215 Va. 484

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SUPREME COURT OF VIRGINIA
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IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

Record No. 740287

GEORGE D. CONRAD,

Appellant,

v.

CHARLES O. STRICKLER,

and

ROBERT H. STICKLER,

Appellees.

Appendix 1

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IN THE CIRCUIT COURT OF ROCKINGHAM COUNTY
(filed 4/25/73)

AMENDED BILL OF COMPLAINT

TO THE HONORABLE JOSHUA L. ROBINSON, JUDGE:

Your complainant respectfully represents:

1) Complainant who is a resident of the City of Harrisonburg, Virginia, is the owner of a tract of 199.173 acres of land with improvements thereon situate in Central District, Rockingham County, Virginia, which was conveyed to complainant by Olie M. Arbogast and Elsa L. Arbogast, husband and wife, by deed dated November 1, 1972, recorded in the Clerk's Office of Rockingham County, Virginia, in Deed Book 411, at page 692, which conveyance included an easement of right-of-way extending from said property across the land of the defendants to the Harrisonburg - Keezletown Road which easement is appurtenant to said real estate. An attested copy of said deed is filed as an Exhibit with complainant's original Bill of Complaint.

2) Defendants who are residents of Rockingham County, Virginia, are the owners of an adjoining tract of land lying between complainant's land and the Harrisonburg-Keezletown Road (State Route 925) containing approximately 86 acres, which was conveyed to the defendants by deed dated November 27, 1964,

from Sallie Crider Hall, which is recorded in said Clerk's Office in Deed Book 323, at page 501, an attested copy of which deed is filed as an Exhibit with complainant's original Bill of Complaint, in which deed said easement of right-of-way is referred to and recognized.

3) The said Strickler property was acquired by J. W. Hall, predecessor in title to the said Sallie Crider Hall, by deed from N. H. Keezell and Helen Keezell, his wife, dated July 16, 1936, recorded in said Clerk's Office in Deed Book 165, at page 374. An attested copy of such deed together with a plat of a survey of said land made by A. R. Myers, dated April 24, 1936, which shows the location of said right-of-way and which is recorded along with said deed are filed as Exhibits with complainant's original Bill of Complaint.

4) By the aforesaid deed from the Arbogasts the complainant acquired all of their right, title and interest in said easement of right-of-way fifteen (15) feet wide extending from the southwestern corner of the Arbogast property across the said defendant's land to the Keezletown-Harrisonburg Road (State Route 925) which easement was conveyed to J. M. Liskey (a former owner of part of the Arbogast land) without any restrictions thereon by George B. Keezell and wife, by deed dated March 28, 1913, recorded in said Clerk's Office in Deed Book 97, at page

222. An attested copy of said deed is filed as an Exhibit with complainant's original Bill of Complaint. Complainant is now legally entitled to the use and benefit of said easement.

5) For further description of the location of said easement reference is made to a deed from James Layman and George B. Keezell to Emma Rinker and Minnie A. Rinker, predecessors in title to complainant, dated May 19, 1894, recorded in said Clerk's Office in Deed Book 49, at page 207, an attested copy of which is filed as an Exhibit with complainant's original Bill of Complaint and reference is also made to the aforesaid plat of A. R. Myers on which the location of said easement is shown.

6) Although said easement is a matter of record, and it has never been released or legally abandoned, and defendants have knowledge thereof, defendants have willfully denied complainant the right to use said right-of-way and have erected fences thereon and placed obstructions thereon and have refused to remove such fences and obstructions and have willfully and persistently refused and continue to refuse to recognize complainant's right to use said right-of-way, and have prevented and continue to prevent complainant from using the same.

7) The precise amount of complainant's damages cannot be determined and therefore complainant has no adequate remedy at law.

WHEREFORE complainant prays that a permanent injunction be granted restraining and enjoining the defendants from interferring in any manner with the use of said easement and roadway by complainant and his successors in title, and requiring defendants to remove any and all obstructions including all fences and gates from said right-of-way and do all other things which may be necessary to enable complainant to use said right-of-way without obstruction or restriction and as an open roadway and that complainant may recover his costs in this behalf expended, including a reasonable allowance for attorney's fees and that complainant have such further and general relief as the nature of his case may require.

* * * *

IN THE CIRCUIT COURT OF ROCKINGHAM COUNTY
(filed 5/16/73)

ANSWER TO AMENDED BILL OF COMPLAINT

For answer to the Amended Bill of Complaint, the defendants state as follows:

(1) The allegations of paragraphs 1), 2), 3) and 5) of said Amended Bill of Complaint are true, except that defendants deny that the right-of-way claimed by the complainant is "recognized" in the deed from Sallie Crider Hall to the defendants, as alleged in paragraph 2), and state that mere reference is made to a right-of-way described in earlier deeds.

(2) Defendants deny that the fifteen-foot right-of-way conveyed to J. M. Liskey, and referred to in paragraph 4) of the Amended Bill of Complaint, was conveyed without any restriction, but allege that the same restrictions applied to that right-of-way as those described in the deed from James Layman and George B. Keezell to Emma Rinker and Minnie A. Rinker, dated May 19, 1894, recorded in the Clerk's Office of the Circuit Court of Rockingham County, Virginia, in Deed Book 49, page 207.

(3) The allegations of paragraph 6) of the Amended Bill of Complaint are denied. Defendants allege that any right-of-way claimed by the complainant or his predecessor in title has been

extinguished by abandonment and the complainant is not entitled to the use of any right-of-way across the property of the defendants.

(4) Defendants allege that even if said right-of-way has not been extinguished by abandonment, it is subject to the same restrictions of use and location as those contained in the deed from James Layman and George B. Keezell to Emma Rinker and Minnie A. Rinker, referred to in paragraph 5) of the Amended Bill of Complaint.

WHEREFORE, defendants move the Court to deny the relief prayed for and to dismiss the Amended Bill of Complaint.

* * * *

****

COMMENTS OF THE HONORABLE JOSHUA L. ROBINSON UPON VIEWING THE SUBJECT REAL ESTATE ON SEPTEMBER 4, 1973, IN THE PRESENCE OF PHILLIP C. STONE, ATTORNEY FOR DEFENDANTS AND JAMES R. SIPE, ATTORNEY FOR THE PLAINTIFF.

****

(filed 9/4/73)

On a view of the property standing at point A on Exhibit "1" with your back to D and therefore looking along the Conrad line from A in a northerly direction, it appears that grass is planted in the adjacent Conrad field and assuming that the gate posts, including the gate, at A are approximately 15 feet apart, grass appears to be growing up to a point approximately 15 feet from the line and from that point over to the line it appears to be over-grown with brush and from this point you can't tell whether there are any trees growing in what would be the right-of-way. There certainly appear to be trees growing along the edge of the right-of-way. Also at point A facing east, the condition of the 15 feet on the Conrad side of the line between Conrad 1 and Strickler 2, insofar as you can see, appears to be in about the same condition. Also at point E facing road 925 there is what appears to be an old wooden gate attached to a large tree that opens from the Strickler tract to the public road. In Exhibit "8" the distance from the two fences was estimated to be between 16 and 17 feet. Is that fair enough, gentlemen?

IN THE CIRCUIT COURT OF ROCKINGHAM COUNTY
(filed 9/5/73)

Transcript of an Oral Opinion Rendered on September 5, 1973 by Joshua L. Robinson, Judge.

Gentlemen, this has been an interesting case and the arguments and authorities of counsel have been very helpful. I think, however, the issues have been narrowed down so that the case can be decided today. I might say, I would like to prepare a formal written opinion, but my schedule is such that if I would take the time to do it I don't know when it would be finished, so I am going to announce a decision today.

First on the issue of abandonment, and also on a number of the issues, the Supreme Court has spoken quite recently. Under the Lipscomb v. Commins case at 212 Va. 543, the law is stated quite clearly that the party asserting the abandonment of an easement must prove that fact by clear and convincing evidence. Abandonment is a question of intention and may be proven by possession and use coupled with circumstances clearly showing an intention to abandon. Although there was evidence of non-use such as in the Lipscomb case, there was no clear and unequivocable proof that the right of way was intentionally abandoned by the defendant's predecessor in title, and in that case a jury verdict of a finding of abandonment was set aside. In the case of Lindsey

v. Clark, 193 Va. 522, this was a case in which there was an apparent change in the location of the right of way, by conduct of the parties at least, and the court says in that case at 525, "nor is a right of way extinguished by the habitual use by its owner of another equally convenient way unless there is an intentional abandonment of the former way." So, I don't think, and in this case it would be the defendant, has borne the burden of proof on the issue of abandonment.

On the question of whether the Stricklers had notice of the easement, the Strickler's deed which is Exhibit #5 expressly says that one of the boundaries of the property is on the east side of the fifteen foot right of way and refers to the right of way and their deed of course makes reference to the deed from Hall to Keezle and in the deed from Hall to Keezle there is incorporated in the deed a plat that shows the location of a fifteen foot right of way. So, the location of the fifteen foot right of way or rather a fifteen foot right of way goes directly in Strickler's chain of title. Now with reference to Strickler's contention that he may have looked at the property and did not see or could not tell there was a right of way, if we look at the exhibits, Mr. Strickler testified that there was a gate at what would be B on Exhibit #1 across what would be line 1-4 on Exhibit #1, and he substituted for that gate some boards that in effect

obstructed the right of way. The presence of a gate there would indicate that there was a right of way. And again, in Exhibit #7, in the background of Exhibit #7, when we look at the property we can see that grass was growing up to a point some fifteen feet, and that's an approximation, along the fence on the line between Conrad #1 and Strickler #3 and on the line between Conrad #1 and Strickler #2, so if Mr. Strickler had looked at the corner and seen the view it would have been apparent that the owner of what is now Conrad #1 was reserving the use of the boundary to the property for purpose of ingress and egress, so all indications were that the gate being there was for access from that field to the line at least. I also might point out that when we looked at Plaintiff's Exhibit B, the area shown in Exhibit B shows a fence on each side of what appears to have been a road. There would be no reason to have that fence unless it be used as a roadway for some purpose.

So, we get to the question of the right of way. The grant is in Exhibit #3 - "the parties of the first part grants to the party of the second part a right of way over the lands of the parties of the first part along the Hall line," more particularly described in the deed of Layman and Keezle to Rinker, Deed Book 49 at Page 27, which refers to Exhibit #4A. The effect of that is to incorporate Exhibit #4A by reference into Exhibit #3.

The problem there is how much of Exhibit #4A is incorporated by reference into Exhibit #3 bearing in mind that Exhibit #4A is a conveyance of other tracts and this merely describes a right of way in the same location. I have made some ball point pen markings on Exhibit #4A indicating what of Exhibit #4A is incorporated by reference into Plaintiff's Exhibit #3. So the record is clear, I will ask you gentlemen to substitute an unmarked copy of Plaintiff's Exhibit #4A in the record. It says, "with the privilege to the party of the first part to fence said roadway or not fence it as they respectively may elect, and also to put a gate across such roadway at such points as they may desire." I will hold that that language is incorporated by reference into Exhibit #3. Then we go on down, bearing in mind that Exhibit #4A is for another farm, so I think as we incorporate it by reference we have to read the language this way - "it is further understood by the parties hereto that the right of way hereby granted to the parties of the second part" - that would be to the parties of the second part in Exhibit #3, "is for the use of" and we have to substitute there the twenty-four acre tract which is described in Exhibit #3, in effect omitting the language "thereupon over whose lines said roadway begins and for no other purposes." Then we would incorporate, "said roadway is to be sufficiently wide to wagon over but shall not at any point

exceed fifteen feet. Nothing in this deed shall be construed to give the parties of the second part" - that would be the parties of the second part in Exhibit #3, "any right or use of said land" - that has to be said easement, "for other purposes than that of a roadway to and from said twenty-four acre tract".

That gives the complainant the right to use A - B - D - E, fifteen feet wide for the use as a roadway for the benefit of the twenty-four acre tract. We now get to the question and back to the Lindsey case, with respect to the change in the location of the right of way. In that respect this case seems to be almost precisely the same as the Lindsey case. The Stricklers were certainly on notice of the record right of way, I'm referring to Exhibit #1, from A to B to D to E. There is evidence that would show this and in view of these circumstances I will permit the Stricklers to make an election, I would think thirty days from today would be long enough to make that election, as to whether they prefer that the easement, and I will have to say approximately because I am going to suggest, gentlemen, so that we know definitely, that either you each retain your own surveyor to fix the precise location, or if your two surveyors cannot agree, then the court will have to appoint a surveyor to resolve the differences which would mean that you would each have to pay

for one and a half surveyors unless you can just get together on one surveyor and you would each have to pay for only one-half of the surveyor, to fix the precise location. I would also give the defendants the right to route the right of way around any permanent obstructions that may have been constructed in the right of way provided it's done reasonably and it does not create any additional burden for the owner of the dominant estate. As I view the evidence and as I have indicated, the way Exhibit #4A is incorporated by reference, this gives the respondent the right to use the right of way for a roadway for the benefit of the twenty-four acre tract. Now, as I read the Cushman v. Barnes case, 204 Va. 245, that would bring the burden of the right of way within that case and since this right of way is pertinent only to the twenty-four acre tract, it would also bring it within Robertson v. Robertson 214 Va. 76. So, I will ask counsel to submit a decree accordingly fixing the burden of the right of way within the guidelines layed down in the Robertson and Cushman cases. We will leave the matter of costs to another time, I am inclined to think that the costs should be divided equally - I won't say equally between the parties, but each party should pay his own costs. I would suggest - I am trying to ascertain whether the defendants should make their election before a decree is presented, but I think a decree should be presented first giving the defendant that election.

IN THE CIRCUIT COURT OF ROCKINGHAM COUNTY
(filed 12/3/73)

DECREE

This cause came on further to be heard on the 3rd day of December, 1973, upon pleadings, amendments and exhibits thereto, heretofore filed, various pre-trial conferences, a hearing ore tenus and all testimony, exhibits, documents, stipulations, and other evidence introduced, upon a view of the premises and argument by counsel, and the Court after consideration of the law and the evidence doth hereby ADJUDGE and DECREE as follows:

(1) By virtue of a grant from George B. Keezell and wife (predecessors in title to the defendants) to J. M. Liskey (a predecessor in title to the complainant), by deed dated March 28, 1913, recorded in the Clerk's Office of the Circuit Court of Rockingham County, in Deed Book 97, page 222, the complainant is entitled to a right of way over and across a tract of land containing approximately 86 acres, located on State Route 925 in Central District, Rockingham County, Virginia, which tract was conveyed to the defendants by deed dated November 27, 1964 from Sallie Crider Hall, which is recorded in said Clerk's Office in Deed Book 323, at page 501.

(2) The right of way to which the complainant is entitled is appurtenant only to the 24 acre tract acquired by

J. M. Liskey (a predecessor in title to the complainant) from George B. Keezell and wife, by deed dated March 28, 1913, recorded in said Clerk's Office in Deed Book 97, page 222.

(3) The right of way to which the complainant is entitled is more particularly described by deed dated May 19, 1894, from James Layman and George B. Keezell to Emma Rinker and Minnie Rinker, recorded in said Clerk's Office in Deed Book 49, page 27, the description and terms of said deed being expressly incorporated to the extent hereinafter set forth:

> The parties of the first part do grant and convey with General Warranty unto the parties of the second part and to their vendees and assigns forever ascertain right and use of roadway, as follows, to-wit: Beginning at a small white oak on the line between the lands of the parties of the second part and Layman's 14 acre Peale lot, thence through said lot S 54 1/2 W 18.8 poles S 30 1/2 W 32 poles along Layman's roadway, thence along and near Keezell's line S 62 1/2 W 3 poles and N 72 3/4 W 8 Poles to the corner of said 14 acres lot, thence on Layman's Koontz land on the west side of Keezell's line S 21° 40' W about 75 or 80 poles to near the north side of Layman's pond, thence diagonally across the line on the Keezell's land above said pond and near the corner of his woods, thence wholly on Keezell's land along his and Layman's line and following the present roadway to the Keezletown and Harrisonburg road, with the privilege to the parties of the first part to fence said roadway or not fence it as they respectively may elect, and also to put gates across said roadway at such points as they may desire....
>
> It is further understood by the parties hereto that the right of way hereby granted to the

> parties of the second part is for the use of their 24 acre tract, said roadway is to be sufficiently wide to wagon over but shall not at any point exceed fifteen (15) feet. Nothing in this deed shall be construed to give the parties of the second part any right or use of said lands for other purposes than that of roadway to and from said 24 acre tract.

(4) Since the evidence was clear that those claiming the right of way to which the complainant is now entitled have for many years deviated from the right of way originally granted and have entered the public highway through the driveway between the residence and barn located on the defendants' tract designated as A-B-C on Exhibit No. 1, the defendants are hereby put on terms to make an election as to whether the complainant shall be entitled to the right of way as originally described in the Rinker deed, or whether the complainant shall continue to use the route along the driveway aforesaid. In the event election is not made within fifteen (15) days after the entry of this Decree, the defendants shall be deemed to have elected the original route of the right of way.

(5) The complainant shall be entitled to use the right of way for such use as that established at the time of its creation in 1913, and such other purposes to which the complainant's 24 acre tract might thereafter be reasonably devoted so long as purposes other than those existing in 1913 shall not impose an additional burden on the servient estate.

(6) The defendants have failed to carry the burden of proof as to their claim that the 1913 right of way has been abandoned and the Court holds that there was no abandonment. The defendants had record notice of the right of way.

(7) The right of way to which the complainant is entitled shall be surveyed by a surveyor designated by the parties hereto and in the event the parties cannot agree upon a surveyor, or, in the event the parties choose separate surveyors and the surveyors fail to agree as to the location of said right of way, the parties shall so advise the Court so that the Court may order a survey to determine the route of the right of way or rule upon contested issues dealing with the location of the right of way.

(8) The defendants shall have the right to route the right of way around any permanent obstructions that may have been constructed in the right of way provided it is reasonably done and does not create any additional burden for the owner of the dominant estate.

(9) The Clerk is directed to record a copy of this Decree in the land records of the Court and to index the Decree under the names of all the parties hereto.

(10) The parties hereto shall pay their own costs.

To all of which action the complainant objects except that set forth in Paragraphs (1) and (6). The defendants object

to the decree to the extent that the Court held that the right of way or portion thereof had not been abandoned.

There be nothing further remaining to be determined in this cause, it is ORDERED to be retired from the docket unless within thirty days after this date either party files a notice of appeal and assignment of error.

Entered this 3rd day of December, 1973.

/s/Joshua L. Robinson
Judge

* * * *

IN THE CIRCUIT COURT OF THE COUNTY OF ROCKINGHAM
(filed 12/31/73)

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR
By GEORGE D. CONRAD

George D. Conrad, by counsel, hereby gives notice of his intention to appeal from the final decree entered herein on the 3rd day of December, 1973, whereby the Court: recognized the right of way which Conrad sought to have protected from interference by defendants, holding that it had not been abandoned, but holding that the right of way was subject to restrictions in a deed referred to in the deed from which Conrad's right of way originated; allowed defendants to elect whether Conrad would be entitled to the right of way as originally described in the deed by which it was created or as its location had been changed by express consent by the parties predecessors in interest, which right of way as changed had been in use for many years; and ordered that Conrad's right of way as elected by defendants be surveyed at the joint expense of the parties and that defendants be permitted to route the right of way around any permanent obstructions constructed in Conrad's right of way.

George D. Conrad Assigns as error the following:

I. The Court's holding that the right of way to which Conrad is entitled is appurtenant only to the 24 acre

tract acquired by J. M. Liskey(a predecessor in title to Conrad) from George B. Keezell and wife, by deed dated March 28, 1913, recorded in the Clerk's Office of the Circuit Court of Rockingham County, Virginia in Deed Book 97, page 222, a copy of which was introduced at the trial as Exhibit 3 because (a) the instrument creating the easement does not limit the use to be made thereof; and (b) the evidence shows that there was no intent to limit the benefit to the 24 acre tract in that the right of way has been continuously used by Conrad's predecessors for the benefit of the entire farm now owned by Conrad with the knowledge of defendants' predecessors in title.

II. The Court's holding that the restrictions on the easement granted by deed dated May 19, 1894 from James Layman and George B. Keezell to Emma Rinker and Minnie Rinker recorded in said Clerk's Office in Deed Book 49, page 27, a copy of which was introduced at the trial as Exhibit 4A, should be incorporated by reference into and be applied to limit the easement provided for in the deed from George B. Keezell and wife to J. M. Liskey, dated March 28, 1913 recorded in the said Clerk's Office in Deed Book 97, page 222 because (a) such holding is plainly wrong and unsupported by the language in the 1913 deed which clearly intended to incorporate only the description of the location of the easement as found in the deed from

George B. Keezell and James Layman to Emma Rinker and Minnie Rinker dated May 19, 1894; (b) the language in a deed imposing any limitation is to be strictly construed and such limitations are not to be lightly raised by implication; and (c) a deed or grant must be construed most strongly against the grantor if there is any doubt or uncertainty as to the meaning of the language employed by the grantor it must be solved in favor of the grantee.

III. The Court's holding that defendants were entitled to elect whether Conrad would be entitled to the right of way deeded to him as recognized by the Court and found not to have been abandoned or whether he would be entitled to use the driveway between the residence and the barn located on defendants' tract as A-B-C on Exhibit No. 1 introduced at the trial which has been in use for many years by those claiming the right of way to which Conrad is entitled because (a) such holding would unjustly deprive Conrad of a property right clearly recognized by the Court established by the facts and which has not been abandoned; (b) Conrad's and defendants' predecessors in interest expressly and impliedly consented to a change in location and the right of way was used in its changed form from sometime prior to 1951 up to the time defendants purchased the property; and (c) unless Conrad is willing to consent to an election by defendants,

the law as applied to the facts must determine the right of way to which Conrad is entitled.

IV. The Court's holding that Conrad's use of the right of way would be limited to that established at the time of its creation in 1913, and such other purposes to which Conrad's 24 acre tract might thereafter be reasonably devoted so long as purposes other than those existing in 1913 shall not impose an additional burden on the servient estate because (a) the instrument creating Conrad's easement does not limit the use to be made thereof; (b) the evidence shows there was no intent to limit the benefit from the easement to the 24 acre tract; and (c) where a right of way is granted or reserved it may be used for any purpose to which the land accommodated thereby may reasonably be devoted unless the grant or reservation specifically limits the use.

V. The Court's holding that Conrad's right of way be surveyed at the parties joint expense and that if there be some disagreement as to location that the Court be advised so that it might order a survey to determine the route of the right of way or rule upon contested issues dealing with the location of the right of way, because the location of the right of way is already clearly established by deed to the extent it has not been changed by agreement of the parties predecessors

in interest and by the location of the driveway between the house and barn to the extent that it has been changed.

VI. The Court's holding that defendants shall have the right to route the right of way around any permanent obstructions that may have been constructed in the right of way provided it is reasonably done and does not create any additional burden for the owner of the dominant estate because (a) there is no basis in law or in fact for such a holding and (b) it is not the Court's function to establish a new right of way or change the location of the substituted right of way by allowing the defendants to make such an election.

VII. The Court's holding that the parties each pay their own costs because defendants wrongfully denied Conrad any use whatsoever of the right of way across their property and thereby compelled Conrad to resort to legal proceedings to establish such right and because Conrad's contention that the easement was conveyed without any restriction on use should be sustained. Thus Conrad has substantially prevailed and should be awarded his costs against defendants.

VIII. The Court's failure to grant a permanent injunction restraining and enjoining defendants from interferring in any manner with the use of Conrad's easement by him and his successors in title, and requiring defendants to remove any and

all obstructions including all fences and gates from the right of way so as to allow Conrad to use the right of way without obstruction or restriction.

A transcript of the testimony and other incidents of the trial of the above styled matter will hereafter be filed.

* * * *

EXCERPTS FROM TESTIMONY OF GEORGE CONRAD
(filed 1/30/74)

[23]

Q Approximately how many acres does this farm contain?

A It contains between 195 and 200 acres.

Q Now would you please state for the benefit of the Court where, as best you can describe - the location of where this farm is? [24] A Well, it is located about a 10 minute drive from Harrisonburg, just north of Keezletown, the village of Keezletown, and it extends from the road that runs north and south through Keezletown, which is - referred to I believe in most of the older deeds as the Brock's Gap Road...in a westward direction to the ....to within about 300 feet of the Keezletown-Harrisonburg Road. The 300 feet of property which is owned by the Stricklers which separates it from the Keezletown-Harrisonburg Road.

COURT: You say the line A-B, or rather the line A-D is approximately 300 feet? A Well, I would say so, I was measuring it directly across there, rather than in that direction.

Q When you refer to 300 feet, it would be from your land to....

COURT: Oh I was looking at the wrong road....I can't read those letters from here. A Well, the old road which is the road on the left there is the Harrisonburg-Keezletown Road. The road

at the top is the road, which has not existed for anything like the period of time that the Old road had been in use. And it's about 300 feet from that road to my boundary line.

COURT: I can't read....what is that road at the top?

Q This public road is designated number 719....

[25]

COURT: 719.... so it's approximately 300 feet from point A to that road.....

Q Would you describe this farm that you have purchased and the location of any improvements on the farm? A The buildings on the farm are on the eastern end of the farm, where it fronts on what I would call the Brock's Gap-Keezletown Road, which runs almost parallel to the road at the top of this map.

Q Could you state approximately the distance from where your improvements on this farm are located to the Strickler land? A I would say half a mile.

* * * *

[27]

Q Mr. Conrad I will show you a deed dated March 28, 1913 from George B. Keezell and Belle C. Keezell his wife, to James M. Liskey, which is recorded in the Clerk's Office of Rockingham County in Deed Book 97, at page 222, and ask you first of all whether this is in your chain of title? A This conveyance is in my chain of title.

Q Is this the grant of the right of way which you rely on as benefiting you at the present time? A This is the grant which I rely upon.

Q And that's in the year 1913? A Correct.

* * * *

[43]

Q Mr. Conrad since you purchased this farm in 1972, have you used this right of way to the public road? A I have never used it because I had some correspondence with the Stricklers to which I received no reply and then they advised me that they had referred it to their attorney, and they would not permit me to use it, and rather than go through trespass proceedings and the usual forerunners of injunction proceedings - I have decided to proceed directly with an injunctive proceeding and have the Court decide what [44] our respective rights might be.

COURT: Gentlemen, I assume that it can be stipulated that the complainant has asserted a right to use this right of way and the defendant has refused to permit him to use it?

STONE: Yes Sir.

* * * *

[79]

Q All right, as to the Exhibit - referring to Exhibit 1 as to the right-of-way from B to E, would it be a fair statement to say that your factual investigation of this matter had

revealed to you that that portion of the right-of-way has not been used since at least the 1930's? A I believe that to be correct.

Q Has your investigation also revealed and doesn't your- doesn't the exhibits prepared by your counsel which you've made - which you've had occasion to testify about all this, indicate the presence of a shed in what appears to be the route of the granted right-of-way, that is between B and D? A That is correct. My information is that after an agreement was reached to substitute this entrance which is marked on that plat in black, that the old right-of-way was no longer [80] used and that the shed was build by mutual consent of the people who were involved, because there was no longer any need for that entrance.

Q Your testimony then as I understand it, is that the parties agreed to use the route indicated from B to C and apparently some time in the thirties? A Right.

Q And since that time did not use or at least no one claiming title as one of your predecessors, no one used the route from B to E, a shed was built in its path and the only route used was from A to B to C? A That's correct.

* * * *

EXCERPTS FROM TESTIMONY OF EVERRETT R. TIBBINS
(filed 1/30/74)

[94]

Q Mr. Tibbins, normally when the right-of-way was used by Mr. Barnhart and I believe I was about to ask you if anyone else used it to your knowledge? A Not to my knowledge.

Q When Mr. Barnhart used it, did he use it as far as you know to come out to the road to number 925 or just to come on Mr. Hall's farm now designated Strickler number 2? A Well to my recollection he ran a machine shop.

Q Who did? A Mr. Barnhart.

Q All right, where was that located? A I think it was located out there along the railroad somewhere there.

Q Well not in the area that we're talking about here. . .

A No, no it wasn't on that.

[95]

Q All right now, when Mr. Barnhart or anyone else used the right-of-way, can you tell us to your knowledge whether they would normally come through the property starting at point A when they leave the - Mr. Conrad's property, you call that the Liskey tract? A Yes.

Q Starting at point A with this being the highway here, 925, what to your knowledge was the direction and route of the right-of-way that was actually used? A Well that other end up there it wasn't used.

Q You tell me what letters to refer to here? Can you read the letters from there? A Yes. That's D there ain't it.

Q D right here? A Yes, ain't it.

Q All right sir. And back how far? A That wasn't used.

Q And it wasn't used how far - back now far, I'm sorry?

A Well back to where it goes down there from the barn.

Q Which is . . . A Right there.

Q . . .at this point, B? A Yeah.

[96]

Q So from B to D - now let me just show you, I don't know if you can see it, but D to E is the right angle turn that takes you from the field out onto the road, was that used? A No, it was an old shed out there.

Q So do I understand you to say that from B to D to E to the road was not used? A No.

Q All right. Since you've been acquainted with the property has it been used? To go to the road or to come in? A No.

Q Has not been? A No, it wasn't used.

Q All right sir, referring to. . .

SIPE: When you say it has not been used you mean from B to E?

Q Yeah, only the section B to E, from the driveway tenant house there which is B over to E, that's the part we're referring to not being used, isn't that correct? A (Shakes head yes.)

COURT: The witness nodded affirmatively.

Q And you say that that's true since you've been acquainted with the property somewhere around 1915? A Yes sir.

Q You referred to an old shed, what shed are you talking about and where is it located? [97] A It was a machine shed. After Mr. Hall bought that Keezell land over there off Nat Keezell, he put that shed up up there in a clearing.

Q Now on this Exhibit 1 there has been drawn here a little block in the red line up close to point D and would be in the route from B to D and I'm putting my pencil tip on it right now. Is that approxiamately where the shed would be? Is that the shed you're talking about? A That's right.

Q Can you tell us anything about the appearance of the shed? Was it metal, wood or what? A Well it's wood. Mr. Hall, he used it for a machine shed there.

Q Now Mr. Hall you're referring to the owner of the Strickler property some years ago? A Yes.

Q When was the shed built, do you remember? A I don't know just when it was.

Q Can you estimate it? A Of course I didn't try to remember. It wasn't nothing to me or anything like that. But it was after he bought that land off of Keezell.

Q After Mr. Hall bought the land from Keezell? A Yes.

Q Can you give me any estimate at all about how many [98] years ago that would be? I believe you said you moved there in '34, was it before or after that? A Oh, it was after that.

Q All right and how much longer? A I have an idea it was along in the forties somewhere but I just wouldn't . . .

Q All right sir. And you have indicated that that shed apparently was built in what appeared to be the route of the old right-of-way? And was built when Mr. Hall owned that Strickler tract number 2? A That's right.

Q Was it used to your knowledge for anything but a machine shed? A Not while Mr. Hall had it.

Q Never used for animals or anything like that? A (shakes head no.)

Q And excuse me, I believe you shook your head again. If we are talking about the distance I think the east - west sides of the shed, that is going from west to east, what would be the width of the shed we're speaking of, that is being the east-west dimensions? A I just don't know how it measured. Around 18, probably 20 feet.

Q All right sir. You ever go to that shed? A Yes, I helped him pushing machinery back in there.

[99]

So you know machinery was actually kept in it? A Yes sir.

COURT: You say you helped push machinery back there?

A Yes. He'd pull thresh blocks and over-seed hullers...

Q Mr. Tibbins, as to the right-of-way portion designated here from point A, which is the corner to the Liskey tract or the Conrad tract on the Exhibit, over to B, which is the drive-way near the tenant house there, what was the use normally made for this section of the right-of-way? Since you're familiar with it what was it normally used for, right here at the point from A to B? A Well it's just there, it wasn't used only just as I say when Mr. Barnhart lived there, he come through there some over there.

Q And do you know normally which way he would go when he came through? Did you ever see him come through there? A Well he'd go up through that field - the field there.

Q You talking about from A to B? A Yeah.

Q Then where would he go? A He'd come from down there and he'd go through the field over to his home.

Q And you're talking about Mr. Barnhart? A Yeah.

[100]

Q Well maybe I misunderstand the direction. Are you talking about when he came in off the road or are you talking about when he leaves the Conrad property here? A No, after he leaves there and he goes into the Conrad property he'd go on

home. See he lived across the hill there from . . .

Q But Mr. Barnhart owned the Conrad property designated on the sketch as Conrad number 1? A Yeah.

Q Did you ever know of any use of the right-of-way by Mr. Barnhart or others from the Conrad property across and onto the Strickler property at the route designated from A to B? In other words, do you know if anyone ever came from the Conrad property and over to the Strickler property along this route A and B? Which is the old right-of-way you referred to? A Well that's the only way they could get there because it was there.

Q But when they got to point B can you tell us where they would leave the property to get to the road to where they were going? A Well they was always coming up there to 925.

Q Road number 925? A Yes.

Q Which would be through the driveway there by the tenant house, between the house and the barn? [101] A That's right.

Q Mr. Tibbins, you say you've been acquainted with this property since 1914 or 1915 and lived there since '34, as to the Strickler tract 2 and 3 and the Conrad tract number 1, all of the, 199 or so acres there, that you've been familiar with, has all these properties to your knowledge always been farmed? A Yes sir.

* * * *

[101] Q Now what is the - what was the nature of the farming [102] on the Strickler tract number 2? Was it dairy, beef, sheep or what, can you tell us generally from 1915? What was it when Mr. Hall owned it? A Well he farmed, I don't know, a few years before he passed away he . . .

Q When was that just to get it in the record? When did he pass away? A I couldn't tell you.

Q Wasn't to long ago was it? A Well time flies around pretty fast, or it does to me.

Q Basically when Mr. Hall owned the property what kind of farming was done on there? A Well he farmed, just general farming, but only - I'd say probably 6 to 8 years there he went into the dairy business.

Q He did have a dairy farm on there? A Yeah, yeah he had a dairy farm.

Q Now what about the Conrad property number 1, what kind of farming was done there? A Just general farming.

Q On the Strickler tract number 2 and Strickler tract number 3, except for the buildings that we've referred to, a barn and a milking parlor, the house and shed, you know of any other improvements on the property? I'm eliminating gates and [103] and things, but I'm talking about actual dwellings or sheds? A Well they did some work there on the house.

Q Are those the only dwellings or sheds on the property? A Yes sir.

Q And otherwise does the property appear to be primarily to pasture? A Well at the present time that's about what it is.

Q Is that also true of the Conrad property except for the improvements he referred to in his testimony, the house on his property? Is that primarily pasture land? A Yes it is.

Q All right sir. You indicated that your father at one time leased the Liskey tract down in the corner of the Conrad property number 1? A That's right.

Q Was that your testimony? And that was around 1915? A 1915.

Q How long did he lease it? A Just one year.

Q Would it be a year or season or 12 months? A No, one crop.

Q Who would he have leased it from, do you remember? A Jim Liskey.

[104] Q And what use of it did - did your father rent the entire acreage there from Liskey as far as you know? A No, just a clearing.

SIPE: I don't know what he said.

A Around 10 or 12 acres, about half of it.

Q Would the acreage he leased have been closest to the

property line between what is now Conrad and Strickler, would it be against the property line? A Yeah.

Q It would actually have adjoined the property or the fence? A Yes, there's a fence there.

Q What did your father do with the property? What did he do with it that year he leased it? A Had corn in it.

Q Was there ever a dwelling on that acreage there that he had leased? A No, won't no dwelling, was a little old shed down there at the corner.

* * * *

[108]

COURT: So the Barnharts owned the 24 acre tract and a larger tract from approximately 1951 to 1958?

Q And the Barnharts owned not only this Liskey part but they owned additional land, they had about 400 or more acres in there didn't they? A That's right.

Q And to your best knowledge the Barnharts, when they owned the property, did use this right-of-way as a means to get to public road number 925 from time to time? A Well they did it a few times. They didn't use it all the time.

Q I believe you did testify that you were working during all those periods of time and would not be there generally during the daytime? A That's right.

Q And even the times you were home you did observe them using this right-of-way from time to time? A That's right.

Q Did you testify that Barnharts had a machine shop to on their property? A No, not on their property. I think it was along [109] out here about where the Apple Shed - it's along there that they had some machinery.

Q It was not on their farm? A No, no it wasn't there, no.

Q Did they use this right-of-way to get from their farm to where they did have this machine shop? A Not always, they come down from Keezletown most of the time, but sometimes they'd come through there.

Q But while the Barnharts owned this property, this farm, they would use this right-of-way from time to time to get from their farm to their business property? A I'd say so, yeah. But not all the time, they . . .

Q Right. Now the only other question, I believe you testified that originally this right-of-way went from A up to B up to D and then E to get to the public road? A That's right.

Q And to the best of your recollection sometime during the 1930's it was changed so that they then went out to the public road by using the right-of-way from A to B to C? A Yeah, that's the way they was using it.

Q And they did not use - they did not quit using the old right-of-way until they did use this right-of-way which was up between the tenant house and the barn to get to the public road? A Yes sir.

* * * *

EXCERPTS FROM TESTIMONY OF DAVID H. BARNHART
(filed 1/30/74)

[111]

Q And how long did you reside in the Keezletown area in Rockingham County? A About 14 years.

Q Do you have a brother? A Yes.

Q And what is your brother's name? A John.

Q John Barnhart? A Yes.

Q And where does your brother reside at this time? A Well I have three brothers, John lives in Augusta, Georgia now, I mean Hephziabah, Georgia.

Q He lives in Georgia? A Yes.

Q All right. Mr. Barnhart, did you and your brother, [112] John, purchase a farm located in the Keezletown area from Mr. D. Wampler Earman? A Yes we did.

Q Do you recall approximately when you purchased this farm? A In the Spring of 1951.

Q And approximately how many acres did the farm contain at that time? A It had 329 and a fraction.

Q Acres? A Yes sir.

Q Now this farm that you and your brother, John, purchased from Mr. Conrad back in 19 - from M. D. Wampler Earman in 1951, is this part of the farm now owned by Mr. George C. Conrad? A Yes sir.

Q You and your brother then would be what is called predecessors in title to Mr. Conrad? In other words you all owned the farm that's now owned by Mr. Conrad? A Well we did for a while, then I sold my interest that my brother sold to Mr. Arbogast which he sold to Mr. Conrad.

Q Okay, let's go through that again? A My brother had it after I did.

COURT: Part of it went from Barnhart to Earman. No he bought it from Earman.

[113]

Q I think I can clarify it Judge.

COURT: All right.

Q You and your brother bought this 300 and some acre farm from Mr. Earman? A Right.

Q And subsequent to your purchase of the farm did you and your brother divide up this farm? A No, that was about two and a half years later.

Q I see, later you all did? A Yeah, that's right subsequently.

Q Right. I believe in 1953, a couple years later, you and your brother divided the farm? A Right.

Q And your brother, John, took that part of the farm which is now owned by Mr. Conrad? A Right.

Q And what part of the farm did you take? A The northern part.

Q Northern part of the farm? A Yes, 129 acres, it was on the north end of it.

Q And who is the present owner of the farm that you owned? A Simeon Heatwole.

Q And about how many acres did your brother acquire? A It was right at 200, I think it was 199 and a fraction.

[114] Q And that would be the same farm that Mr. Conrad now owns? A Right.

Q After you and your brother divided up the land did both of you continue to live there on the farm? A Yes we both lived on the farms. I lived on that particular farm part of that year but then I was building on the end that I bought. It didn't have - I mean after I got buildings there I lived in that part.

Q So you put some buildings on there and you lived there for approximately how long? A Twelve years.

Q You lived there 12 years? A Yes.

Q And did your brother, John, continue to reside on the farm that he acquired which is now owned by Mr. Conrad? A He did until January of 1958.

Q And to whom did your brother sell his farm at that time? A Olie M. Arbogast.

Q To Mr. Olie Arbogast? A Yes.

Q And then I believe Mr. Arbogast sold the farm to Mr. Conrad? A Yes.

[115]

COURT: So your brother sold it to Arbogast in '58?

A I think that's right. Mr. Arbogast is here, you can check with him.

Q January 16,1958 is the date of the deed. Mr. Barnhart, when you and your brother purchased this farm in 1951, were you aware of a right-of-way from this 300 and some acre farm to the public road number 925 that I believe has been referred to as the Keezletown-Harrisonburg Road? A Yes.

Q How did you become aware of this right-of-way? A Mr. D. Wampler Earman pointed out to us before we bought the place. Mr. James Hall confirmed it to us and he said it's your right-of-way for you to use. But at that time they had closed the fence and we went out between his house and barn.

COURT: Now I didn't hear your answer, please repeat it?

Q Mr. D. Wampler Earman told you prior to you and your brother buying or purchasing the farm that there was a right-of-way and pointed it out to you, is that correct? A Yes.

Q Referring to Plaintiff's Exhibit 1, at point A, is this where the right-of-way would have commenced? A Yes.

Q And in what direction, if you can read these letters, in which direction did Mr. Earman point out the right-of-way? [116] Was it straight over to the public road or was it down through between the Hall house and barn? A I'm not sure that I can say as to that, but he said it's our right-of-way out across Mr. Hall.

Q Okay. A And Mr. Hall said because of gates to keep up, he would prefer that we use the route out between his house and barn which was agreeable to us.

COURT: At that time Mr. Hall owned Strickler 2 and Strickler 3?

Q At the time that you and your brother purchased the farm did Mr. Hall own the tract that's described on Plaintiff's Exhibit 1 as Strickler number 2 and did he also own the one that's designated as Strickler number 3? A Yes.

Q He owned both tracts? A Yes.

Q And I believe you stated that Mr. Hall confirmed or verified that you did have the right-of-way to cross his land to the public road? A That is correct.

Q And he said that he preferred that you use this right-of-way to the public road between his house and the barn? A That's right.

COURT: Now when you asked him this right-of-way,you [117] C, B on Exhibit A.

Q From here to here? A Yes.

Q So he did state to you - verify that you had a right-of-way out to the public road over this right-of-way?

STONE: Excuse me, that wasn't his testimony. I thought he indicated that the right-of-way came across the . . .

COURT: Just a minute, counsel's last question referred to D, E?

Q Did Mr. - let me rephrase this. At the time you and your brother purchased this farm, you stated that Mr. Hall verified that you had a right-of-way to the public road across his land, is that correct? A That's correct.

Q And I believe your testimony was that he said that he would prefer that you use the right-of-way between his house and the barn? A Yes.

Q Could you at the time your purchased your farm, could you see any visible evidence of where the right-of-way existed? A Yes, it was very plain.

Q And would you please describe it to the best of your knowledge? [118] A It continued south, what is known as E and D or to there - to the - out to there, straight.

Q To here? A Yes. But at that time the fence was closed, but there was evidence of a well worn roadway sometime in the past.

Q Now you say the fence was closed, was there a gate where it went on to the public road or do you recall? A I think it was

closed - he had closed it at that time.

Q All right.

COURT: Excuse me, you say the fence was closed. Can you tell us or point to what section on the sketch there was a closed fence? A No, when someone gave you permission to go across you go across where they tell you and we had nothing to do with that, going to investigate where the right of way might have been when this was satisfactory to us. From the testimony of the others I accepted that at that time it was closed. I think it was.

Q All right now, you're talking about out here at E, is that correct? A That's correct.

* * * *

[120]

Q Now, where were there any gates? First of all were there any gates at point A? A Yes.

Q And that's where it joined your farm? A (Shakes head yes.)

Q Were there any other gates on this right-of-way? A There was gates into Mr. Hall's barnyard so that he could let his cattle in and that's all we ever bothered with [121] and that's all I looked for.

Q What about the roadway itself, what appearance did it have? Did you determine- did it appear to you to be a roadway? A It certainly did. And I don't know the width of it but I know

I could take a tractor, a farm bailer or a four harvester, equipment like that and squeeze the 12 foot gate and let in. That area of land there's no problem to get through, no crowding like it would have been at. . .

Q In between the fences here?

COURT: The witness designated the area between A and B.

Q He's talking about the width now?

COURT: Yes and I just want the record to be clear as to what part of the sketch he was referring to.

Q From A to B what - between the fences, what would you estimate as to the width?

STONE: Before he answers this question, is it understood Your Honor that we're going in on apparently evidence that's based on the assumption that the Court would find an ambiguity in the instrument? Otherwise we think it's incompetent evidence set in since the instrument the Court must hold with.

COURT: Well they contend there's an ambiguity . . .

STONE: Right, . . .

COURT: . . . and parole evidence. . .

[122]

STONE: And our objection is on that basis then.

Q What would be your estimate as to the width between the two fences from point A to point B? A At least 16 feet, at the very least, could have even been 20, I don't know.

Q Now what about the appearance from point B to the shed, was there a fence only on the northwestern side or was there a fence also on the other side, the southeastern side? A There was a fence on both sides out as far as this garden.

Q And would the width and the appearance of the roadway up to that point be the same as it was from point A to point B? A As I recall it was.

Q Now coming to this shed, was that shed there when you purchased your farm? A Yes it was, but it was not on the roadway at that time. I think there was a building put to it later that may have been on the roadway but it was not on the right-of-way.

Q Was there a shed off of the right-of-way which is now torn down or has been done away with? A There was none on the right-of-way at the time we moved there.

Q Was there a lean-to or something like that put onto a shed at a later time or do you know? [123] A Yes there was.

Q All right. But at the time you purchased your farm the shed was not located on the pathway of this right-of-way? A That's right.

Q Now Mr. Barnhart, during the time that you and your brother owned this farm together from 1951 to 1953, did both you and your brother use this right-of-way? A Yes. . .

STONE: Excuse me, which right-of-way are you talking about now?

Q Did you use a right-of-way? A Yes.

Q And what right-of-way did you and your brother use? A A to B and B to C.

Q Now I believe you stated that Mr. Hall asked you to use B to C instead of using from B to E? A Correct.

Q Did you and your brother - how often did you and your brother use this right-of-way? A During summer months sometimes we used it every day.

Q Did you and your brother use it as a means to get to the public road number 925? A Some, not always.

Q Did you also use that right-of-way from time to [124] time in order to go from your farm to the Hall farm? A Yes.

Q So you used it really for two purposes? A Correct.

Q One would have been to get from your farm to the Hall farm and the other purposes would have been to get from your farm to the public road number 925? A That is right.

Q I assume that you used this some of the time for farming purposes?

STONE: Object to the leading nature of the question. . .

Q Excuse me, for what purpose did you and your brother use this right-of-way? A For anything we had need.

Q Was it used for farm purposes? A Yes and other too.

Q And did you and your brother use it to drive vehicles over the right-of-way? A Yes.

Q Automobiles? A Yes.

Q Did you and your brother use it as a means to go to Harrisonburg? A If we were on the western part of the place and we needed to go that's the way we went.

[125]

Q Did Mr. Hall and members of his family use this right-of-way to come to your farm? A Yes they did.

Q So actually it was used by both parties as a means to go back and forth to the farms and also by you and your brother as a means to go to the public road? A And could I say something else.

Q Yes sir. A My father worked for us at that time and he would often come that way?

Q Where did he live? A He lived at Dayton.

Q And he did. . .

COURT: I didn't hear his answer. A He lived near Dayton.

Q Dayton, Virginia. And your father would use this as a means to come to your farm? A Yes.

Q Was it used by anybody else working for you and your brother on the farm? A Some.

Q After you sold part of the farm to your brother, John,

and you retained the northern part of the farm, did you continue from time to time to use this right-of-way? A Yes as I had need.

[126]

Q And so you and your brother then continued to use this farm until such time as the farms were later sold? A Yes.

Q And your brother sold his farm in 1958? A That is correct and even after Mr. Arbogast owned the place I still used it some.

Q For what purposes? A The same as before.

Q I believe that - I believe you stated that after you and your brother divided the farms, that you built a house and some other buildings on your part of the farm, is that correct? A That is correct.

Q And did you continue to use this right-of-way for your own use? A Well if - it was more if we were doing farm work than other type work because I'd have to go through my brother's farm to in order to use this.

Q Where were the improvements on your brother's farm, the house and the barn and other things? Was it close to the Keezletown Brock's Gap Road? A Yes.

Q And did he still use this right-of-way for his entire farm? Other words, after you all divided the far, he had a 200 acre farm is that correct? [127] A That is correct.

Q And did he continue to use this right-of-way to go from his farm - from his house to the public road across the Strickler land or the Hall land? A Sometimes he did.

Q So he continued to use it for the same purposes up until the time he sold it to Mr. Arbogast? A Right.

* * * *

[134]

Q Now did I understand your testimony Mr. Barnhart to be that at least since 1951 when you bought the property with your brother, that the right-of-way, that you've been referring to from the Conrad farm shown on Exhibit 1 across the Strickler farm, number 2 here, was used exclusively from A to B, and from there through the driveway out onto the road at C? A Yes.

* * * *

[139]

Q And did you then go to Mr. Hall and confirm this? Didn't you ask Mr. Hall if that was his understanding of it and asked if he minded? A We had an understanding. I'm not sure if we - I went to him or he came to us, but I really think we went to him to see if it was satisfactory to do this.

Q Well Mr. Hall was a good neighbor wasn't he? A Yes he was.

Q And any time you went through here and certainly he didn't object to it did he? A No.

Q And he told you it was all right to go through there didn't he? A Yes.

Q How many times did you ask him while you were there for permission to go through there? A When he told me once I could go through, I never asked again. I thought his word was good and . . .

Q So your agreement was when you first bought the property? A That's correct.

* * * *

[142]

Q Now let me ask you again, which highways could you reach from your farm, that is the northern portion after you divided the D. Wampler Earman farm with your brother? Which highways, public roads could you reach from your farm? That you [143] had access to? A The road that leads into Keezletown comes up by the farm Mr. Conrad now owns. That was my most easily access I guess, if that's a highway.

Q Is that a road that's paved? A Yes.

Q And was one having - was your brother after he retained this part and even before you sold your interest .....your brother in this farm, that is the section of the D. Wampler Earman farm closest to the Strickler farm, did you also have means of getting on that road to Keezletown, that is the paved road I understand, of getting out? In other words could you leave

Mr. Conrad's farm and what is now the Conrad's farm and get to Keezletown on that same paved road? A Yes.

Q All right. That's the way - if I asked you the way you normally went out, that's the way you usually went out wasn't it? On the hard road? A Yes, most often.

Q And normally, isn't it fair to say that normally your use of the route through the Strickler driveway here was related to your farm business wasn't it? I'm not saying always, but usually that was the case wasn't it? A Usually it was but during those years I had some hired help that used that route because it's closest.

[144]

Again these were people hired to help you on the farm? A Yes.

Q What about things like going out to church and going shopping with your family, things like that, would you most always go out to Keezletown on that paved road? A Mostly.

Q What was the Conrad farm, I'll refer to it as the Conrad farm, the part that your brother retained, what was it used for from 1951 to 1958? A Dairy operation.

Q And what was the Strickler farm used for, Strickler farm number 2 on the Exhibit? A Well that belonged to Mr. Hall and he - he was a farmer.

* * * *

[148]

Q And - sorry I think you might have answered this but I don't recall your answer, how many gates starting with A then would you have before you as you came through the right-of-way A, B, C? How many gates would be in your path? A Usually it was just one.

Q That would be at A? A At A.

Q All right. A But sometimes Mr. Hall would bring his cattle in and it was a possibility there would be one at B that would need to be opened.

Q Let me step up to the Exhibit again and tell me where you're talking about the cattle would come from? Which direction would they be brought in from, the cattle of Mr. Hall's? A They came out by his house and garden out to this pasture. And here's the barnyard, there's a gate.

Q So this will be in the record, they came from a southerly direction? A Yes, and so that they would not go down here instead of going to the barnyard there was a gate across here.

Q So the gate would be for the purpose of apparently turning cattle coming from the southern portion of the Strickler portion in towards the driveway in towards the barn? A Correct.

COURT: Did Mr. Hall keep cows in fields 2 and 3? [149] A When we were there he did not keep any in 3.

COURT: He did evidently from time to time kept them in 2? A Yes.

Q I believe I asked you, in fact I know I asked you and you responded, I asked you whether or not after you bought the property in 1951, that is the farm from D. Wampler Earman, whether you always - when you used this right-of-way went through at B to C, and you said you always did. To your knowledge do you know anyone who ever used the right-of-way, that is to your knowledge, from B to E? A Not after we went there.

Q In '51. And do you know - well that's all right.

* * * *

Q Just a couple of questions. Mr. Barnhart, according to your testimony if Mr. Hall was not turning cattle into this barn there would have been no gates to open or close on the right-of-way, is that correct? A On the right-of-way that's correct. However...

Q The only one would have been the gate from your [150]property to the Hall property at point A as shown on the diagram? A That is correct.

Q All right. Now, to clarify what Mr. Stone asked you here, it was my recollection that on direct examination you testified that when you and your brother purchased the farm that Mr. Hall told you that did have a right-of-way, a legal right-of-way and Mr. Earman told you you had a legal right-of-way across his property? A He said there was a right-of-way.

Q And did he ask you which route he would like for you to use? A Mr. Earman or Mr. Hall?

Q Mr. Hall, excuse me? You and your brother bought your farm from Earman and you went and talked with Mr. Hall, you and your brother, I believe you testified you did, did Mr. Hall tell you that you - or verify what Mr. Earman had told you that there was a right-of-way across the Hall property? A Yes.

Q And was it your understanding from talking with Mr. Earman and Mr. Hall that they had agreed to a substituted right-of-way to the public road? A That is correct.

Q Did Mr. Hall acknowledge this or did he ask you to use this substituted right-of-way? By that I mean between the barn and the house?

[151]

COURT: Apparently the witness doesn't understand the question. I suppose you can lead him further in a case like this.

Q I'm not trying to keep repeating Mr. Barnhart, but let me go over this. At the time you and your brother purchased your farm from Mr. E. Wampler Earman, first of all I believe you stated that Mr. Earman informed you and your brother that you did have a right-of-way across the Hall property to the public road? A Right.

Q And I believe you further testified that subsequently after that that Mr. Hall verified the fact that you and your

brother did have a right-of-way from the farm that you had purchased from Mr. Earman to the public road, is that correct?

A That is correct.

Q Did he ask you or did he indicate that he would prefer for you to use the right-of-way from a point of B to C to get to the public road? A Yes he did.

Q And was this the reason that you used the right-of-way from A to B to C? A Yes.

Q That's all I have.

* * * *

EXCERPTS FROM TESTIMONY OF BEN HALL
(filed 1/30/74)

[158]

Q Mr. Hall, was your father the owner of any of the land that has been in question here today? A Yes sir.

Q What was your father's name? [159] A J. W. Hall.

Q Referring to the Plaintiff's Exhibit 1, there, would you state whether your father ever owned what is referred to as Strickler number 2 there? A Yes sir.

Q Did your father ever own what is called Strickler number 3? A Yes sir.

Q In other words your father was a predecessor in title to the property now owned by Strickler? A Yes sir.

Q Do you know from whom your father purchased those tracts of land? A Well he inherited number 3 from his home, but number 2 he bought from Nat Keezell.

Q He acquired tract 3 and number 2 at separate times and separately? A Yes sir, right.

Q And tract number 2 as designated on the map was acquired by Mr. N. H. Keezell is that correct? A Right.

Q I believe he's referred to as Nat Keezell? A Nat Keezell.

Q I believe the records show that a deed conveying this tract containing about 86 acres was conveyed to your father [160] James W. Hall, by deed dated July the 16th, 1936, is that correct?

A Yes sir.

Q Did you live on this property at any time, either tracts number 2 or 3? A Yes sir.

Q Were you born on one of the tracts? A Yes sir.

Q And which tract would that have been? A Number 3.

Q Number 3? A Yes sir.

Q And did you live in what is designated on the map there as a house? A That's right.

Q And that would be right here shown on this map? A Yes sir.

Q And you were born there and did you live there while you were growing up? A Yes sir.

Q And how long did you continue to reside there? A Up until November of '64.

Q Was this property sold in 1964? A Yes sir.

Q And who was the owner at that time? [161] A My mother, Mrs. Sally Hall.

Q When had your father died? A April of 1960.

Q Your father died in April of 1960 and did he have a Last Will and Testament? A Yes sir.

Q And by his Last Will and Testament did he leave this real estate including tracts 2 and 3 to your mother? A Yes sir.

Q Did your mother Sally C. Hall, sell this property in 1964? A Yes sir.

Q And to whom did she convey it? A She sold it to the Strickler's.

Q But you continued to live there your entire life up until the time the property was sold to the Strickler's? A All but about 3 months.

Q When was that? A In 1953 when I got married, I lived at my wife's home for 3 months.

Q All right. And so you were born and lived there until 1964 at which time the land was sold by your mother to the Strickler's and prior to that time this property had been owned by your father and then inherited by your mother? A Right.

[162] Q Mr. Hall, during the time that you lived there and until such time as conveyed to the Strickler's, could you state who was the owner of the Conrad property designated as tract 1 on this plat? A You mean all the people that owned it or. . .

Q Right. A . . . just one? Well. . . .

Q Well let me ask you this. I may be able to simplify it a little bit. Did Mr. D. Wampler Earman own that tract at one time? A Yes he did.

Q And was it conveyed by Mr. Earman to the Barnhart Brothers? A Yes it was.

Q And subsequently conveyed by David Barnhart to John Barnhart? A That's right.

Q And John Barnhart to Mr. Arbogast? A That's right.

Q And Arbogast to the present owner Mr. Conrad? A That's right.

Q All right now, and you were living there when Mr. Earman owned it, is that correct? A Yes sir.

Q Were you aware of any right-of-way over your father's [166] real estate there? A Yes sir.

Q Again referring to Plaintiff's Exhibit 1, and referring to A, is that the point where your father's property adjoined what is now the Conrad property? A Yes sir.

Q And was there a right-of-way from that point to the public road number 925 across your father's land? A Yes sir.

Q Was this right-of-way recorded to the best of your knowledge? A Yes sir I think that's right.

Q It was a recorded right-of-way? A Yes.

Q You see here on this diagram various letters A, B, C, D and E. Do you recall where this right-of-way - what direction it went referring to these letters? A Well it started at A at the corner of Mr. Conrad's - which belongs to Mr. Conrad's land there and it followed almost a straight line to the highway which would be out at E.

Q In other words it came from A straight to what is referred to as D and then a little angle. . . A Right.

Q . . . there to the public road designated as E? A Right.

[167]

Q And that was the right-of-way across your father's property? A True.

Q Was the use of this right-of-way later changed? A Yes sir.

Q At what point in time to the best of your recollection was it changed? A Well I was maybe, possibly in my early teens when my dad and Mr. Earman in a verbal agreement decided that it was more convenient to go out our driveway to the highway than it was to open a lot of gates and keep up gates to go out to where E is now.

Q And was this agreement as to another right-of-way being from point B to C? A Right.

Q You would still commence with point A, come to point B and then rather than continue straight out like the recorded right-of-way, Mr. Earman and your father agreed that it would be more practicable to cut off and go from B to C to the public road? A True.

Q Would this have been between your house and the barn? A Right.

Q And was there a driveway there? [168] A Right. There's always been a driveway there.

Q And that was a verbal agreement between your father and Mr. Earman? A That's right.

COURT: Well now, were you present when your father and Mr. Earman discussed it? A Well I don't know whether I was maybe present or not, but I've heard the two gentlemen talk about it from time to time, that they was glad they done it this way and, you know, it was a lot more convenient.

COURT: Then you heard your father and Mr. Earman talk about it? A That's right. Mr. Earman as a frequent visitor there and he used this right-of-way to go into his farm I would say more than he did the other way.

COURT: And you're not depending solely on what your father may have told you when Mr. Earman was not present? A Right.

COURT: All right.

Q In other words you heard the conversation between Mr. D. Wampler Earman and your father pertaining to this? A That's right.

Q Now, prior to that verbal agreement was the right-of-way used from point A to point E as a means of getting back and forth from the Earman farm to the public road? [169] A It was up until they made this agreement. It was a gate in the fence there at point E and . . .

Q The gate would have been right here on the public road? A That's right and along about - that gate stayed there. It was

a broken down old gate in later years and that gate stayed there until say about 1954 we built a new fence. When we built the fence we done away with the gate because that part of the right-of-way wasn't used by anybody other than us there on the farm.

Q But up until in your teens which would have been about when? It would have been the late thirties or when? A Well probably in the forties.

Q All right. But up until that time this right-of-way from point A to E had been used by Mr. Earman and other people is that correct? A Yes sir.

Q And it was only changed by a verbal agreement which you've testified in the late thirties or early forties where they substituted the right-of-way to provide the entrance to Road number 925 from point B to C? A That's right.

Q And up until that time the other right-of-way had been used? A That's right.

[170] Q Now, going back again to the time when Mr. Earman, did Mr. Earman use the recorded right-of-way? A Yes sir, Mr. Earman used it frequently. Yes sir, he lived here in Harrisonburg and he came out and he would look at his crops back there and would go through that way with his automobile.

Q In other words he would use that as a means of going from his home in Harrisonburg to his farm? A Right.

Q And he would come in over your father's property to his farm? A That's right.

COURT: You talking about E,D,B,A? You said. . .

Q You talking about from E to D to B to A? A No, I'm talking about C,B, A.

Q But until it was changed did he use E, D, C, A? A Well I presume that he did because up until that time that's the way they came in. At that time there wasn't a lot of travel because most of the farming was done with horses.

STONE: Your Honor I think the witness ought to be restricted to what he saw or heard himself. I believe he's assuming right now about something that he didn't see or hear. A Well I have seen people come in that way if that's what the gentleman would like to hear.

[171]

Q But during the time you lived there the roadway was initially from A to E and then later it was from C, B, to A was used for the benefit of this property now owned by Mr. Conrad? A That's right.

Q And again Mr. Earman I believe you stated - you testified, used it very frequently? A That's right.

Q And after Mr. Earman sold the farm to the Barnhart's did John and David Barnhart use a right-of-way across your father's land? A Yes sir, they used the right-of-way right frequently

for a couple of years because John farmed my dad's farm for a couple of years, he had it rented and he used this right-of-way back and forth between the farms all the time.

Q Now at the time the Barnhart's owned the Conrad property they used the right-of-way from A to B to C to the public road? A Correct.

Q Now for what purposes did they use this right-of-way, the Barnhart's? A Well, actually the two boys that was doing the farming, they used it mostly, to transfer farm machinery back and forth. Their dad and some other hired help that lived at Dayton or Harrisonburg, they would come through that way.

[172]

Q In other words people going to the Barnhart's farm, going there would use this as a means or a way of getting into the farm and out of the farm, is that correct? A That's right.

Q In addition, did people on your father's farm, did they use this right-of-way to get to the Conrad property? A That's right, I worked for Mr. Barnhart for about six months. I didn't have a permit and I drove his truck back and forwards through there every day.

Q Was it used by the Barnhart's as a means of getting to the public road to go to Harrisonburg and other places? A It was there for that purpose if they wanted to use it and I do know they used it for this purpose. If they was working back there and

break down, they had a truck there, they'd go that way instead of going by Keezletown which was probably 5 miles out of the way.

Q And during the time that Mr. D. Wampler Earman and later the Barnhart's and later John Barnhart, was this right-of-way used for their entire farms? A How was that question again?

Q During the time that Mr. D. Wampler Earman owned the farm which is now owned by Mr. Conrad and during the time that the Barnhart's owned the Conrad farm, was this right-of-way used as a means of getting in and out of the entire farm? Or was it just used for a small area here? [173] A Well I wouldn't say it was used for the entire farm, no, I think if they was working over on the other side the farm and they needed to get out, they would have went out through Keezletown.

Q They had two ways though to get out, is that correct? A That's correct.

Q One has been testified as Keezletown of Brock's Gap Road, is that correct? A Well, I've never heard it called Brock's Gap Road. I thought Brock's Gap was at Broadway.

Q I believe that some old deeds referred it that way but we know. . . A We always called it (inaudible) Gap Road.

Q Okay. In other words there was a road there where you could get out of the farm and then you had this right-of-way to get out of the farm? A Yes.

Q And were they both used from time to time? A Yes, they were.

Q I believe - where were the improvements, house and barn, located on the Conrad property? A It was located on the eastern side of the farm next to the Brock's Gap Road.

Q And I believe you've heard Mr. Barnhart state that [174] he used that mostly, but he also used this as a way of going to Harrisonburg at times? A He may have done this at times, yes.

* * * *

[184]

Q This right-of-way at the - I assume when you left that area in 1964 there was actually a recessed area here that looked like a lane didn't it? A That's right.

Q And that's where you also ran your cattle through, your dairy cattle, is that true? A Well, my dairy, it wasn't a lane there when I was running dairy cattle there. It wasn't a fence on the east side of that right-of-way any longer. I took the fence out.

Q You took the fence of the right-of-way down? [185] A Right, and when you get up - well back this way from B, it was a barnyard there and I took and put gates at the barnyard so when I let my cows in I had some way to hold them and actually a part of the right-of-way was a part of the barnyard.

Q But it is the same area, just to make sure I understand you, the same area that you ran your cattle through? A Right,

but now down at A my cattle, when they went down there, they was just pastured, I wasn't driving through there.

Q You talking about the pasture area down in the corner of your fields next to Mr. Conrad's farm? A All of number 2 is pasture ground, tract 2.

Q You lived most of your life, apparently from your testimony, on this farm designated number 2, isn't that correct? A That's right.

Q And that's where your home was? A That's right.

Q And as long as you lived on that farm was it always used exclusively and only for farming? A I never knowed it to be used for anything else.

Q And what - and let's see, that would also be true of tract number 3 over here? A That's right.

Q I take it that really if you look at this sketch [186] right here, we're looking at your farm land aren't we, these parcels of land on this board? A Well it was either used for farm or pasture land, now there's a difference between farming land and pasture land.

Q Are you familiar with the corner of the Conrad property that's closest to the right-of-way? A Yes sir.

Q And that you're a farmer of some reputable - some experience over there and I take it if you look at it through a field you'd pretty well estimate what acreage it is can't you, of a

field that you can see? A Well, maybe.

Q Does there appear to be a field down there that looks like it's 24 acres in this corner? A No - you're talking about farming land?

Q No, I'm talking about crop land or farming land either one? A No.

Q What is exactly - what is in that corner? What kind of a farm? What kind of land? A Well right here in the corner it's farming land.

Q What do you mean by farming, maybe we're talking . . . A When I speak of farming land I'm talking about land that you plow up and you plant a crop in.

Q So it's crop land? [187] A Right.

Q Corn, crop land? A Corn, wheat, oaks or whatever you might want to plant in it.

Q From this corner here right at A, would that be true for at least 24 acres on that corner? A No sir, I don't believe it's that much there. It may be but I don't believe it it.

Q You think it's less but it could be 24? A It's a possibility, but I don't believe it's that much.

Q All right. Since you've lived - you've known this property since you were born, has there ever been a dwelling in the area that I might designate as a 24 acre tract starting at the corner of A on the Conrad property, has there been a dwelling

there? A Never been a dwelling there that I knew of that was standing. I believe that back in the edge of the woods there it may be a place there of where a dwelling once stood.

Q Back up on the ridge there? A I don't - well, yes.

Q But you're not claiming that's on that 24 acre tract here are you or what the tract. . . A No, I'm not.

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EXCERPTS FROM TESTIMONY OF RICHARD HIGGS
(filed 1/30/74)

[200]

Q Did you hear Mr. Hall's testimony a few moments ago about moving these dairy cattle? A Yeah, but he was talking about a different time from what I'm talking about.

Q I see, so at the time you are talking about B to D was used primarily, that is the area that was fenced in on both sides, was used primarily for turning or moving cattle? A When I say B I'm talking about probably total of 5 feet north of B. . .

Q Up this way? A No.

Q No, back this way? A Yeah, now we're right.

Q All right. From the barn to D was used primarily to move cattle back and forth wasn't it, that is in the fenced in area? A Well I wouldn't say it was used primarily for that. We used it every day but we also used it for, you know, travelling back and forth from one part of the farm to the other.

Q That is between B and D? A Right.

Q All right and what other part of the farm - well let me ask you this, you're talking about use that you made out of it on the Hall farm aren't you? A This is true.

[201]

Q Now, and as far as the fenced in area between A and B that Mr. Hall testified to, you say you don't have any knowledge of that, about the dairy cattle? A Yes sir, there was - we had

that fenced off to keep the cattle - that's why we had that barnyard gate there, to keep the cows out from down there.

Q And to be able to turn them also or. . . A Turn them into the barnyard, right, and keep them out of there.

Q Do you remember how many cattle were normally kept on the Hall farm that you lived on when you were old enough to remember? A I'd say approximately 40 or 45.

Q Would these be beef cattle or dairy cows? A Both, approximately 20 head of dairy cattle and then the balance were beef.

Q Do you remember whether the dairy cattle were usually moving back and forth, morning and evening when they came in and went out? A I know exactly yes sir, where we moved them.

Q All right, where were. . . A From D to B or approximately 25 feet north of B.

Q Right where the barn is here? A Right.

Q Up to D? [202] A That's true.

Q In the fenced in area that's designated here . . . A Well of course, on the east side - I beg your pardon, on the west side there was no fence. That was an open lot in there and those cows, once they got up to a certain point there they were out in an open field and you had to drive them where you wanted them in.

Q So you had to have an imaginary fence on one side didn't

you. . . A Yes sir.

Q . . . to keep them going? A Yes, of course there was a fence over to the road, over at the road, they couldn't go farther than that, but there was an open lot there.

Q But basically you'd funnel them between these fenced in areas and by the garden you'd have to move pretty quickly or before you got to the garden. . . A Well no, there was a fence by the garden and you didn't have to take them any faster there than you did anywhere else, but if you wanted them to go there to point D you had to hustle them on.

Q All right, but they did move from a path that is exactly where the right-of-way is shown here, isn't that true? A Sir.

Q They moved in a path between - north of B to D on [203] the same path that's shown there as the right-of-way, didn't they? A Well of course, you couldn't always keep them right on the right-of-way, when you got them out in an open lot from the right-of-way, there between - half way between E and B was open, there was no fence, only along the garden.

Q But it was your effort to try to keep them in that path? A Yes sir.

* * * *

Q Let me just ask you one question Mr. Higgs. During the time the Barnhart's owned the Conrad property did - I believe you stated before they owned or ran a machine shop somewhere? A True, yes sir.

Q Where was that machine shop? A (Inaudible) Down here beside. . .

COURT: I didn't hear the answer.

Q Down towards the Mason's Chapel, that would be on old Route 33 on the Country Club Road. [204] A That's right.

COURT: It wouldn't appear on this Exhibit?

Q No sir. This would be just a short distance from the Corporate Limits of Harrisonburg, is that correct? A Right.

Q And did the Barnhart's use this right-of-way during the time you lived on the Hall property as a means to go to Harrisonburg to this machine shop and back and forth? A Yes sir.

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EXCERPTS FROM TESTIMONY OF OLIE M. ARBOGAST
(filed 1/30/74)

[205]

Q Mr. Arbogast, did you sell the farm located in the Central District of Rockingham County Virginia to Mr. George Conrad containing approximately 200 acres? A Yes sir.

Q Do you recall when you sold this to Mr. Conrad? I believe the deed is in evidence. . . A We fixed up things in. . .

COURT: The deed is dated January - November 1, '72.

A November the 1st, '72.

Q That's when you sold it to Mr. Conrad? A That's right.

[206] Q From whom did you purchase this farm? A John A.Barnhart.

Q And I believe that deed cites that you bought it January of 1958? A Right sir.

Q Now prior to your purchasing this farm, had you ever worked with John Barnhart there on the farm? A Yes sir, on different occasions.

Q During the times that you worked for John Barnhart there on his farm which is now the Conrad farm, did you or Mr. Barnhart use a right-of-way across the then Hall property which is now owned by Strickler? A Yes sir, various times.

Q And was it used for various purposes? A That's right.

Q And did Mr. Barnhart and yourself use it as a means of getting from the farm over to the public road number 925? A Yeah,

we used it to come out - well, we'd be over there maybe and want to go to town for something and we'd use it there and then they'd haul hay or something like that out there and around and into Keezletown which is a much better road.

Q So you used this right-of-way to haul farm products from the Conrad farm to the public road because it was shorter and you and Mr. John Barnhart also used this as a means to get to public road to go to Harrisonburg? [207] A That's right, because it was shorter to go that way.

Q All right. Now over what period of time did you work there for Mr. John Barnhart? A Oh, I would be over there and help him sometimes with his hay and I helped him alot of different things there.

Q Over a period of several years or so? A No, over a period, I'd say of a couple years. . .

Q A couple of years? A . . . the different times I was there.

Q Now, after you bought this farm in 1958 from Mr. John Barnhart, did you and your family live there on the farm? A Yes sir, we lived there up until I sold it, with the exception of 4 years we lived in Park View, my wife works at the Nursing Home and we rented a house there for 4 years.

Q Now I'm not sure the Judge - maybe you'd better turn your head this way. As I understand it after you bought the farm

in 1958 you and your wife and family lived there on the farm up until you sold it to Mr. Conrad in 1972, except for a period of 4 years when you lived in Park View because your wife was employed at the Mennonite Home? A That's right.

Q Now, during the time that you lived there on your farm, did you have occasion to use this right-of-way across the Hall-Strickler property? [208] A Yes sir, different times.

COURT: I didn't hear the last. . . A Yes sir I did at various times.

COURT: Various times.

Q Mr. Arbogast, when you purchased this property were you told or were you aware that you had a legal right-of-way to the public road? A No sir I didn't know there was a right-of-way across there except Mr. Hall told me to go through there when I wanted to.

Q Did you have - at the time you purchased the farm did you have an attorney to represent you or did you have the title examined? A No I did not. I knew John Barnhart and I knew there was no use that when he usually told me something he done it.

COURT: I didn't hear you. I'll have to ask you to repeat your answer. A I knew John Barnhart, I knew that there was no use to having the title searched. He was a man that I knew and knew what he was, so I didn't have the title searched.

Q But you were not told or did you know that you had a legal right-of-way to the public road? A No sir I was not told.

Q But now you say you did talk to Mr. Hall and which Hall would that have been? [209] A That was J. W. Hall.

Q Mr. J. W. Hall? A Yes sir.

Q And you found out, now I believe you've testified, that it was all right to use a right-of-way across his land? A Said go through there whenever you want to.

Q And referring to this Plaintiff's Exhibit 1, would the course of the right-of-way that you used be from point A to B and then from B to C to the public road? A I don't know as I quite understand that map there. I can't see very good.

(The witness goes up to the map.)

Q This is the corner, it's designated A, is the corner between the Conrad farm and your farm and the Hall or Strickler farm. And this shows the right-of-way coming in a southerly direction to a point here which is named B and then it goes up between the house and the barn to the public road. A That was the road I used.

Q After Hall's - Mrs. Sally Hall conveyed the property to the Strickler's in 1964, did you ever have occasion to use that right-of-way? A After it was sold?

Q Yes sir? A After it was sold to Strickler's I used it one time that I recall. I was taking a bulldozer across and I

asked [210] him if I could take a bulldozer over there. It was a bulldozer and he said okay.

* * * *

[212]

Q Did you ever discuss a right-of-way at all with Mr. Barnhart? A No sir.

Q You didn't ask him if he had one? A No sir, and he didn't tell me that he had one.

Q When you got permission from Mr. Hall to use the A,B,C, as you say you had been, did you discuss right-of-way? A No sir we didn't discuss right-of-way, he said just come through here when you want to.

Q Did he point out where you to go? A No there was a gate there. Well he said - there was only one way there that you could go then. That was in between the barn and around back.

[213] Q And when you went through there what purpose did you - well, why did you go through there? A I hauled hay out of there.

Q Out of your field? A Out of my fields, out the road and down around his - because it was a better road to begin with, out.

Q You mean you hauled hay from the western portion of your land? A Yes, across over Hall and then around into Keezletown.

Q Back to the eastern portion of your same farm? A Yes, that's right.

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EXCERPTS FROM TESTIMONY OF ROBERT H. STRICKLER
(filed 1/30/74)

[219]

COURT: That's the horizontal boards.

Q Yes sir.

COURT: All right.

Q Now is that located directly in the path of what's shown here to be a right-of-way? A Yes sir.

Q And you say it's immediately north of the - where you turn into the driveway? A Yes sir.

Q And you have to cross that, go around it or under it to get to the driveway? A Yes sir.

Q How long has that been there? A Oh, we built that as a part of rebuilding that whole area and at the same time we built a corral which now exists in the northwest - to the northwest of the right-of-way designated B, C.

Q What basic purposes did the fences along either side [220] of the right-of-way where there are fences on both sides, what basic purpose do these fences serve for the farm today? A Well starting back at point A the fence which Mr. Arbogast and Mr. Hall built between the two of them some many years ago is just a so-so kind of fence and quite frequently we have cattle out of it from one side to the other. And I happen to be the guy also who rebuilt that particular gate.

Q You talking about at A? A At A, and hung it and that's the way we get cattle back where they belong if they get out. It's what I would refer to as a neighbor gate. We have at least half a dozen of them on various parts of our farms between neighbors.

Q Have you personally had occasion to go through gate A? A Yes sir.

Q And go onto what is now Mr. Conrad's property? A Yes sir many times.

Q Have you done that since Mr. - since you acquired the property designated number 2? A Yes sir.

Q So that would be what, since '64? A Yes sir, our portion and we had to do it.

Q Now I take it from your testimony then that the fenced in area was used to shuttle cattle back and forth, at least as to A to B? Did I misunderstand. . . [221] A There has not been a fenced in area since we've had the property from point A to point B.

Q Where is that fence on both sides, at any point along . . . A From point B to about half way towards point D.

Q Be toward the shed? A That's to create a funnel to get cattle into the corral area and it would have appeared to me that it was also used for that purpose when this farm was in the dairy

business.

Q Since 1964 when you owned the property, has any person owning or operating or living on the Conrad farm come through your driveway?

COURT: To what are you referring to as his driveway?

Q That is from B to C. A I don't believe anybody has ever come the way they have - the way the previous witnesses have described the right-of-way. We also put in a gate in this fence right here and one up in this general area. . .

COURT: You designated A and C. A Yes. And the - Mr. Arbogast has come through here for the same reasons. The road back - he tried to haul a big load of hay back this way, the road was very rough and it falls off so they get out here on a smooth road which is much further, the hay will stay on the wagon.

COURT: You mean they took hay on a straight line from [222] A to C? A Yes sir.

Q The diagonal line from A to C? A Approximately a straight line. You'll see where the gates are.

Q But sir, from what you're saying to the north of and to the west of the barn and house. . . A Right.

Q . . .is the driveway? A To my knowledge nobody has ever used the right-of-way as they have described it since we've owned the farm.

Q You heard Mr. Arbogast testify that he once came through

your farm somewhere there by permission, do you recall that? A Yes sir, but he came - he wanted to bring a bulldozer in over our property to clean the fence line which went down this way. He brought it in the same way I've described it. He didn't bring it in this way, there wouldn't be any road there.

COURT: You say he brought it in from C to A and not from C to B to A? A Yes sir.

Q Now in the area that appears to be recessed or something in this area, can you tell whether there might have been a fence on the - at anytime on the eastern side of the right-of-way? [223] A You can see where there had been a fence down along what was originally the barnyard, which is up close to point B. You can't see where there would have been any fence as you go on down towards there.

Q And the next thing directly that you - here today that you personally helped replace the gate at A? A That's right, I bought the gate.

Q Even though you didn't know about a right-of-way? A Yes sir, I didn't know about the right-of-way.

Q And what was the purpose in putting a gate instead of a fence? A As I previously stated we had the problem that Mr. Arbogast's fences were very minimal and we were always having cattle out of there, so we had to get the cattle back.

Q Are there any out buildings at any point on the right-of-way between B and E, any buildings or structures? A Yes sir.

Q What's located on the right-of-way? A There was a tool shed that was approximately 20 -25 feet wide, I don't know, by 70 or 80 feet long. We used it as a hay barn. I never used it as a tool shed after we owned it. It blew down here, I think it was a year ago.

Q Is any portion of it still standing? A Some - a small shed part of it is still standing.

Q To your knowledge has anyone been using the right- [224] of-way between B and E for anything other than to go to this shed? A No sir.

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[226]

Q Now, have any additional things been placed on tracts 3 or 2 by you? A Yes and no, we - the original Hall homestead was a rather large and cumbersome building and we tore about half of that down and rebuilt it. They had a dairy parlor which they - we had no interest in and we converted that to a small apartment. Other than that, no.

Q In other words, I believe this dairy parlor or something would be in front of the residence? Between . . . A It's north of the original Hall residence.

Q All right. It would be between here and the public road? A Yes.

Q And how many apartments? [227] A One.

Q One apartment? A One little two bedroom apartment.

Q Is that the tenant to the farm or some one else's? A We used it both ways. At the moment we have it rented. Originally we were using it as a place to house one of our maintenance workers.

Q And what about the original Hall home? A We have used that consistently to house a tenant.

Q And there is a tenant there now? A Yes sir.

Q Is there another dwelling on this? A Yeah, there's another one down the road there that was apart of the same property that was used as a tenant.

Q So there's really aound three living quarters on this property now? A Correct.

Q And I believe this property does have two - it goes all the way out to the other Keezletown road? A Correct.

Q And haven't you recently built various homes on the back of this property? A We have sold a piece of property which is really not suitable for farming on the east side of the railroad which fronts the Keezletown road.

[228] Q Fine. And at that time did you have that property rezoned for residential? A Yes.

Q Who did you sell that property to? A Homes Foundation.

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[228]

Q Mr. Strickler you bought this property in 1964? A Yes I believe that's correct.

Q And you said that you put up the horizontal boards at 1, 4, - at B? A Yes sir.

Q Approximately when did you do that? A I'd say within a fairly short time frame after we bought the property, we were. . .

Q It was within a year or two of the time you bought the property? A Yes sir.

Q Now what was at that location or across that location at the time you put up those boards? A I believe it was a gate there at the time.

Q All right, thank you sir.

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