used to make our roads throughout the development if it would come to that.

So I went back then, and I reported this to Mr. Bacas, and I thought, well, natural resource, the thing we had there to work with, would make a very good proposition for us to go into.

Q. Now, so what you visited the property for was to determine the feasibility of developing it, was that right?

A. No. The second visit was I wanted to show this to my wife. We were interested in an investment, and I felt that—In all my investments I always do this. And we talk

it over, then if we decided to invest in it we would do it, if we don't, we don't. The second visit was purposely for that reason.

Q. How about the third, fourth and fifth visits?

A. Well, then, I wanted to study it more. I wanted to study the timber and the possibility of what we could claim in clearing rights-of-way or different streets and page 77 } roads. What salvage we could get out of the timber and what we could do, how much we could plan on putting into the property from the sale of logs that would be taken down from the—this was on the third visit.

The fourth time I went back was in the latter part of February or, say, around the first of March, and, at that time I noted that someone was working the field, had plowed or had begun to plow. I think the weather had permitted them to do this. And I noted that.

Also, I walked the power line. I was looking for some reference stakes as to the extent of width of a possible right-of-way.

I walked the beach area, and down, let's say, on the west end of the property there is a fence that comes down, and I went to the corner of this fence to look for a property corner to denote some riparian rights, what you would have as to beach rights, and I was almost attacked by a bunch of vicious dogs that were there, so I deemed it best not to play around that corner too long.

I left there, walked the extent of the beach property. There is a mansion on the east side.

I looked around there, I found one stake, a typical stake that surveyors use, a long stake driven in the ground with a red ribbon tied on the stake.

I could find nothing else that would indicate page 78 } it was a surveyor's mark or if somebody had just put it there, maybe tied a red ribbon on it. I really don't know.

Again, I was attacked by some German Shepherd dogs that came off of the other place, so I thought I had better get back to the middle of the property.

On my return trip I went to Mr. Bacas and I questioned him about the—

Mr. Billingsley: Objection.

The Court: Objection sustained.

James P. Ware

Q. Just tell what you did, Mr. Ware, not what was said.
A. Well, this is what I did.
Q. Yes, but not what was said to or from Mr. Bacas.
A. Well, I'm going to say what I asked Mr. Bacas, if it's permissible for me to do this. I don't know if this is objectionable or not.
Q. Go ahead with your testimony.
A. I asked Mr. Bacas what was the status of the power line crossing this property, and I also asked him if he had come up with a survey of the property.
Q. Then what did you do?
A. I made one more trip back to the property in the latter part of March or first of April, as I previously stated, and I took one more walk over the property, and I, at
page 79 } that time, I had in mind that in the low lands of the area back of this power line it would be a very good place to put a runway for an air strip, which we wanted to incorporate into our proposition, or into the development of this property.
Q. Now, you have developed quite a few properties, have you not?
A. Yes, sir, I would say a few.
Q. How long have you been in that business?
A. Close to 37 years.
Q. During this period of time what type of construction or development have you been in?
A. Well, I had the pleasure of doing some in Vera Dera Beach.
I was in Mangua, Nicaragua, at the invitation of General Somosa who was President of Nicaragua on a survey there to develop the City of Managua, Nicaragua.
I'm formerly from Silver Spring, Maryland where I was in business for myself and where I was engaged by many land developers to develop land.
And this is the extent of it.
Q. Your 37 years have been put into the development of land and communities?
A. This is true.
Q. This was to be your function, at least one of your functions, in this particular development?
page 80 } A. This was why I was brought into the deal, and then I liked the property to the extent where I had solicited through investors, found that they were going to start this in motion with me.

James P. Ware

Q. Did there come a time when you found out there was a right-of-way on the property?

A. No, sir. I still don't know. I asked for a clarification of the power line and I asked for a survey by a registered land surveyor of recent date. I have never seen anything. I don't know whether there is a right-of-way there or not. I'm waiting to find out, and I'll not go any further until I do find out.

Mr. McGinnis: No further questions.

CROSS EXAMINATION

By Mr. Billingsley:

Q. Mr. Ware, you walked the power line when?

A. I think I did the second or third trip.

Q. That would have been January, February, last year?

A. Somewhere along in there.

Q. And you saw this stake which appeared to be a surveyor's stake with a ribbon tied on it away from the power line, between the existing power line and the river?

page 81 } A. This is true, and may I clarify that the stake was out at the edge of the bank where the water had washed against the bank. It was down at the sea.

Q. That aroused your suspicion that this was a power line stake?

A. No, sir.

Q. You observed it anyhow?

A. I observed the stake. I raised the question what was the stake there for.

Q. You went back and asked Mr. Bacas right after that trip about the status of any easement across the property?

A. No, sir, I didn't ask him about the easement, I asked him about the status of the power line across it.

Q. You asked him about the status of the power line across the property?

A. Yes, sir. I have never gone into it. I don't know if there is an easement there or not.

Q. But you asked him about that in January or February of last year?

A. On return from one of the trips.

Q. You raised the question in January or February of last year?

A. I would say something like that.

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

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