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IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

Record No. 740660

THE CHESAPEAKE CORPORATION OF VIRGINIA,

Appellant,

v.

F. D. McCREERY, et al.,

Appellees.

APPENDIX

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Sutton and Causey
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TABLE OF CONTENTS*

App. Page

Petition of The Chesapeake Corporation of Virginia, Filed June 14, 1973 (without exhibits) 1

Answer of F. D. McCreery and Frances M. McCreery, Filed July 5, 1973 6

Answer of the State Highway Commissioner, Filed July 16, 1973 10

Excerpts from Reporter's Transcript of Proceedings:

Preliminary Matters Raised by the Trial Court 12

Opening Statement of John Paul Causey . . . 15

Opening Statement by R. Westwood Winfree . . 25

First Colloquy Among Trial Court and Counsel 30

Introduction of Exhibits 33

Testimony of Robert F. Brake 53

Testimony of Meaco Woodson 80

Testimony of R. B. Cartwright 92

Testimony of F. D. McCreery 96

Testimony of William H. Redd 131

Second Colloquy Among Trial Court and Counsel 152

Closing Statement of R. Westwood Winfree . . 155

Closing Statement of John Paul Causey 158

Oral Opinion of the Trial Court 162

App. Page

Final Decree of the Trial Court, Entered March 13, 1974 167

Notice of Appeal and Assignments of Error by The Chesapeake Corporation of Virginia, Filed April 9, 1974 171

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* References to the Record page number of pleadings and the page numbers in the reporter's transcript appear in the upper right-hand corner of pages in this Appendix. The Appendix page numbers appear in the lower right-hand corner.

PETITION OF
THE CHESAPEAKE CORPORATION OF VIRGINIA,
FILED JUNE 14, 1973

To the Honorable Judge of the Circuit Court of New Kent County:

Your petitioner, The Chesapeake Corporation of Virginia, by counsel, respectfully shows unto the Court:

1. It is a corporation chartered under the laws of the State of Virginia, with its principal office at West Point, Virginia, its prior name being "The Chesapeake Corporation."

2. By deed dated April 29, 1930, recorded the same day in the Clerk's Office of this Court in Deed Book 22, page 262, J. H. Harden, widower, conveyed to The Chesapeake Corporation, now The Chesapeake Corporation of Virginia, the following property, to-wit:

> "The following described real estate situate, lying and being in Cumberland District of New Kent County, to-wit: A certain tract of land containing Thirty Three and Twenty Five Hundredths Acres (33.25), more or less, adjoining the lands of The Chesapeake Corporation, the lands of Mrs. Sarah Harden and the lands of others."

The deed also contains the following language:

"It is mutually understood and agreed between the parties to this deed that the party of the first part hereby excepts and reserves from this conveyance a small

parcel of land containing Five Acres (5), which adjoins the lands of the estate of Hezekiah Harden, Jr., deceased, on the West; by the lands of John W. Harden and Willie E. Harden on the East, and on the North and South by the lands of the Chesapeake Corporation.

"The Twenty Eight and One Fourth Acres (28 1/4), of land actually conveyed is a portion of an original tract containing 110.65 acres, which was conveyed to the party of the first part by William E. Cottrell, and is the residue of said tract of land after deducting Thirty Acres (30) sold to Hezekiah Harden, Jr., by deed recorded in Deed Book No. 5, page 562, and also Forty Seven and Forty Hundredths Acres (47.40), sold to John W. Harden and Willie E. Harden, which deed is of record in Deed Book No. 13, page 467, and the Five (5) acres of land which is herein excepted from this conveyance by the party of the first part. For a more particular description of the tract of land hereby conveyed, reference is here made to the deeds above referred to, and plat of O. M. Chandler recorded with the deed from J. H. Harden and W. E. Harden of record in D. B. No. 13, page 467. All of said deeds are recorded in the Clerk's Office of New Kent County, Virginia."

A copy of the deed is filed herewith as "Exhibit A".

3. On or about February 20, 1931, G. L. Evans, a Certified Surveyor, made for The Chesapeake Corporation of Virginia, a plat of its "Harden Tract", that being the property acquired by The Chesapeake Corporation by the aforementioned deed, which shows the tract to contain 32.4 acres and to be bounded by the "Ellsworth Tract" of The Chesapeake Corporation on the north and west, by the lands of W. E. and John Harden on the east, and by a swamp dividing it from lands of R. E. Richardson Estate on the south. The said G. L. Evans, who is now dead, was a competent and well known surveyor thoroughly familiar with lands in New Kent County. A copy of his plat is attached as "Exhibit B".

4. The Chesapeake Corporation entered upon and took possession of the land shown on the aforesaid Evans plat and has exercised exclusive ownership and control of the same, under claim of right, for more than fifteen years following the Evans survey.

5. In July, 1933, the Commonwealth of Virginia, by deed dated July 27, 1933, recorded September 11, 1933, in the Clerk's Office of this Court acquired from The Chesapeake Corporation the land required for what is now State Highway Route 608, through the land shown on the

Evans plat. At that time, and for more than fifteen years thereafter, has any claim been made that the said right of way is not vested in the Commonwealth of Virginia.

6. By deed dated March 8, 1968, recorded in the Clerk's Office of this Court in Deed Book 57, page 162, Robert Wesley Couch and Ann Couch, his wife, purported to convey to John G. Sowder and J. C. Francisco, Jr., their interest in the five acres purported to be reserved in the aforementioned deed dated April 29, 1930, from J. H. Harden to The Chesapeake Corporation of Virginia. This deed describes the five acres as being bounded on the East by Route 608, and is otherwise inconsistent with the description in the April 29, 1930, deed. Also the property so described would fall wholly within the boundaries of the Evans plat.

7. By various deeds beginning in 1970, F. D. McCreery and Frances M. McCreery purport to have acquired various interests in the five acres purported to have been reserved in the aforesaid Harden deeds. The Chesapeake Corporation of Virginia is advised that the said F. D. McCreery and Frances M. McCreery claim the five acres to be a strip approximately two hundred feet in width across the northern end of the ground shown on the Evans plat, including .275 acres within the right-of-way of Route 608.

8. The State Highway Commissioner has acquired title to two parcels of land lying on either side of Route 608, and certain easements, and has now filed a petition for the appointment of Commissioners and determination of compensation.

9. Without first determining the location of the five acres purported to have been reserved in the deed from J. H. Harden to The Chesapeake Corporation, as to which a justicable controversy exists, it is impossible for any of the parties intelligently to proceed in the condemnation case or for Commissioners to make an award.

10. The parties defendant other than F. D. McCreery, Frances M. McCreery, John G. Sowder, J. C. Francisco, Jr., and State Highway Commissioner of Virginia, are those persons who are heirs at law of J. H. Harden whose interests have not been conveyed in any property to which they might be entitled as his heirs.

WHEREFORE, petitioner prays that the Court take jurisdiction of this matter and enter a judgment declaring the location of the five (5) acres purported to be reserved by J. H. Harden in the April 29, 1930, deed to The Chesapeake Corporation and the ownership thereof.

Respectfully,

The Chesapeake Corporation of Virginia

By Counsel

ANSWER OF F. D. McCREERY
AND FRANCES M. McCREERY,
FILED JULY 5, 1973

For their answer to the Petition of The Chesapeake Corporation of Virginia for a declaratory judgment, the defendants, F. D. McCreery and Frances M. McCreery, state as follows:

1. They admit the allegations of paragraphs No. 1 and 2 of the Petition.

2. These defendants are not advised as to the accuracy of the allegations in paragraph No. 3 of the Petition, but they believe that the Evans plan (Exhibit "B" with the Petition) errs in not showing accurately the land which was conveyed to Chesapeake Corporation by the J. H. Harden deed (Exhibit "A" with the Petition).

3. As for the allegations in paragraph No. 4, these defendants deny that the petitioner has exercised exclusive ownership and control over that portion of the Harden tract consisting of five acres excepted from the aforesaid deed.

4. As to paragraph No. 5, these defendants are not advised as to the circumstances of the Commonwealth of Virginia taking land for Route 608, since that occurred before these defendants took an interest in a portion of the Harden tract. These defendants believe that such

circumstances, and any dispute as to the portion of the five-acre tract lying within State Highway Route 608, is not relevant in this suit.

5. They admit the allegations of paragraph No. 6 of the Petition.

6. They admit the allegation of paragraph No. 7, the deeds by which these defendants acquired interests in the said five-acre parcel being as follows:

Deed from G. Preston Griffith et al. dated November 4, 1970, recorded in New Kent County Clerk's Office, Deed Book 61, page 546;

Deed from Matilda Couch et al. dated May 11, 1970, recorded in Deed Book 61, page 200;

Deed from Viola H. Harden et al. dated April 8, 1970, recorded in Deed Book 60, page 418;

Deed from Annie Harden White et al. dated April 8, 1970, recorded in Deed Book 60, page 394;

Deed from Mary E. Davis, Widow, recorded in Deed Book 61, page 58.

7. They admit the allegations of paragraph No. 8 of the Petition.

8. They admit that a justicable controversy exists as alleged in paragraph No. 9 of the Petition, but these defendants contend that this controversy can be settled in the condemnation suit under the provisions of Virginia Code Section #25-46.28. As between the petitioner and these defendants, the same justicable controversy over the ownership and location of the aforesaid five-acre parcel exists also in another Chancery suit in this court, styled The Chesapeake Corporation of Virginia, a Virginia corporation, v. F. D. McCreery and Frances Marian McCreery, in which the Bill of Complaint was filed in September, 1970, in which the issue is the right of access of the McCreerys from State Route 608 over other land of The Chesapeake Corporation to the residence of the McCreerys.

9. These defendants neither admit nor deny the allegations of paragraph No. 10, and call for strict proof thereof.

WHEREFORE these defendants pray that the Petition be dismissed, on the ground that the petitioner has an adequate remedy in the pending condemnation suit under Virginia Code Section #25-46.28; and, if the Court does not

dismiss the said Petition, these defendants join in the prayer of the Petition.

Respectfully submitted,

F. D. McCreery
Frances M. McCreery

By /s/ R. Westwood Winfree
Counsel

ANSWER OF THE STATE HIGHWAY COMMISSIONER
FILED JULY 16, 1973

Now comes the State Highway Commissioner of Virginia, by counsel, and answers the Petition filed against him as follows:

1. He admits the allegations of Paragraphs 1, 2, 8 and 10.

2. He admits the allegations of Paragraphs 5 and 6, but neither admits nor denies the allegations as to the "Evans plat."

3. He admits the allegations of the first sentence of Paragraph 7, but neither admits nor denies the remaining allegations of said paragraph.

4. He neither admits nor denies the allegations of Paragraphs 3 and 4.

5. He specifically denies the allegations of Paragraph 9 and says that the value of the land which the Commonwealth of Virginia has acquired and the damage to the residue, if any, can be determined and that the controversy now pending in this proceeding should relate the land value and damages, if any, awarded in the condemnation action which he has filed and not the land itself which is now defeasibly vested in the Commonwealth of Virginia.

WHEREFORE, this respondent prays that he be dismissed from this proceeding with his attorney's fees and costs allowed.

STATE HIGHWAY COMMISSIONER
OF VIRGINIA

By: /s/ J. F. Phillips, Jr.
Of Counsel

Carneal, Smith & Athey
Post Office Box 440
Williamsburg, Virginia 23185

By: /s/ J. F. Phillips, Jr.

I certify that on the 13 day of July, 1973, a true copy of the foregoing Answer was mailed by me to John Paul Causey, Main Street, West Point, Virginia, counsel of record for The Chesapeake Corporation of Virginia.

/s/ J. F. Phillips, Jr.

EXCERPTS FROM REPORTER'S TRANSCRIPT OF PROCEEDINGS

Preliminary Matters Raised By the Trial Court

* * * *

[Tr.7-10] THE COURT: Thank you. Gentlemen at the Bar, is there any motion to exclude the witnesses from the courtroom?

MR. CAUSEY: No, sir.

MR. WINFREE: No.

THE COURT: Mr. Sheriff, the witnesses may remain in the courtroom.

Gentlemen at the bar, the Court has heretofore read this file over five or six weeks ago and yesterday quickly glanced over it again. There are two questions the Court wishes to bring forward to counsel at the Bar. Number 1 is the question of whether two persons are properly before the Court --

MR. CAUSEY: I have prepared an Answer and here is an order if the Court will permit it to be received and filed, sir.

THE COURT: Thank you, sir. All right, Mr. Clerk, here are the Order and Answer to be

filed.

The second matter is the fact as to whether the Court is advised whether the Court should refer this matter to a Commissioner in Chancery. There are three in this county and others I am sure in other counties who would be available as specific masters. As to whether or not the Court should refer the matter to a Commissioner in Chancery and have him report back to the Court and give him the authority to employ a surveyor or surveyors to give him some idea so that that survey may be made a part of his report if he deems it necessary.

The Court could be advised by counsel at the Bar as to whether or not it is a proper procedure.

MR. CAUSEY: I think it is a matter within the discretion of the Court. But Mr. Winfree and myself anticipated that you sitting, if you want to put it that way, as Chancellor, that the matter could be submitted to you as Mr. Winfree has previously told the Court in chambers and I concurred. Ultimately you are going to have to go ahead and make a decision as to this matter. If it is referred to a Commissioner I would take it that whatever the Commissioner reports is going to be that problem, one

of the others of the parties may take exception to it and you would have to hear it on the exception. It would seem to me as far as I am concerned, that it would be just as appropriate if you hear the thing directly and you have the testimony of a written report as review and you act if you please, in Commissioner in Chancery and Judge.

It is discretionary with you.

THE COURT: At this point, you realize there is another part of this matter that comes out through the State Highway Commissioner. There is a condemnation proceeding in this court in this particular suit and we have to be very definite where this land is if we possibly determine that. Are plats introduced to show if the Court should find that the five-acre tract is there, would there be a plat to show where the boundary lines are?

MR. CAUSEY: There will be a plat introduced to show the contention of Mr. and Mrs. McCreery as to the location of the five acres.

THE COURT: Then it is possible for the Court today to determine where this land is by a survey?

MR. CAUSEY: It is possible for the Court to determine today where the land is by a survey

1 assuming the Court is satisfied from evidence that
2 is where it is located. It is equally possible
3 that the Court -- Let me put it this way, the Court--
4 THE COURT: I understand that the Court
5 could determine today -- also it is so vague and
6 indefinite that it couldn't be determined at all.
7 MR. CAUSEY: There are three alternatives
8 the Court could determine that reservation be
9 effective but not located where the McCreerys say
10 it is located. That is the third possibility.
11 MR. WINFREE: I concur the way Mr. Causey
12 has said it. I think it is perfectly legal for the
13 Court to have a reference. I think if this case --
14 it would be expedient to hear it ore tenis today.
15 We are prepared and would prefer that.
16 THE COURT: From what you have stated,
17 the Court will proceed to hear this case in its
18 entirety today and will make a ruling today.
Opening Statement by John Paul Causey
19 Do you wish to make opening statements,
20 Mr. Causey?
21 [Tr.10-20] MR. CAUSEY: I think it possibly would
22 help the Court.
23 If Your Honor please, the evidence will
24 show that one, Joseph Harden or Harding owned a
25 tract of land in New Kent County which he acquired

himself years ago. Actually the Deed is 1890. That subsequently that land by three conveyances was divided into three parts. It was approximately 110 acres which was conveyed to Mr. Harding originally and the first portion of that which was conveyed off to Hezekiah Harden was again a Deed made 1893 which was thirty acres, which was at the eastern edge of this 110 acres. There was secondly a conveyance from Mr. Joseph Harden to John W. Harden and Willie E. Harden in 1914 of 47.4 acres. And with that there is recorded a plat by O. M. Chandler. And that 47.4 acres lay immediately to the west of the 30 acres originally conveyed to Hezekiah Harden.

So across the 110 acres we are going from east to west. And finally by a Deed executed in 1930 Mr. Harden conveyed to what was then the Chesapeake Corporation, now the Corporation -- It is now the Chesapeake Corporation of Virginia, the remainder of the property. In this Deed to the remainder, in the Deed set out in the Bill and also, of course, will be admitted into evidence, the Deed reads that he conveyed the tract of land containing 33.25 acress more or less and then he says that his exceptions and reservations in this conveyance, the small parcel of land containing 25 acres which

adjoins the lands of the estate of Hezekiah Harden and John W. and Willie E. Harden, and on the north and southwest, the Chesapeake Corporation. And he further says that the 28-1/4 acres balance is the residue of the tract conveyed to the Cottrells by Cottrells to him so that the three conveyances account for all of the original grants to Cottrell.

The evidence will further show that after the 1930 Deed, in the year 1933, the Chesapeake Corporation -- not the Chesapeake, the Commonwealth of Virginia, constructed a highway through this property which is the existing Route 608. That at the time that highway was constructed, the right-of-way through the property which Chesapeake acquired from Harden was taken from the Chesapeake Corporation of Virginia and would include that portion of the right-of-way which lies within the five acres which the McCreerys now claim to have an interest in.

The McCreerys acquired the interest in the five acres by a series of Deeds in the beginning of the year 1969 or 1970. Again, the Deeds will be introduced so the Court will have them. In those Deeds which are from various heirs of Joseph Harden, the property is described as it is described in the Deed to the Chesapeake Corporation of Virginia. In

other words, described as the exception it describes there.

When the Highway Department took the right-of-way in 1933, as I have said, Route 608, which runs directly through the location which the Harden -- which the McCreerys now say is the five acres was taken from the Chesapeake Corporation of Virginia. At that time Mr. Harden was still living. And he was living within a mile or so of the premises there. As a matter of fact, for the improvement of Route 608, the Highway Department up the road from the Courthouse from this location took certain property or acquired certain property from Mr. Harden.

But as to the property down here where there is this area of controversy, there was never any question raised at that time by Mr. Harden or anybody about the title being acquired by the Chesapeake Corporation through there. It would also show by evidence we expect to produce that in a area which the McCreerys now claim as constituting the five acres, topsoil was removed for the construction of the highway for the benefit of others than Mr. Harden and that subsequent to the removal of the topsoil the portion from which the topsoil

was removed was replanted by the Chesapeake Corporation of Virginia. But there has been cutting continuously in and around the property by the Chesapeake Corporation of Virginia since then and that is the reason that there has been no cutting where the trees were planted because they were basically not material for cutting at the time when cutting operations had been held there.

The position of the Chesapeake Corporation of Virginia in this matter because it has come to light at the time that the Highway Department was acquiring right-of-way for Interstate 64, the Highway Department first filed a certificate or negotiated with the Chesapeake Corporation of Virginia for a right-of-way in connection with thatimprovement. And the question was then raised by Mr. and Mrs. McCreery with the Highway Department as to their possible interest or ownership of a portion of the land sought to be acquired at that location by the Highway Department for such improvement. The position as I have indicated to the Court today in chambers to the Chesapeake Corporation of Virginia with respect to this matter is that, 1: The reservations in the Deed from Harden to Chesapeake fails because of ambiquity and uncertainty and consequently

1 the reservation is void and the five acres reserved
2 is excluded in the grant. That is the law. We are
3 prepared to give you authority so far as that
4 situation is concerned. If that is the case, then the
5 ownership of the five acres wherever it may be
6 located -- as a matter of fact, it was not locatable
7 under that contention as in the Chesapeake Corporation
8 of Virginia and the McCreerys consequently have no
9 interest. That is our position.
10 Our second position would be that in the
11 event you don't feel the reservation of itsd f is
12 sufficiently vague so as to be inoperative that
13 the five acres as reserved is at a different loca-
14 tion than what the McCreerys claim because their
15 predecesors in title except for the situation so far
16 as they are concerned have never executed any
17 position or rights with respect to it.
18 There is one further fact I think, so
19 you will understand the situation. After the
20 Chesapeake Corporation had acquired the property
21 there was made by G. L. Evans who was a surveyor who
22 did a great eamount of surveying in this area a plat
23 of the Corporation, the Chesapeake Corporation deemed
24 to be the property which it had acquired. A copy
25 of that plat is filed with the petition and the plat

also will be introduced in evidence. It is a plat dated February 20, 1931, in which as evidenced the plat shows the Harden tract a size of 32.4 acres and there is no reservation of 5 acres shown in the plat. Mr. Evans at that time was an independent surveyor. He was subsequently employed by the Chesapeake Corporation of Virginia. At that time he was an independent surveyor whose work was acknowledged as being reputable and again as a fact which goes ahead and bears upon the situation one of the independent facts as to establish that as early as 1931 the reservation was regarded as no longer existing. Whether their conclusion can be drawn from that there was possibly some grant in the reservation or some understanding with Chesapeake. In other words, the point I am making there and what the evidence would tend to prove was that again contemporaneous with the lifetime of the grantor the reputable surveyor surveys the property and there is no reservation or exception reflected in that survey. We think the appropriate thing, upon the conclusion of the evidence is that the order be entered by the Court that the reservation or exception fails and is void and consequently whatever the interest in the five acres itself in the Chesapeake

1 Corporation of Virginia to the exclusion of the
2 McCreerys or any other parties.
3 There are two parties never answered,
4 Sowder and Francisco, who purport to own an interest
5 in the five acres. The Deed to them specifically
6 alleges the location of the five acres and specifies
7 it at a different location than what the McCreerys
8 now claim. The McCreerys claim if you will look at
9 the plat which is attached to the petition, the
10 McCreerys claim that the five acres is a parallelogram
11 immediately adjacent to the north line of this plat.
12 Route 608 coming from the property approximately
13 like this.
14 The Sowder and Francisco Deed says that
15 the property is located wholly on the east side of
16 Route 608, whereas the McCreeys' contention is that
17 the property crosses Route 608 and lies on both sides
18 of it. We submit that as another area which shows
19 the impossibility of locating the five acres and the
20 uncertainty of the description and the ambiguity
21 which is there. We expect that the Court, from the
22 conclusion of the evidence, would enter in the terms
23 suggested.
24 THE COURT: Just a minute, before we
25 proceed on -- from the three conveyances from Joseph

1 Harden when the Deed was made to the Chesapeake
2 Corporation in 1930, he conveyed from that original
3 tract of 110 acres what would have been the acreage
4 left after the two conveyances of Hezekiah and
5 John Harden. What was the total acreage left at that
6 time?
7 MR. WINFREE: 33-1/4 acres.
8 THE COURT: That was borne out at that
9 time by the plat of Mr. Evans which the Court has
10 before it. This was all that was left was 32.4
11 acres?
12 MR. WINFREE: Yes, sir.
13 THE COURT: That was all that was left?
14 MR. CAUSEY: There was no suggestion by
15 any party with the possible exception of this five
16 acres that there was any property left after this
17 conveyance in the name of Joseph Harden from the
18 original 110 acres.
19 THE COURT: Does the Deed not first of all
20 convey all of this?
21 MR. CAUSEY: Yes, sir. The Deed in terms
22 itself says conveys with general warranty of title
23 the following described real estate, lying and
24 being -- that certain tract of land 33.25, 33.25
25 acres more or less adjoining the lands of the

Chesapeake Corporation, Harden land, and being a portion of the same tract, the land conveyed by Deed of November 1, 1899, from William T. Cottrell, to -- it is fully understood and agreed between the parties to this Deed that the parties of the first part hereby accept and reserve from this conveyance a small parcel of land containing five acres which adjoins the lands of the estate of Hezekiah Harden, Jr., deceased, on the west, by the lands of John W. Harden and Willie E. Harden on the east, on the north and south by the land of the Chesapeake Corporation, 20-1/4 acres of land actually conveyed is a fourth of the original tract containing 110 acres from the 65 acres adjoining the properties of William E. Cottrell and is the residue of the tract of land containing 30 acres to Hezikiah Harden, Jr. by Deed recorded in Deed Book 5, Page 562 and also 47.40 acres sold to Joseph T. Harden and Willie E. Harden which is recorded at Deed Book 13, Page 467 and the five acres of land which is herein and excepted from the conveyance of the parties of the first part". And he says more thoroughly referred to and here made in Deed referred to by O. M. Chandler by Deed to J. T. Harden in Deed Book 13, page 467.

THE COURT: Thank you, gentlemen at the Bar. I take it that the Chandler plat will be forthcoming?

MR. CAUSEY: Yes, sir.

THE COURT: The records would show there is no Hezekiah Harden, Jr.

MR. CAUSEY: That is not correct. The property conveyed says Hezekiah Harden, Jr. was the first conveyance of thirty acres.

THE COURT: Who is Hezekiah Harden, Jr., the son of Joseph?

Opening Statement by R. Westwood Winfree

MR. WINFREE: No, sir, brother.

THE COURT: Thank you, Mr. Causey.

[Tr.20-25]

MR. WINFREE: If Your Honor please, and with the permission of Mr. Causey, I think it would be helpful at this time if I hand the Court a copy of a plat so that the Court can see what we are talking about and also a copy of this Deed. Do you object to this?

MR. CAUSEY: No, sir.

MR. WINFREE: This is not a jury case and I have this Xeroxed copy of the Evans plat which will certainly come into evidence and a copy of this 1930

Deed. Do you object to the Judge having this in his hands?

MR. CAUSEY: No, sir.

MR. WINFREE: Unless you have a larger scale that you want to use -- I have discussed this with Mr. Causey and he agrees that I can hand the Court a copy, a photocopy of the plat made by G. L. Evans in 1935 and a photocopy from the Deed Book of a deed of April 29, 1973, from J. H. Harden to the Chesapeake Corporation. The three properties with which we are concerned in this case are shown very graphically on this 1935 Evans map. If Your Honor please, you will see the Harden tract is 110 acres and has a long straight northerly line, a straight westerly line running roughly north and south, and a southerly line which meanders along a stream or swamp as it is called on the map, and then becomes a straight line and an easterly line which runs roughly north and south and ties in with the northerly line. You have elongated 110 acres map divided into three portions. I am inclined to quote Julius Caesar. The Hezakiah Harden tract which was the first parcel conveyed in which the McCreerys subsequently acquired and own today is farthrest to the right. This plat doesn't purport to the actual

survey but I feel Mr. Causey will contend it is located as accurately shown on this map.

THE COURT: That is the Joseph Harden piece, the first piece right here?

MR. WINFREE: The one on the right which was conveyed in 1890 something.

MR. CAUSEY: 1893.

THE COURT: That is the Hezekiah --

MR. WINFREE: Yes, sir.

THE COURT: We have one 1890. Let's see --

MR. CAUSEY: I don't mean to interrupt. The first Deed which was 1890 was from Cottrell to Joseph Harden whereby the whole 110 acres was conveyed.

THE COURT: This is the whole, the first 110 acres?

MR. WINFREE: The 110 acres is bounded on the north by a long straight line and southerly line, with the westerly line at this straight line running north and south and a southerly line follows this meandering swamp and picks up with a straight line over to roughly this area. You can see there dotted lines and goes off the page. This is roughly where it is.

THE COURT: This doesn't purport to show the original 110 acres.

MR. WINFREE: It shows it as if we included this parcel right here. The purpose of this plat was for the surveyor to show these two parts--this was first conveyed to Hezekiah, 1893, thirty years. The one conveyed by the 1914 Deed --

THE COURT: 47.72

MR. WINFREE: Is shown on here as Harden Number 2. It is the middle portion and then the one conveyed in 1930 in which the five acres was reserved is the one to the far west or to the left. I hand the Court this copy of this 1930 Deed which the Court may wish to refer to from time to time. Now, there are three cases involving my client, the McCreery's, which is a matter of interest to the Court. The first was a suit against the McCreerys by the Chesapeake Corporation to restrain the McCreerys from crossing this middle portion on a road. That case was technically dismissed by the Court for failure to prosecute but can be reinstated.

The second litigation has to do with the continued suit with regard to an excess along either side of 608 from an approach to Interstate 64. The highway has already taken it but the question as

to who is entitled to the award, that is pending, and then we have this case, the purpose of which is to determine the location of the five acres which was reserved in this Deed. The McCreerys contend that the five acres is along the northerly portion of this westerly tract. The basis of their argument being that it was reserved by Joseph Harden in his deed and he had previously reserved the road over this tract. And it is logical to assume that he reserved a road leading to his property and then he reserved a piece of property connecting with the road and I think we can show without any doubt that the road which has been in controversy in another case and which is the effect of this case, is material with respect to that road that the road exists, it has existed for many years. We feel that while the 1930 Deed is admittedly ambiguous as to the exact location of that thirty acres, we can show by circumstantial evidence a reasonable location where it should be and we feel that the Court could so decide it.

The five acres was owned by the Harden heirs through the years. It continued to be accessed for some years after the conveyance of this westerly part to the Chesapeake Corporation and then

1 it was taken off the tax rolls and subsequently put
2 back on the tax rolls and the McCreerys through
3 five separate Deeds have acquired approximately
4 80 percent interest in the five acres. Judge
5 Sowder and Mr. Francisco, who are also parties by a
6 separate Deed, acquired the interest in the five
7 acres. It is most important to the McCreerys to
8 establish their rights in that five acres and the
9 location not so much as to own valuable land as an
10 interchange with 64 as to establish this key aspect
11 of their rights in the road which led to the five
12 acres.

First Colloquy Among Trial Court and Counsel

13 [Tr.25-27] THE COURT: Thank you, gentlemen at the
14 Bar, for your opening statements. Can the Court
15 conclude that the reservation of the five acres,
16 that it is impossible to bear out the Deed, the Deed
17 says which five acres, which adjoins the lands of
18 the estate of Hezekiah, Jr. That is impossible
19 because it is the 47 acre tract between the two
20 particular five-acre tracts and the Hezekiah Harden
21 tract, is that correct?
22 In other words, it is five acres and it
23 couldn't possibly adjoin the Hezekiah Harden piece.
24 MR. WINFREE: That is correct, if Your
25 Honor please. We concede that the Deed is ambiguous.

If we look only at the Deed, we cannot tell where it is. We feel we have to go outside the Deed.

THE COURT: Is this all impossible. On the west it further says then by the lands of John W. Harden and Willie E. Harden on the east.

MR. WINFREE: That is a correct statement.

THE COURT: That would be the 47 acre tract which would be --

MR. CAUSEY: John W. and Willie E. owned it at the time of the Deed.

MR. WINFREE: Correct.

THE COURT: Then if it is on the north by Chesapeake Corporation, it would not possibly be this road, is that correct, Mr. Winfree, unless it would be some land left between the northern boundary and the road. This road that continues on out --

MR. WINFREE: On your contention then is that road running across the 37 acre tract from that Hezekiah Harden parcel on the east across the 37 acre tract?

THE COURT: To the top northern part of that boundary.

MR. WINFREE: Yes, sir, it was a meandering road and it turned at five acres in that area.

THE COURT: Then the northern line itself

says on the north and south by the lands of the Chesapeake Corporation. It couldn't be -- when the Chesapeake Corporation acquires the land north --

MR. CAUSEY: The land north and east of this parcel at the east of the Harden tract had been acquired by the Chesapeake Corporation of Virginia prior to the execution of this Deed from Harden to it, sir.

MR. MCCREERY: He is wrong there, it is not, he is --

MR. CAUSEY: Excuse me, west. I was using the language which you used.

THE COURT: The Chesapeake Corporation owned the tract of land?

MR. CAUSEY: Owned the tract of land indicated as Ellsworth on the Evans drawing which you have, sir.

THE COURT: That was the Chesapeake Corporation's land?

MR. CAUSEY: Yes, sir.

THE COURT: All right, thank you, gentlemen, for your opening statements. They have been very informative and the Court appreciates the consideration extended to the Court. We are now ready to receive the evidence. First witness.

Introduction of Exhibits

[Tr.28-48]

MR. CAUSEY: If Your Honor please, there are certain matters of record which I think should go into the record which are Deeds, as follows:

The first is a deed from William E. Cottrell and Nora A. Cottrell to Joseph H. Harding. It is spelled H-a-r-d-i-n-g, dated November 12, 1889, recorded May 1, 1890, in the Clerk's office of this Court in Deed Book 5, Page 185, which conveys to Joseph H. Harding, 110 65/100 acres according to a plat and survey made by J. A. Christian, Surveyor, dated September 26, 1889. While the Deed recites that the survey is to be recorded with it, neither Mr. Winfree nor myself or anybody else as far as I know has been able to find the survey. We would offer that as Chesapeake Corporation Exhibit Number 1.

THE COURT: Complainant's Exhibit Number 1.

NOTE: At this point the afore-mentioned Deed dated November 12, 1889, from William E. Cottrell and Nora A. Cottrell to Joseph H. Harding is now marked and filed as Complainant's Exhibit Number 1.

MR. CAUSEY: Now, if Your Honor please,

Mr. Winfree has given you a copy of a plat made by G. L. Evans, dated November 26, 1935, which purports to be a plat of the Harden Number 1 and Harden' Number 2 tracts, then owned by the Chesapeake Corporation of Virginia. And we would offer that in evidence as Chesapeake Corporation Exhibit Number 2.

THE COURT: Complainant's Exhibit Number 2.

NOTE: At this point the aforementioned plat dated November 26, 1935, is marked and filed as Complainant's Exhibit Number 2.

MR. CAUSEY: For the next exhibit we would offer, sir, a Deed dated January 12, 1893, from Joseph H. Harden , and there it is spelled H-a-r-d-e-n but he is the same person as H-a-r-d-i-n-g, to Hezekiak Harden, Jr. And this conveyed with general warranty thirty acres of land and one-half the stated dwelling house, it being a portion of the land purchased by Joseph Harden from William E. Cottrell. It was dated January 12, 1893, and was recorded January 12, 1893, in Deed Book 5, Page 562.

THE COURT: Complainant's Exhibit Number 3.

NOTE: At this point the aforementioned Deed dated January 12, 1893, from Joseph H. Harden to Hezekiah Harden, Jr. is now marked and filed as Complainant's Exhibit Number 3.

MR. CAUSEY: Your Honor, I think it will be helpful to now cross these matters as we introduce them to the Evans plat, Exhibit Number 2, and with the consent of counsel if we could enter the letter "A" on the section marked Hezekiah Harden's Estate, and say this Deed refers to the portion marked "A" on this plat. If you want to enter the letter "A" on this --

THE COURT: All right, sir.

MR. CAUSEY: You want to do it with a red pencil?

THE COURT: That would be best.

MR. CAUSEY: It is understood that the Deed which has just been admitted as Complainant's Exhibit Number 3 refers to Parcel "A" on Exhibit Number 2.

THE COURT: That is correct. The record would show that.

MR. CAUSEY: The next Deed to be introduced

is a Deed dated July 12, 1940, from J. E. Harden and others conveying to Clarence L. Harden, the property described in the Deed which is Exhibit Number 3 and which is Parcel "A". In this Deed the property is described as being bounded on the east by Holt Richardson's property owned by R. E. Richardson's estate, now the property of T. G. Layfield; and on the north, west and south by the properties of the Chesapeake Corporation, known as Ellsworth & Oteys. This Deed refers to Parcel "A" ans passes the title in Parcel "A" to Clarence L. Harden.

THE COURT: Complainant's Exhibit Number 4.

NOTE: At this point Deed dated July 12, 1940, from J. E. Harden and others to Clarence L. Harden is now marked and filed as Complainant's Exhibit Number 4.

MR. WINFREE: May I interrupt a moment, if Your Honor please. May I point out that the sequence in which these Deeds are being introduced is not the chronological sequence. He is giving the Deeds and the chain of title to Parcel "A" and not

in the chronological sequence.

MR. CAUSEY: The next Deed is one dated December 19, 1950, from Clarence L. Harden, unmarried, to F. D. McCreery and Frances Marion McCreery, and conveys the 30 acres which is as the same as the property conveyed to Clarence L. Harden in the prior exhibit and is Parcel "A" on Exhibit Number 2.

THE COURT: Complainant's Exhibit Number 5.

NOTE: At this point the aforementioned Deed dated December 19, 1950 from Clarence L. Harden, unmarried to F. D. McCreery and Frances Marian McCreery is now marked and filed as Complainant's Exhibit Number 5.

MR. CAUSEY: The next exhibit is a Deed dated December 2, 1914 from Joseph H. Harden to John W. Harden and Willie E. Harden which conveys 47.40 acres as shown on the plat of O. M. Chandler which is recorded with the Deed. The Deed was recorded January 1, 1915, in Deed Book 13, Page 467, and this is the property if you will take a middle portion of Exhibit Number 2 and mark on it the Letter "B" -- I have it here, sir. And mark on the

middle portion the letter "B", this is the Deed by which Joseph Harden conveyed that piece of property away. The Deed also provided and the record should show that by this Deed Joseph Harden granted to John W. Harden and Willie E. Harden in a right-of-way over the tract of land formerly owned by Kiah Harden, deceased, which would be Parcel "A" and it also reserves to Joseph Harden the right, privilege and authority to use a road through the tract of land hereby conveyed which would be Parcel "B" as an outlet from his property to the county road.

THE COURT: Is that all the description of the road?

MR. CAUSEY: It read verbatim"And the said party of the first part hereby reserves unto himself, his heirs and assigns the right, privilege and authority to use a road through the tract of land hereby conveyed as an outlet from his property to the county road."

I would point out to the Court that at the time this Deed was executed, the only property which he had left that is Joseph Harden, lay to the west of the property conveyed. So that the road would run in an easterly direction. The county road which is being referred to is not Route 608.

THE COURT: Complainant's Exhibit Number 6.

NOTE: At this point the aforementioned Deed dated December 2, 1914, from Joseph Harding to John W. Harding and Willie E. Harding is now marked and filed as Complainant's Exhibit Number 6.

MR. CAUSEY: The next is a Deed dated August 10, 1934, from John W. Harden, single, and Willie E. Harden, single, to R. W. Taylor, which conveys 47.40 acres of land which is the same property as in the Deed in the immediately preceding exhibit Parcel "B". And this Deed also conveys the property with a recital and I quote, "The Deed conveying the above-mentioned tract of land to the parties of the first part herein from Joseph H. Harden reserves unto the said Joseph Harden, his heirs and assigns, the right, privilege and authority to use a road through the tract of land hereby conveyed as an outlet from his property to the county road." This Deed was admitted to record September 5, 1934, in Deed Book 24, page 367.

THE COURT: Complainant's Exhibit Number 7.

NOTE: At this point the aforementioned Deed dated August 10, 1934, from John W. Harding, Single, and Willie E. Harden, Single, to R. W. Taylor is now marked and filed as Complainant's Exhibit Number 7.

MR. CAUSEY: The next is a Deed dated October 25, 1935, from R. W. Taylor (Single) to the Chesapeake Corporation. It conveys 47.40 acres which is the same property conveyed to R. W. Taylor by the Deed in the immediately preceding exhibit and is Parcel "B" on Exhibit Number 2 and this Deed conveys the following language "The Deed conveying the above-mentioned tract of land to the party of the first part herein from John W. Harden (Single) and Willie E. Harden, (Single) reserves unto the said John W. Harden (Single) and Willie E. Harden (Single) his heirs and assigns the right, privilege and authority to use a road through the tract of land hereby conveyed as an outlet from their property to the county road."

THE COURT: Complainant's Exhibit Number 8.

NOTE: At this point the aforementioned Deed dated October 25, 1935, from R. W. Taylor (Single) to the Chesapeake Corporation is now marked and filed as Complainant's Exhibit Number 8.

MR. CAUSEY: The next exhibit is a Deed dated April 29, 1930, from J. H. Harden (Widower) to the Chesapeake Corporation which was admitted to record April 29, 1930, in Deed Book 22, Page 262. This is the Deed of 33.25 acres subject to the exception of five acres with which we are here concerned and of other parcels now to the extreme west what is designated on the Evans plat as Harden Number 1 you would mark the letter "C". This Deed relates to Parcel "C" on that plat.

THE COURT: Thank you. Complainant's Exhibit Number 9.

NOTE: At this point the aforementioned Deed dated April 29, 1930, from J. H. Harden (Widower) to the Chesapeake Corporation is now marked and filed as Complainant's Exhibit Number 9.

MR. CAUSEY: The next, if Your Honor please, is a Deed dated July 27, 1933, from the Chesapeake

Corporation to the Commonwealth of Virginia which conveys the parcel of land containing 4.84 acres more or less for the improvement of what was then known as Route 155 and which is now Route 608.
You will find on that evidenced plat that it shows that the portion of this right-of-way which was within Parcel "C" on the evidence plat is 1.9 acres. The remaining portion of what was covered from this Deed is from the Ellsworth Tract which is owned by Chesapeake and through which the road also ran.

THE COURT: Complainant's Exhibit Number 10.

NOTE: At this point the aforementioned Deed dated July 27, 1933, from the Chesapeake Corporation to the Commonwealth of Virginia is now marked and filed as Complainant's Exhibit Number 10.

THE COURT: At this juncture, Exhibit Number 10, was there any other grantor, any other Deed to the State Highway Commissioner of Virginia or Commonwealth of Virginia, any other grantors at this location?

MR. CAUSEY: No, sir.

THE COURT: Do you know why?

1 MR. CAUSEY: I think the answer is as
2 you know, we have the plans which show that that
3 property was construed --
4 THE COURT: It refers to the plan here.
5 MR. CAUSEY: This is the next exhibit,
6 sir. The next exhibit is a "Plan and profile of
7 Proposed State Highway," which the highway
8 recovered by the foregoing deed in the immediately
9 preceding exhibit and consists of a title page and
10 page 004, 005, 006, 007, 008, and 009, and 010 and
11 011. The position acquired from the Chesapeake
12 Corporation by the Deed which is the preceding
13 exhibit is shown at Page 006 and 007. It also should
14 be noted that on Page 008 and 009 is shown property
15 which the Highway Department acquired at that time
16 from J. W. and W. E. Harden, which is located about
17 half a mile north.
18 THE COURT: Gentlemen at the Bar, assuming
19 that the contention of the respondents is what it
20 is, wouldn't a part of this highway as of that time
21 be in that five acre parcel?
22 MR. CAUSEY: Yes, sir.
23 THE COURT: Then if that position is
24 strengthened that would be that the Highway Depart-
25 ment did not have good title as of 1930?

MR. CAUSEY: I think that is a proper conclusion, sir.

THE COURT: All right. Mark and file that as Complainant's Exhibit Number 11.

NOTE: At this point the aforementioned "Plan and Profile of Proposed State Highway" is now marked and filed as Complainant's Exhibit Number 11.

MR. CAUSEY: If Your Honor please, the next exhibit is a Deed dated April 8, 1970, and recorded April 23, 1970 in Deed Book 60, Page 418, from Viola H. Harden and others to F. D. McCreery and Frances M. McCreery, which conveys all of the grantors' right, title, and interest into a parcel of land described as containing five acres and described as the exception and reservation in the Deed from Harden to the Chesapeake Corporation dated April 29, 1930 and is one of the Deeds by which Mr. and Mrs. McCreery claimed title to the five acres which is being here discussed.

THE COURT: Complainant's Exhibit Number 12.

NOTE: At this point the aforementioned

Deed dated April 8, 1970, from Viola H. Harden and others, to F. D. McCreery and Frances M. McCreery is now marked and filed as Complainant's Exhibit Number 12.

MR. CAUSEY: The next exhibit, if Your Honor please, is a Deed dated November 4, 1970, recorded February 24, 1971, in Deed Book 61, Page 546, from G. Preston Griffith and others to F. D. McCreery and Frances M. McCreery and similarly conveys the interest of those parties in the five acres reserved.

THE COURT: Complainant's Exhibit Number 13.

NOTE: At this point the aforementioned Deed dated November 4, 1970, from G. Preston Griffith and others to F. D. McCreery and Frances M. McCreery is now marked and filed as Complainant's Exhibit Number 13.

MR. CAUSEY: The next exhibit, sir, is a Deed dated May 11, 1970, from Matilda Couch and others to F. D. McCreery and Frances M. McCreery, recorded September 22, 1970, in Deed Book 61, Page

200, and conveys the interest of the grantors in the five acres reserved.

THE COURT: Complainant's Exhibit Number 14.

NOTE: At this point the aforementioned Deed dated May 11, 1970, from Matilda Couch and others to F. D. McCreery and Frances M. McCreery is now marked and filed as Commonwealth's Exhibit Number 14.

MR. CAUSEY: The next is a Deed dated April 8, 1970, recorded April 10, 1970, in Deed Book 60, Page 394, from Annie Harden White and others to F. D. McCreery and Frances M. McCreery and conveys the grantors' interest in the five acres reserved.

THE COURT: Complainant's Exhibit Number 15.

NOTE: At this point the aforementioned Deed dated April 8, 1970, from Annie Harden White to F. D. McCreery and Frances M. McCreery is now marked and filed as Complainant's Exhibit Number 15.

1 MR. CAUSEY: The next is a Deed dated
2 June 9, 1970, from Mary E. Davis to F. D. McCreery
3 and Frances M. McCreery recorded July 22, 1970, in
4 Deed Book 61, Page 58, and conveys the grantors'
5 interest in the five acres reserved.
6 THE COURT: Complainant's Exhibit Number
7 16.
8
9 NOTE: At this point the aforementioned
10 Deed dated June 9, 1970, from Mary E. Davis to
11 F. D. McCreery and Frances M. McCreery is now marked
12 and filed as Complainant's Exhibit Number 16.
13
14 MR. CAUSEY: Mr. Winfree, I think it can
15 be stated for the record that these Deeds to Mr. and
16 Mr. McCreery represent what they ascertain to be
17 their interest in the property.
18 MR. WINFREE: Correct.
19 MR. CAUSEY: The next, sir, is a Deed
20 dated March 8, 1968, recorded March 11, 1968, in
21 Deed Book 57, Page 162, from Robert Wesley Couch and
22 Ann Couch, his wife, Robert Westley Couch being an
23 heir-at-law of J. H. Harden, to John G. Sowder,
24 S-o-w-d-e-r, and J. C. Francisco, Jr., whereby the
25 grantors convey all that certain piece of land lying

and being in Cumberland Magisterial Distrct, containing five acres of land and bounded as follows: On the north by Chesapeake Corporation of Virginia, on the east by State Route No. 608, on the south and west by the Chesapeake Corporation of Virginia. And it restricts that it is the same property reserved in a Deed from J. H. Harden to Chesapeake Corporation of Virginia dated April 29, 1930. And is the deed whereby John G. Sowder and J. C. Francisco would claim any interest in the five acres.

THE COURT: Complainant's Exhibit Number 17.

NOTE: At this point the aforementioned Deed dated March 8, 1968, from Robert Wesley Couch and Anne Couch, his wife, to John G. Sowder and J. C. Francisco, Jr., is now marked and filed as Complainant's Exhibit Number 17.

MR. CAUSEY: The next exhibit, if Your Honor please, is a plat of G. L. Evans, certified Surveyor, dated February 20, 1931, of the Harden tract containing 32.4 acres and is the same plat which is filed with the petition in this case as an exhibit but it is being introduced now although it

is an exhibit already.

THE COURT: Complainant's Exhibit Number 18.

NOTE: At this point the aforementioned plat of G. L. Evans dated February 20, 1931, is now marked and filed as Complainant's Exhibit Number 18.

THE COURT: Let the record show that this is recorded in the Clerk's office of the Circuit Court of New Kent.

MR. CAUSEY: For the record, it has not been admitted to record.

If Your Honor please, I guess probably I had better let you introduce this. I will not introduce this one at this time. There may be certain exhibits for the record which Mr. Winfree would want to introduce which I don't think I should introduce on his behalf. You were indicating you wanted to take a recess?

THE COURT: Have you finished with your exhibits?

MR. CAUSEY: We will get to those later. There are other exhibits, there are aerial photographs. These are exhibits in the record.

THE COURT: It is now approximately fifteen minutes past eleven. We will take a mid-morning break and come back in ten minutes.

NOTE: At this point there is a brief recess, after which the hearing continues as follows, viz:

THE COURT: Mr. Phillips, would you like to come to counsel table here?

MR. PHILLIPS: Yes, sir.

THE COURT: We are now ready to proceed with the evidence.

MR. CAUSEY: If Your Honor please, there are a couple of matters I think Mr. Winfree would like to introduce at this time. I have no objection and I think it would help.

THE COURT: These are Respondents' Exhibits?

MR. WINFREE: Yes, sir. And they will be brought out by witnesses in due course. We feel if the Court had them at this time it would facilitate the Court's understanding of the matter.

This is a plat made by Mr. William H. Redd, September 17, 1970, purporting to show the

five acres we have been discussing.

THE COURT: Respondent's Exhibit No. A.

NOTE: At this point the aforementioned plat of William H. Redd, dated September 17, 1970, is now marked and filed as Respondent's Exhibit A.

MR. WINFREE: Then we have what purports to be a family tree of the descendants of H. Harden.

THE COURT: Would you mark these "A" and "B" for clarification.

MR. WINFREE: Mr. Causey has seen this family tree. I have furnished him with a copy and I thought that when references are made to the family relationships of the Hardens, it would facilitate the Court's understanding.

THE COURT: Respondent's Exhibit Number B.

NOTE: At this point the aforementioned family tree, descendants of H. Harden, is now marked and filed as Respondent's Exhibit B.

MR. WINFREE: Mr. Causey and I have discussed the matter of getting into the record the information shown on the land book of the county with

respect to the property in question. First the five-acre parcel showing how it was handled by the tax assessors on the land books. And I have made an extract from the land book rather than haul the book into the courtroom.

MR. CAUSEY: I have no objection.

MR. WINFREE: Mr. Causey has been furnished with a copy of this. That first is with respect to the five acres described as J. H. Harden, Cumberland District.

THE COURT: Respondent's Exhibit C.

NOTE: At this point the aforementioned extract from the land book records is now marked and filed as Respondent's Exhibit C.

MR. WINFREE: And then an extract from the land books in the property in the name of Chesapeake Corporation showing how it was assessed from 1934 through 1942 with particular respect to the westernmost parcel which was designated as Parcel "C" on the Evans map.

THE COURT: Respondent's Exhibit Number D.

NOTE: At this point the aforementioned

extract from the land book records is now marked and filed as Respondent's Exhibit D.

MR. WINFREE: That's all.

THE COURT: All right, thank you, gentlemen. We are now ready to proceed.

Mr. Causey.

MR. CAUSEY: Mr. Brake.

Testimony of Robert F. Brake

[Tr.48-75]

ROBERT F. BRAKE, a witness called on behalf of the complainants, being first duly sworn, testified as follows, viz:

DIRECT EXAMINATION

BY MR. CAUSEY:

Q Please state your name, sir?

A Robert F. Brake.

Q Are you employed by the Chesapeake Corporation of Virginia?

A Yes, sir, I am.

Q In what capacity?

A As a Forester.

Q Are you familiar with the property which

we described as Chesapeake Harden Number 1 and Harden Number 2 Tract?

A Yes, I am.

Q I show you Complainant's Exhibit Number 2 and ask you if the parcel identified by the red letter "B" on that drawing is what you term as the Harden Number 2 tract?

A Yes, sir, it is.

Q Is the parcel identified by the red letter as "C" that which you identify as the Harden Number 1 tract?

A That's right.

MR. CAUSEY: Judge, we have some aerial photographs here and I think they have got to be looked at flat. Would it be agreeable to you to leave the bench and go over to that table? The table where a witness testifies or would you prefer to put them on your desk in front of you.

THE COURT: We can proceed over there.

NOTE: At this point the Court, counsel and the witness are viewing the photographs.

THE COURT: Are these to be entered as exhibits?

MR. CAUSEY: Yes, sir.

THE COURT: How many are there, Mr. Causey?

MR. CAUSEY: Seven, all total.

THE COURT: We will proceed with 19 and 20 and so on through Complainant's Exhibit Number 25.

NOTE: At this point the aforementioned aerial photographs are now marked and filed as Complainants Exhibit Numbers 19, through 25.

MR. CAUSEY: Pick up Exhibit Number 2.

BY MR. CAUSEY: (Continuing)

Q Mr. Brake, I show you what has been identified as Complainant's Exhibit Number 19, which bears at the upper left corner the date, April 17, 1937, and ask you to tell me what it is, sir?

A This is a photograph from the Department of Agriculture and Stabilization Conservation Division indicating that aerial photograph of a section of New Kent County made at the stated date, April 17, 1937.

Q Is the State Highway which is now known as Route 608 shown on this photograph and if so, will you show where it is by pointing to it?

A It is shown on the photograph running in a diagonal direction across the photograph.

Q Would you at the top of the photograph and at the bottom of the photograph put the letter "A" in red pencil here to show what you have just described?

NOTE: At this point the witness marks the aforementioned photograph as requested.

BY MR. CAUSEY: (Continuing)

Q Now, to get the correct orientation with respect to the photograph, what direction is north?

A To the top of the photograph is north, as near as the plane could be flown. It may vary a few degrees.

Q Will you also show by designating at the point with your finger on the photograph what is now the property or essentially the property owned by Mr. McCreery designated as Parcel "A" on Exhibit Number 2?

A That parcel of land is here (indicating).

Q Would you put with this red pencil the letter "B" roughly in the center of that area?

NOTE: The witness marks the photograph as requested.

BY MR. CAUSEY: (Continuing)

Q Would you now identify on the photograph what is designated as Harden Tract Number 2 on Complainant's Exhibit Number 2 with the letter "B", identified on the photograph with the letter "C" and putting the letter approximately in the center of the area?

A That tract is right here (indicating).

NOTE: At this point the witness marks the photograph as requested.

BY MR. CAUSEY : (Continuing)

Q Will you now identify on the photograph what is shown as Parcel "C" on Complainant's Exhibit Number 2, putting the letter "D" approximately in the center of that area?

A That is the tract coming from here (indicating).

NOTE: At this point the witness marks the photograph as requested.

BY MR. CAUSEY: (Continuing)

Q In the course of your work as a Forester,

do you read aerial photographs?

A Yes, sir, I do.

Q There is immediately to the east of what you have designated as Route 608, and adjacent to your red letter "D", a white area. Would you describe what that represents?

A That is a cleared and non-wooded area indicating an open area and if you further examine it, you will find that there has been topsoil removed from the area or it's of an uneven characteristic.

Q If there was any small planting on the area, would it still show as being open?

A If in small planting, it would because it would not pick it up.

Q What is the general condition here indicating area "C" and "D" at the time this photograph was taken as to the stand of timber?

A There is a piece of woodland. There has been a cutting operation sometime prior to the date of the photograph.

Q Are you able in your experience to indicate how much prior to that time the cutting operation would have taken place?

A In my estimation, five to six years.

Q Now, there is a road which lies to the

west -- excuse me, to the east, of what you have designated on the photograph as Parcel B. You know what that road is?

A In that period it was known as Highway 155.

Q Was that in existence prior to the construction of what is now Route 608?

A Yes, sir.

Q This was then the county road?

A Yes, sir.

Q I ask you turning now to an area west of the present Route 608 which you have designated by the letter "A" to "A" and ask you does that run off to the west and ask you what that is?

A That would have been the road at the time the photograph was taken.

Q And that again to the best of your knowledge existed prior to the construction of Route 608?

A Yes, sir, it did.

Q I now invite your attention to what is designated as Complainant's Exhibit Number 20 in which bears the date at the top of 3-9-43, and ask you to tell me what that is?

A That is an aerial photograph that again is from the Department of Agriculture.

Q Covering the area in question?

A It covers part of the same area.

Q Would you again with the use of the letters "A" to "A" mark where present Route 608 goes across that property?

NOTE: At this point the witness marks the photograph as requested.

Q Would you again mark with the letter "B" the approximate center of the thirty acres belonging to Mr. McCreery which is marked as Parcel "A" on Commonwealth's Exhibit Number 2.

NOTE: At this point the witness now marks the photograph as requested by counsel.

BY MR. CAUSEY: (Continuing)

Q Would you mark now with the letter "C" the approximate center of your Harden Number 1 tract which is marked as "B" on Commonwealth's Exhibit Number 2.

NOTE: At this point the witness marks the photograph as requested.

BY MR. CAUSEY: (Continuing)

Q And finally mark with the letter "D" the approximate center of Harden Number 1 tract which is "C" on Complainant's Exhibit Number 2.

NOTE: The witness marks the photograph as requested.

BY MR. CAUSEY: (Continuing)

Q When referred to an area which you indicated as to the topsoil being removed on the earlier plat, do you see that area and could you tell us from this plat, from this photograph, what the condition of the area was at the time this photograph was taken?

A That area is located here (indicating) and there is a timber stand beginning to grow up there. And you can see the rows of planted trees. You can see the rows indicating that the trees were planted and the predetermined separations.

Q Is there still not in existence in this plat the road which you have described as the old road running to the east of McCreery property Parcel "B"?

A Yes, sir, that road is there in existence here (indicating).

Q What is the state of the particular area as far as cutting is concerned in the photograph shown

Parcel "C" and"B"?

A The forest growth has grown, continued to mature since the 1931 photograph.

Q What is the significance of the numeral 3-9-43 in the upper lefthand corner of this photograph?

A That is the date the photograph was taken.

Q I now show you what is identified as Complainant's Exhibit Number 21 which has in the upper left-hand corner the figures 10-13-53 and ask you to tell me what that is?

A That is an aerial photograph that was provided by the Department of Agriculture.

Q Why is it difference from the other ones we are talking about?

A These were used at different times and given different photographic processes and were taken at different times of the year.

Q Would you again with the letters "A" to "A" identify on this photograph the extremities shown on Route 608?

NOTE: The witness marks the photograph as requested.

BY MR. CAUSEY: (Continuing)

Q Again on the identified photograph "B", the approximate center of the McCreery thirty acres which we previously referred to on the old photograph as "B".

NOTE: At this point the witness marks the photograph as requested.

BY MR. CAUSEY: (Continuing)

Q Identify as "C" the approximate center of Harden Number 1 Tract which is identified on the other photograph as "C".

NOTE: At this point the witness marks the photograph as requested.

BY MR. CAUSEY: (Continuing)

Q And mark the approximate center of your Harden Number 2 Tract which is identified on the other photograph as "D".

NOTE: At this point the witness marks the photograph as requested.

BY MR. CAUSEY: (Continuing)

Q Mr. Brake, could you locate on this photograph and could you point it out, the area which appears on the first photograph as being cleared as far as topsoil was concerned?

A Yes, located right here (indicating).

Q What is the condition of the tract at that time?

A The planted timber growth on it has matured further.

Q What is the condition of the timber on the areas which you have designated as "C" and "B" generally during that period of time?

A All has matured further.

Q Do you find on this plat any reference to the county road running east on this photograph, any reference to the county road running east on the McCreery property?

A The road is still shown as being in existence.

Q Now, I show you a photograph dated, or identified as Complainant's Exhibit Number 22, bearing in the upper lefthand corner the numerals 4-26-60 and ask you to state what that is?

A An aerial photograph again from the Department of Agriculture.

Q Can you locate on there what is the present

Route 608?

A I will put the emblem "A" to "A".

Q Could you locate on there the McCreery property of the thirty acres which you have previously identified with the letter "B"?

NOTE: The witness marks the photograph as requested.

BY MR. CAUSEY: (Continuing)

Q Could you locate the approximate center of the 47 acres of the Harden Number 1 Tract which you have previously identified on photographs by the letter "C".

NOTE: The witness marks the photograph as requested.

BY MR. CAUSEY: (Continuing)

Q Now, does this particular Exhibit Number 22 embrace all of Harden Tract Number 2 and Number 1?

A No, it doesn't include Harden Number 2.

Q I show you now -- what is the state of the timber on Harden Number "C"?

A Further matured from the prior photograph.

Q Has there been any cutting with respect

to it?

A There is -- a cutting operation just occurred or possibly in progress.

Q How do you determine that?

A I see evidence of a logging road whereby built into the tract and branching out from the tract and points within the tract in at least three or possibly four places.

Q Would you describe to -- what this photograph shows as to the road running east of the McCreery property, is it still in existence on this photograph?

A The road is still in existence and in fact it has been improved.

Q Now this is the photograph identified as Complainant's Exhibit Number 23, and bears the date of 1-22-68 at the top. Tell us what that is?

A That is a photograph drawn by the Virginia Department of Highways which I obtained a copy.

Q Does it show the area in question?

A Yes, sir.

Q Would you show on that photograph first by marking with the letter "A" present Route 608?

NOTE: At this point the witness marks the photograph as requested.

BY MR. CAUSEY: (Continuing)

Q Now, could you show by the letter "B" the McCreery property, thirty acres, putting the letter in the approximate center of the same?

NOTE: At this point the witness marks the photograph as requested.

BY MR. CAUSEY: (Continuing)

Q And your Harden Number 1 Tract consisting of some forty acres?

A I will use the letter "C".

NOTE: At this point the witness marks the photograph as requested.

BY MR. CAUSEY: (Continuing)

Q And does this show all the Harden Number 2 Tract?

A No, it does not.

Q I show you Exhibit Number 24 bearing the date 1-22-68 at the top and ask you what this shows?

A This is a photograph of the -- it is an overlapping photograph of the preceding photograph showing the area further to the west.

Q Will you mark on this again by the letters "A" Route 608?

NOTE: At this point the witness marks the photograph as requested.

BY MR. CAUSEY: (Continuing)

Q Will you mark on there by the letter "B" if it is on the plat, the property of the thirty acres owned by Mr. McCreery?

A There is part of the thirty acres with approximately the center here (indicating).

Q Will you mark the approximate center of the Harden Number 1 Trct which you have previously designated by the letter "C"?

NOTE: At this point the witness marks the photograph as requested by counsel.

BY MR. CAUSEY: (Continuing)

Q And the approximate designation of the center of the Harden Number 2 Tract which is previously located by "B"?

A That would be here.

Q There is immediately to the east and

adjacent to where you have the letter "B", the dark area. Will you explain what that is?

A That is the same area, part of the same area that shows open on the first photograph with a stand of timber located on it.

Q What is the general condition as to the timber on the Harden Tract Number 1 and Number 2 at this time?

A The timber has been completely removed since the last photograph with the exception of the area we just talked about and the timber again been replanted. If you look closely you can follow the rows of young trees.

Q Turning to and reading in conjunction with each other, these two exhibits dated January 22, 1968, what do they show with respect to the road running to the east of the McCreery property?

A The road is still in existence and appears to be even further improved than in the previous photograph.

Q Now, I finally show you Complainant's Exhibit 25, which has the date 8-23-69 and ask you what that is?

A This is again from the Department of Agriculture.

Q Will you again mark by "A" where 608 is on this photograph?

NOTE: The witness marks the photograph as requested.

BY MR. CAUSEY: (Continuing)

Q Will you now mark with the letter "B" the approximate center of the present McCreery thirty acres?

NOTE: The witness marks the photograph as requested.

BY MR. CAUSEY: (Continuing)

Q With the letter "C" the approximate center of Harden Number 1 Tract, and with the letter "D" the approximate center of the Harden Number 2 Tract.

NOTE: The witness marks the photograph as requested.

BY MR. CAUSEY: (Continuing)

Q With respect to the -- after that, we have previously discussed is there still a stand of timber remaining there in 1969?

A Yes, sir.

Q What is the situation generally so far as

1 the timber on the other tract?

2 A It is in a young state having followed

3 a mechanical regeneration program.

4 Q Is there any indication on this map or

5 this photograph made in 1969 of the dividing line between

6 what was the Harden property and what was known as the

7 Ellsworth Tract?

8 A In the piece that Mr. McCreery holds

9 title to, there is an indication of a dividing line between

10 the two.

11 Q Would you mark where that indication is

12 by the letter "E"?

13 A It would run from approximately here

14 (indicating) over adjacent to the old road.

15 Q All right, and would the line in the cut-

16 over area be according to the plat, would it then be an exten-

17 sion of this "E" line over to here?

18 A Yes, sir, generally a straight projection.

19 Q Would you turn to the easternmost line

20 of the cut area on this photograph of the part which you have

21 marked as "D", would that mark the western boundary of the

22 Chesapeake Corporation of Virginia?

23 A Yes, it would.

24 Q And in that property which lies above

25 this portion of pine which we previously have referred to, would

that be in the Harden Tract or in the Ellsworth Tract?

A In the Ellsworth Tract.

MR. CAUSEY: All right.

THE COURT: You may resume your seat.

BY MR. CAUSEY: (Continuing)

Q Mr. Brake, in your position with the Chesapeake Corporation of Virginia, do you have access to the records of the corporation with respect to the timber cutting?

A Yes, sir, I do.

Q Have you made an examination of the records of the Chesapeake Corporation of Virginia as to the cutting of timber by the -- on these properties we designate as the Harden Tract?

A Yes, I have.

Q With respect to those photographs you have testified that as to certain of them shows recent cutting operations. Are you in a position to tell the Court whether the cutting at that time was done by the Chesapeake Corporation of Virginia or somebody else?

A I didn't find the records of the earlier cutting.

Q The earlier cutting, which do you mean?

A In the forties.

Q Was there any cutting done on it in the fifties?

A I don't know of any.

Q In the sixties?

A Yes, sir.

Q What was done in the sixties?

A The tract was clear cut sometime, sometime possibly in the late fifties, but early sixties.

Q Since then it has been -- was it reseeded or what was done after it was clear cut?

A After the clear cutting, there was a mechanical site operation carried on on the tract. With the use of a large bulldozer we pull what we call a rolling drum chopper across the forest growth remaining and flatten it out on the ground and clear up a ten or twelve foot strip around it and under controlled conditions burn the debris which was flattened out on the ground by the chopping operation That operation would have taken place in the summer and following that late winter or early spring we planted the tract with loblolly pines by hand.

Q Has it been cut since then?

A It has not been cut since then.

Q Mr. Brake, to your knowledge can you tell me whether anyone has made, prior to the McCreery claim, any claim adverse to the ownership of the Chesapeake Corporation

of Virginia in this area?

A I know of no previous adverse claim.

Q The Highway Department has sought to acquire a right-of-way through a portion of this property for the improvement of or construction of Interstate Route 64. Who for the Chesapeake Corporation of Virginia handled the negotiations for that right-of-way?

A Mr. Crute handled them in the early stages and I have handled them in the late stages.

Q Did Mr. Crute operate under your direction?

A Yes, sir, he did.

Q Can you tell me when to your knowledge the Highway Department first raised any question concerning the Chesapeake Corporation of Virginia having title to the area it sought to acquire?

A I don't recall the exact date. It was in the late, earlier stage of their negotiating for the 64 right-of-way.

Q Had they tendered you an offer prior to the time that they raised the question as to title?

A Yes, sir, they had.

Q Do you know whether the offer was accepted?

A The offer has been accepted.

Q It was then not acted upon by the Highway

Department because they claimed the title was deficient?

A That is correct.

Q That is the first notice you had so far as the Chesapeake Corporation had adverse to the title in this area?

A That is the first notice I or anyone had as far as I know at Chesapeake.

MR. CAUSEY: I think that is all of the questions at the present time.

CROSS EXAMINATION

BY MR. WINFREE:

Q Mr. Brake, may I ask your age?

A I am forty.

Q How long have you been a Forester?

A I graduated with a Degree from North Carolina State University in 1960.

Q Did you start work in Forestry work in 1960?

A Yes, I did.

Q How long have you been with the Chesapeake Corporation?

A I came witn the Chesapeake in June, 1960.

Q So you were not around when the 1937 aerial photograph was made?

A No, I was not.

Q Well, you have testified rather positively that the photo indicated that the topsoil had been removed. How can you be positive about that?

A I made an examination of these photographs using a stereoscopic instrument that put it in a three dimensional plan and I was able to tell there had been some soil disturbance and further investigated this by going to the land in question.

Q When did you do this?

A Sometime in the last year, eighteen months. I don't know the exact date. And I found ground evidence whereby the soil had been removed from the base of certain older trees on the stand, some six, eight, twelves inches in some cases shallow and possibly deeper than others.

Q When?

A Approximately a year ago.

Q I believe you indicated that on the Exhibit Number 20, the 1943 aerial photograph, it indicated trees had been planted there. Would that necessarily mean they had been artificially planted? Would it not be indicated equally a planting on the photograph if they were a natural growth of trees?

A It would not be characteristic of a natural growth for the indicated planting to be in rows.

It indicated planting by some mechanical means which predetermined separation.

Q Your testimony is based primarily upon an inspection of these photographs?

A No, I followed it up -- at the time of determining the removal of the topsoil, I always looked at the trees in the area and the rows of the area planted is visible for anyone to see. You can stand on the tract and look right down the rows of trees.

Q All right. Have you made a specialty of studying aerial photographs?

A I have made a specialty of forestry, of which aerial photography is one of the phases of it.

Q Now, you testified that on the 1968 photo, Exhibit Number 24, there was an indication of timber removal or a recent cutting operation. What was the date of the cutting of that timber?

A I don't know the exact date.

Q You are employed by the Chesapeake Corporation?

A Yes, sir.

Q And I believe you testified they had cut the timber?

A Yes, sir.

Q Do you mean to tell the Court you don't

1 don't know the date the timber was cut, when it was harvested?
2 A I don't know.
3 Q I believe you said it was in the early
4 1960's. On what do you base that information? The photograph
5 is dated 1968, so could it not have been in the late 1960's
6 as well as the early 1960's?
7 A I think that possibly it could have in
8 both situations depending on when it was finally cleared.
9 We know from the date of the photograph it was prior to 1968
10 and the Chesapeake Corporation's records as best I can recall,
11 indicated it was in the early 1960's instead of the late
12 1960's, or possibly both times.
13 Q Don't you keep records of when timber is
14 harvested for your company?
15 A Yes, sir, we do.
16 Q And you came today without that information?
17 A The records that we keep, we don't keep
18 them beyond -- I am not exact on the figures, of four or
19 five or six years as far as the individual cutting records.
20 They are kept in the tract accounting books, which the books
21 are updated periodically in their earlier cutting and would
22 have been in an older ledger than I --
23 Q You know in a rather vague way when the
24 timber was cut then, in a general sort of way?
25 A I know in a general way when the timber

1 was cut.

2 MR. WINFREE: If Your Honor please, I
3 would like to have the witness look at one of these
4 photographs again. I hate to trouble everyone to
5 move over to the table. I wonder if we could just --
6 I am particularly interested in the 1937 photo and
7 maybe we could lay it here on the table. May I please
8 have that exhibit.

9 MR. CAUSEY: Yes, sir.

10

11 BY MR. WINFREE: (Continuing)

12 Q In your work in Forestry you have to
13 be somewhat familiar with property values, do you not?

14 A Yes, sir.

15 Q And you have determined parcel "B", "C"
16 and "D" on the 1937 aerial photo as being the same as Parcels
17 "A", "B", and "C" on the 1935 Evans survey?

18 A That is correct.

19 Q Can you designate on the 1937 photo --
20 May I borrow your red pencil -- the location of the northerly
21 line of the Harden 110 acres by putting the letter "X" at
22 the westernmost premise and the letter "Y" at the eastern-
23 most premise.

24 A That northern line would run from here--

25 Q And now put the letter "Y" at the eastern-

most premise.

NOTE: At this point the witness marks the photo as requested by counsel.

BY MR. WINFREE: (Continuing)

Q You would say this remarkable 1937 aerial photograph shows very plainly the straight line which marks the northerly boundary line of the Harden 110 acres?

A Yes, sir.

MR. WINFREE: I have no further questions.

THE COURT: You may step aside.

- - - - - - - - - - - - -

WITNESS STOOD ASIDE.

Testimony of
Meaco Woodson

[Tr.75-86]

THE COURT: Next witness, Mr. Causey.

MR. CAUSEY: Meaco Woodson.

TESTIMONY OF MEACO WOODSON

MEACO WOODSON, a witness called on behalf of the complainants, being first duly sworn, testified as follows, viz:

DIRECT EXAMINATION

BY MR. CAUSEY:

Q Please state your name.

A Meaco Woodson.

Q How do you spell your first name?

A M-e-a-c-o.

Q Where do you live?

A I live one mile east of New Kent Courthouse.

Q How long have you lived there?

A For close to around sixty-five years.

Q How old are you?

A I will be sixty-five years old the 27th day of this coming September.

Q In other words, you are a native of this area, all your life?

A All my life.

Q Did you happen to know Joseph Harden?

A All my life.

Q Do you know his brother, Willie Harden?

A Well enough.

Q Do you know where Mr. Joseph Harden and Mr. Willie Harden lived during the 1930's?

A Oh, yes, sir.

Q Whereabouts did they live?

A They lived on one -- they lived on -- I mean 608.

Q Is that the highway which runs from just beyond here to Providence Forge?

A Yes, sir.

Q Do you know where the property which we have been talking about and described as the Harden tract which the Chesapeake Corporation of Virginia now owns and portions of which the McCreerys now own, do you know where that property is located?

A Yes, sir.

Q What has been your occupation all your adult life?

A I've been in the timber business all my life.

Q Are you on your own or are you cutting for others?

A Well, I used to cut for Chesapeake. I used to manufacture Chesapeake timber some years ago and for the last twenty years I have been buying timber from any one

1 individual that I could buy it from, anybody.
2 Q Were you ever in a salaried capacity with
3 Chesapeake or did you operate with them as an individual
4 contractor?
5 A Well, I always have my own machinery now
6 and I cut and haul for Chesapeake.
7 Q Could you tell me whether or not you have
8 ever cut timber on the property which used to belong to Mr.
9 Joseph Harden and that is adjacent to the McCreery property
10 at Route 608?
11 A I cut on Mr. Harden's tract, but never
12 cut at Mr. Clarence Harden's tract which McCreery owns now.
13 Q You never cut on the property Mr. McCreery
14 owns now?
15 A That's right.
16 Q Did you cut on property, both pieces of
17 property?
18 A Yes, sir, both sides of the highway.
19 Q That cutting, was that done for the
20 Chesapeake Corporation of Virginia or somebody else?
21 A That was done for the Chesapeake Corpora-
22 tion Company.
23 Q Do you know when you cut as far as years
24 were concerned, sir?
25 A Yes, sir. I cut in 1942 and I cut in

1943 and I didn't cut no more from '43 until 1950 or around 1951. I pulled out then and 1953 and -- in 1953 in the month of March I bought timber from Mr. Clarence Harden and Mr. Clarence Christian and Jimmy Christian up to 249, that is what they call it now.

Q Did you have any part in the cutting which Mr. Brake testified to which took place in the late 1950's or 1960's?

A I didn't cut any in 1960, but I cut in 1953, that was the last cutting I done.

Q The last cutting you did there?

A Yes, sir.

Q Did you also cut in 1943?

A 1942 and 1943 and somebody maybe asked the question why I pulled out there. Sometimes on account of conditions of weather and they put me somewhere else on the Ellsworth Tract or --

Q At the time that you were cutting there, say in 1942 or 1943, how would you transport your logs to the mill at West Point?

A By the trucks.

Q And in what direction were your trucks going from there?

A I would come out 608 and to hit 33 at that time.

Q Did you go by where Mr. Willie Harden and perhaps Joseph Harden were living at that time?

A Yes, sir, every day.

Q What kind of association did you have with them during that period of time?

A Willie Harden, he would catch me down here at Mr. E. P. Bolts' store, two or three times a week. Sometimes he would ride down to West Point. But he would come down to the store and get his tobacco and get him some coffee and some sugar and I would mention that he would come in the woods where I had been once or twice a week.

Q That is while you were cutting on the property formerly owned by Joseph Harden?

A Yes, sir.

Q Did he not or did he make any objection to your cutting there?

A Not a bit.

Q There is a piece on that Harden property which has not been cut. Tell us what you know about that?

A Well, I can't tell you the year and I can't tell you the month, but I know one man, he's dead now --

Q Who is that man?

A His right name is Mac Abrams. That timber --

MR. WINFREE: If Your Honor please, is

this witness going to tell us what somebody else told him?

MR. CAUSEY: I think he will tell us what he observed.

BY MR. CAUSEY: (Continuing)

Q What did you observe, what did you see there?

A Yes, sir. I used to travel that route right smart.

Q What did you observe with respect to this?

A What do you mean?

Q What did you see?

A I see them out there working, setting out trees.

Q Who?

A Mac Abrams and Mr. Gooch at that particular time.

Q Who is Mr. Gooch?

A He was employed by the Chesapeake Corporation. He was the foreman, the boss man.

Q And Mr. Mac Abrams?

A Mac Abrams wasn't by himself. They had mostly the employees from King William or King & Queen. Mac

1 Abrams was born and raised right here in this county.
2 Q What were they doing?
3 A They were setting out trees.
4 Q Those trees -- You say they set out trees
5 which are standing there today?
6 A Yes, sir.
7 THE COURT: What was the reason, you were
8 in there in 1942 or the early 1950's, that that
9 area wasn't cut?
10 WITNESS WOODSON: Because it wasn't old
11 enough. Some of them couldn't be no larger than I
12 would say around two inches or an inch and a half
13 on the stump.
14 THE COURT: Mr. Woodson, at the time that
15 you cut the timber on these properties, and you were
16 cutting for the Chesapeake Corporation of Virginia,
17 can you tell me whether or not anybody came in there
18 and objected to your cutting the timber?
19 WITNESS WOODSON: No, sir.
20
21 CROSS EXAMINATION
22 BY MR. WINFREE:
23 Q Mr. Woodson, when you cut the timber,
24 were you told where to cut it or did you go out in the woods?
25 A Well, at that particular time I think they

had my boss from Chesapeake Corporation and they would come out there and they owned both sides of the road. Well, probably so this week I would be cutting on this side or the road or for two or three weeks and then the next week we'd come around and I'd be down the hill and move to the Highland and I'd cut on either the righthand side or the lefthand side of the road, either one, all the way from one line to another, from Mr. R. A. Richardson at both sides of the Harden Tract down to the creek.

Q What was the name of that agent?

A Well, at that time, it was R. H. Harden.

Q How do you spell that?

A H- -

MR. CAUSEY: I think he means Highland, Mr. Highland.

WITNESS WOODSON: I call him --

MR. CAUSEY: If you don't mind, I will try to clear this up. Is he a gentleman who subsequently did surveying work?

WITNESS WOODSON: Yes, sir.

MR. CAUSEY: That is H-i-g-h-l-a-n-d.

BY MR. WINFREE: (Continuing)

Q Was he employed by the Chesapeake Corporati

A Yes, sir.

Q And you cut where he told you to cut?

A Yes, sir, that's right.

Q You had no knowledge of the ownership of the land?

A No, sir, I cut on either side of the road. He showed me the line, not to cut from one creek but to cut down to the creek, and not to go over that creek. That would be heading west I would call it, northwest. And not to cut over the creek going to the southwest, the branch.

Q Could you show us on these maps or photographs where you cut the timber?

A Well, I will do my best. That's all I can tell you.

Q What year were you cutting timber now?

A 1942, 1943 and 1953.

Q Can you tell from that photograph where you have cut timber?

A I cut on this side of the road (indicating).

MR. WINFREE: This is Exhibit Number 20.

A (Continuing) I cut on this side of the road (indicating).

Q This side of which road?

A I reckon this is a road here, isn't that a road here?

Q That is 608.

A This must be 608, yes, sir.

Q Correct.

A I cut on this side of the road and on this side of the road (indicating).

Q Is the place where you cut the timber where you are putting your hand?

A I can't swear to that. I cut on both sides of the road down to Richardson's line.

Q Where is Richardson's line?

A Well, Richardson's line -- there is a creek -- it's two creeks, one northwest and one pointed southwest crossing 608.

Q Do you know -- can you testify with any certainty to what tract of land shown on this photograph, where you cut timber?

A Well, I cut on both sides of 608.

Q Both sides of the road?

A Both sides of 608.

MR. WINFREE: I have no further questions.

MR. CAUSEY: I want to ask him another question.

REDIRECT EXAMINATION

BY MR. CAUSEY:

Q Mr. Woodson, do you know Mr. Graham L. Evans?

A Yes, sir, I know him well.

Q Did he ever do any survey work for you?

A No, he never done any for me, but for the Chesapeake Corporation Company.

Q Have you ever assisted him in any survey work?

A Yes, sir.

Q On what occasion was that?

A I pulled a chain for him.

Q Do you remember approximately when it may have been?

A Oh, back in the late twenties and early thirties.

Q Do you know whether he did considerable surveying work in New Kent County?

A As far as I know, he did.

MR. CAUSEY: I have no further questions.

THE COURT: No further questions, you may step aside.

- - - - - - - - - - - - -

WITNESS STOOD ASIDE.

Testimony of
R. B. Cartwright

[Tr.87-90]

THE COURT: Next witness.

MR. CAUSEY: Mr. Cartwright?

TESTIMONY OF R. B. CARTWRIGHT

R. B. CARTWRIGHT, a witness called on behalf of the complainants, being first duly sworn, testified as follows, viz:

DIRECT EXAMINATION

BY MR. CAUSEY:

Q Please state your name.

A R. B. Cartwright.

Q How old are you?

A Fifty years old.

Q Where do you live?

A West Point, Virginia.

Q What is your occupation or profession?

A I am a Certified Land Surveyor.

Q How long have you been Certified as such?

A I have been Certified fifteen years.

Q By whom were you previously employed?

A The Chesapeake Corporation of Virginia.

Q In connection with your employment, Mr.

1 Cartwright, have you had occasion to go on the grounds or
2 do any examination with respect to either the Harden Number
3 1 or Harden Number 2 Tract in New Kent County owned by
4 Chesapeake?
5 A Yes, we have.
6 Q Mr. Cartwright, I show you Complainant's
7 Exhibit Number 18, which is a plat by G. L. Evans dated
8 February 7, 1945, and ask you if you are familiar with that?
9 A Yes, sir, I am.
10 Q The concrete monument which is shown is
11 the northeastern corner of that property, have you been able
12 to locate that monument?
13 A Yes, sir.
14 Q Is the monument there on the ground
15 now?
16 A It is there, yes, sir.
17 Q There is, I think, shown as the northwest
18 corner of that an iron pipe?
19 A Yes, sir.
20 Q Is that there now?
21 A That is there, yes.
22 Q There is also an iron pipe shown at the
23 southwest corner. Did you make an examination of the lower
24 corner?
25 A No, I did not.

Q There is also shown on Complainant's Exhibit Number 2, which is the plat made by G. L. Evans, the date doesn't show on it, but it is Exhibit Number 2, there is also shown a concrete monument at the northeast corner of what is designated as Harden Number 2 Tract. Is that there?

A It is not.

Q That is not?

A No, sir.

Q How did you determine that the concrete monument located at the northeast corner of Harden Number 1 and northwest corner of Harden Number 2, that is the corner of those two tracts, how did you determine whether that was in the correct location or not?

A There is an iron pipe at this northeast corner of Harden Number 2 which in my opinion is in the same place that the monument was.

Q Was there a plat of record of what Chesapeake calls its Ellsworth Tract?

A Yes, sir.

Q The Ellsworth Tract boundary runs the full extent of the northern boundary of the Harden Tract and McCreery property?

A Yes.

Q Did the location of that iron pin and

1 concrete monument coincide with the Ellsworth Survey?
2 A Yes, sir.
3 Q Were they consistent?
4 A Yes, sir.
5 MR. WINFREE: No questions.
6 THE COURT: You may step aside.
7
8 - - - - - - - - - - - -
9 WITNESS STOOD ASIDE.
10
11 THE COURT: Next witness.
12 MR. CAUSEY: I think that is where we
13 would stand.
14 THE COURT: The complainants rest at
15 this time. It is now approximately twenty-five
16 minutes to one. And I guess since the complainants
17 have rested, we will adjourn for lunch.
18
19 NOTE: At this point there is a recess
20 for lunch, after which the hearing continues as
21 follows, viz:
22
23 THE COURT: Gentlemen at the Bar, we are
24 now ready to proceed.
25 Next witness, Mr. Winfree.

Testimony of
F. D. McCreery

[Tr.91-126]

F. D. MCCREERY, a defendant, being first duly sworn, testified as follows, viz:

DIRECT EXAMINATION

BY MR. WINFREE:

Q State your name, age, address and occupation?

A Frank D. McCreery, age fifty-four, I live at Route 1, Box 190, New Kent, Virginia, occupation, U. S. Government Electronic Mechanical Technician.

Q Are you one of the defendants along with your wife, Mrs. McCreery, in this suit?

A That's right, I am.

Q Do you known a tract of thirty acres of land in Cumberland District, New Kent County, Virginia, formerly owned by Clarence Harden?

A Yes, sir, I do.

Q When did you purchase that land?

A December, 1950.

Q Did you also own a -- have an interest in a tract of five acres which is in controversy in this case?

A Yes, sir, I do.

Q When did you acquire that land?

A Approximately 1970.

Q Did you acquire it by the five Deeds which have been filed into evidence?

A Yes, sir, I did.

Q Do you know the location of the five acres which is the subject of this suit?

A By constant investigation and research on my part, I do.

Q Have you had --Were you able to have the location of the five acre tract surveyed?

A Yes, sir, I have.

Q I hand you a plat by William H. Redd, Certified Land Surveyor, dated September 17, 1970, a copy of which I believe has already been filed into evidence, I don't recall which exhibit number it is --

MR. CAUSEY: I think it is "A".

BY MR. WINFREE: (Continuing)

Q Defendant's Exhibit "A" and will you identify that as being a survey which you had made?

A Yes, sir, this is a survey I had made by Mr. Redd based on the two markings on the ground.

Q Can you explain to the Court why that particular tract of land is in your opinion the five acres in controversy?

A Based on a survey of the 47.40 acres

which indicates the road on the northern end of the property and the Deed from Joseph Harden to Willie Harden reserving that road for the rights, use and privilege for his heirs and assigns, the road shows it going to the five acres, plus the fact that the Chesapeake Deed of 1935 acknowledges such road and the five acres.

Q You mentioned a road. Can you describe that road based on your knowledge of it?

A Prior to it being bulldozed and obliterated and obstructed by the Chesapeake Corporation in 1965, the road was an old wood road which I had been over. As a matter of fact, it was the first road that went back to my property when I bought that in 1950.

Q I hand you an aerial photograph of a portion of the county marked Complainant's Exhibit Number 19, dated April 17, 1937. Can you identify your property which you purchased from Clarence Harden on that photograph?

A The property I purchased from Clarence Harden, thirty acres more or less, consisted of along 212 on the northern line, 76 degrees west to approximately this area (indicating) close down to just before you get to the swamp here and straight to here, which is 108 feet from the Ellsworth property corner line, northern corner line.

Q Is the parcel shown as "B" on this photograph the same as the Hezekiah Harden Tract shown on

the 1935 Evans survey?

A Hezekiah Harden was the father. This is his tract and also the tract that Joe Harden reserved the right of one-half of the house and the Deed of 1893.

Q Was that old house there when you purchased the property?

A Yes, sir, it was.

Q What happened to it?

A I destroyed the house and have moved the house and I built my home on the identical same spot.

Q Now, is the old road to which you have referred shown on this aerial photograph?

A The old road came from here approximately the center of the thirty acres on the eastern boundary line alone here up to this corn crib which is still standing, it beared left through here and followed the property line just south of the northern boundary property line all the way across here, across the swamp to old County Road 413 which is still in existence today on the ground.

Q You have indicated the location of the old road on this photograph. I think the record should show that you traced a line along the northerly line of the Harden 110 acre tract.

A Yes, sir, and such road is identified on the survey of 1912 from Joseph H. Harden to Willie E. Harden

and John Harden.

Q Can you indicate on this map the location of the five-acre tract in question?

A Based on the description of the Deed and the location identified the five acres in this area (indicating) in respect to the house which Joe Harden owned and which was adjoined by the 47.40 acres that the Chesapeake now owns, and didn't purchase until 1935.

Q So you would say in your opinion the five acres connected with the old road?

A The five acres connected to the old road plus the fact that on the separation of the location of the five acres in the Deed of 1930 from Joe Harden to Chesapeake, the five acres was described as being bounded on the north and east, which was -- I can correct, it should have said west of the Chesapeake lands and at the time on the south, and as it was not bounded on the south at that time because the Chesapeake Corporation didn't own any land south of the Harden property in that area.

Q All right, you may sit down.

Mr. McCreery, I hand you Complainant's Exhibit Number 6, which is the Deed of December 2, 1914, from Joseph H. Harden to John and Willie Harden conveying the middle tract, Parcel "B", 47.40 acres and which provided that the parties of the first part reserve unto himself, his heirs

and assigns, the rights, privilege and authority to use a road through the tract of land hereby conveyed as an outlet from his property to the county road and with which there is a map made by O. M. Chandler, are you familiar with that Deed and map?

A Yes, sir, I am.

Q Is there a reference to a road on that map?

A Yes, sir, reference to a road at Point C in the northeastern corner of the survey.

Q Is that an indication of the then existence of the old road which you have observed on the property?

A Yes, sir, it is. It is in approximately the same location.

Q Is there any evidence of that old road still in existence today?

A On the north of the old corn crib between the fence and Interstate 64 there was still evidence of the road and on the west after you cross the swamp because there is no evidence on the ground and west of 608 to the swamp, based on the fact the Chesapeake Corporation pulverized and obliterated all indications except for an iron pin they unfortunately missed. On the west of the creek you can go up across Beaverdam which is an indication of the way it is

built up there is the old road. Follow the old road up to the north at the angle to the north to a road that parallels 413 which is a short cut which would take you to Chris Cross, who incidentally at the time we are talking about were cousins of the Hardens. And that was the road they used to go to Chris Cross.

Q You mentioned a corn crib. Will you clarify the reference to the corn crib with respect to the location, present location of the old road?

A The corn crib is directly south and on the old road.

Q Is it on your property?

A On my thirty acres, yes, sir, and it is still there today.

Q I believe you testified earlier that Chesapeake Corporation had obliterated the old road on the 47 acre tract parcel?

A They had obliterated and obstructed my right-of-way.

Q When did that occur?

A Approximately 1965 because they planted the pine trees, seedlings, on the 47 acres in 1966, and were planted by Mr. Bingley of Providence Forge.

Q Have you subsequently attempted to relocate the old road and its approximate location and to have it

platted?

A Yes, sir. I hired Mr. Redd to lay out the road according to the evidence I presented to him and the Deed and the 1912 survey done by O. M. Chandler. And Mr. Redd laid out the road and I had the road reopened.

Q I hand you a plat of survey made by William Hugh Redd, Certified Land Surveyor, dated May 15, 1970. Does this appear to be the survey to which you have just made reference?

A Yes, sir, this is the road that Mr. Redd laid out starting at an iron pipe put in there by Chesapeake Corporation and went to the west from my property to a concrete monument that was put in there in 1912 by the Hardens when the survey of the 47.40 acres was made. Its bearing, 76 degrees 9 minutes east and its total length, 2,600 feet, and parallel to the northern border.

Q 2,060 feet?

A Pardon me, 2,060 feet.

Q In the right-hand side of this plat is the designation F.D. McCreery "Hezekiah Harden Tract", is that your present property?

A That is my thirty acres, more or less, yes, sir.

Q And then the plat indicates in a straight line running to the west "15 foot right-of-way". Does that

run along the northerly line of the 47 acres?

A That follows parallel of the northern line of the 47 acres.

Q And to what point does it run to?

A It runs to the 32.-- 33.25 acres and the area that I claim the five acres is located.

Q Does it or does it not run to the five acres, in your opinion?

A It runs to the five acres which is on the east side of Interstate Route 608.

Q Do you know about that, the entire five acres?

A It is on both sides of 608.

MR. WINFREE: I would like to file this as Respondent's Exhibit Number "E".

THE COURT: Respondent's Exhibit Number "E".

NOTE: At this point the aforementioned plat by William H. Redd dated May 15, 1970, is now marked and filed as Respondent's Exhibit "E".

BY MR. WINFREE: (Continuing)

Q Did the old road connecting your property with the five acres run in a perfectly straight line?

A No, it meandered a little bit, but did not vary very much from the northern boundary line.

Q Why is it shown as a perfectly straight line on this Redd Survey Exhibit E?

A Because based on the fact there was never a survey made of the road, it would be impossible to lay out a road that had meandered.

Q I believe you said you purchased your property in 1950?

A Yes, sir.

Q Did you move to the property or begin occupying it at that time?

A Periodically over the period of time. We had a four-room cabin located right there on the road just on my western boundary line, just across the western boundary line to the east. My family and I, I was in the Service at the time, we would spend weekends, two and three weeks. My son would hunt the area and in 1960 I was discharged from the United States Navy and I built my permanent home in 1968 to 1960 I built my permanent home -- I mean 1958 to 1960 I built my permanent home and I moved down in March of 1960 and my family came down in June after school expired.

Q Did you hunt or hike around in the woods?

A Yes, sir.

Q Did you hunt on your property in the 1950's

A Oh, yes, sir, very much so. As a matter of fact, I hunted with Chesapeake employees.

Q Did you become generally familiar with the woods in that area?

A Very much so.

Q Can you tell the Court whether you observed any use or occupancy of the five acre tract in question by Chesapeake Corporation?

A At no time in my knowledge was there ever -- have I ever seen Chesapeake use, occupy or mark in any way whatsoever to use the five acres.

Q Were you familiar with the location of the five acres?

A I was familiar with the location of the five acres around 1961 and I was the only one in the area that knew of the existence of that five acres.

Q Did you see anyone cutting timber on it?

A None whatsoever.

Q Has it ever been fenced in?

A It has never been fenced in, no, sir. It has never been fenced in or marked.

Q Have you been in communication with any Forester with respect to the timber on this five acres?

A At the time of my purchase of the interest in the five acres, I knew from past experience that the trees

1 indicated they were not doing anything and I requested the
2 State Forester to come in and make an appraisal and give me
3 a report of what could be possibly done with salvaging the
4 scrub pines that are there. It's most Virginia pines and
5 it's self-growth pine. It is not planted pine.
6 Q That is on your property?
7 A That is on the five acres, yes, sir.
8 Q Have you obtained any communication from
9 the Forester?
10 A Yes, sir, I received a letter from the
11 Forester.
12 Q I hand you what purports to be a letter
13 dated August 13, 1973, on the letterhead, Commonwealth of
14 Virginia, Department of Conservation and Economic Development,
15 Division of Forestry, signed Bernard G. Kubisiak, Jr.,
16 Forester. Did you receive that letter?
17 A Yes, I received this letter from --
18 Q Addressed to you?
19 A It was addressed to me from Bernard G.
20 Kubisiak and it, at that time, in paragraph 2 (witness reading
21 from the letter) "The main species are loblolly pine, spruce
22 pine, and mixed hardwoods. The pines range in size from
23 pulpwood to saw timber. The average age of the dominant
24 loblolly pines is approximately forty-two years. The quality
25 is considered fair, but the majority of the trees are small

in size.

The best forest management recommendations for this area would be to harvest all timber and reforest by planting loblolly pine seedlings."

MR. WINFREE: We offer that as the next respondent's exhibit.

THE COURT: Respondent's Exhibit Number F.

NOTE: At this time the aforementioned letter from Bernard G. Kubisiak, Jr. to Mr. Frank D. McCreery dated August 13, 1973, is now marked and filed as Respondent's Exhibit "F".

BY MR. WINFREE: (Continuing)

Q Are you a party defendant in a certain condemnation suit pending in this court with respect to a portion of the five-acre tract?

A Yes, sir, I am.

Q Were you to your knowledge originally made a party defendant in that case?

A I originally -- no.

Q How did you happen to become the defendant?

A I discovered a highway concrete monument 60 foot in from 608 on the western side. I notified the State Highway Department to this effect and I had my lawyer

1 write them a letter and put them on notice that they were
2 taking land and what was their intentions.
3 Q Were you subsequently made a party
4 defendant?
5 A After that, I was not only made a party
6 defendant, but they also made the revision to the Interstate
7 64 plans that shows the nortnern boundary line which was not
8 shown on the original survey.
9 Q The highway monument which you found, was
10 that situated on your property?
11 A It was situated in 60 feet on my
12 property.
13 Q Which piece of property?
14 A The five acres.
15 Q Do you know a man named Meaco Woodson?
16 A Yes, sir, I am well acquainted with
17 Meaco Woodson.
18 Q Do you see him here today?
19 A Yes, sir, I've seen him here today.
20 Q Was he one of the witnesses who testified
21 in this case?
22 A He was one of the witnesses for
23 Chesapeake Corporation.
24 Q Had you met him before?
25 A Yes, sir, he cut wood for me before.

Q Can you state whether or not you have seen him cutting wood on other property in this area?

A When you say this area, you are talking about around the thirty acres?

Q Around your property?

A No, sir, never have I seen him cut wood in there.

Q Can you state specifically whether or not you have seen him at any time cutting timber on your five-acre tract?

A He has never cut timber on the five acre tract because the trees on there are forty years old -- forty-three years old.

Q Mr. McCreery --

MR. WINFREE: Which exhibit is this one, the family tree?

THE COURT: Respondent's Exhibit B.

BY MR. WINFREE: (Continuing)

Q I hand you a copy of a large sheet of paper which purports to be a family tree which has at the heading Father, H. K. Harden, and has the name of numerous children and other descendants and containing the notarial certification dated September 14, 1970, and a copy of which has been filed as Exhibit "B". I would like for you to state

to the Court whether you obtained this family tree, obtained the information on it?

A This is the family tree which was composed by me from information received from Viola Harden, Harry Harden, and Annie Harden White. And after I composed and laid out this family tree, I then had it signed and witnessed by being signed Viola Harden, Harry Harden and Annie Harden White on the fourth month, 27th day, 1971, and was witnessed by Irene F. Milhouse, Notary Public, on September, 1970.

Q Is the information contained on this family tree true and accurate to the best of your information and belief?

A It is true to the best of my knowledge and as also certain contents are verified by tombstones located in the corner of the Baptist Church across the street from the courthouse.

MR. WINFREE: I have no further questions.

MR. CAUSEY: Let me see Exhibit Number 6.

CROSS EXAMINATION

BY MR. CAUSEY:

Q Mr. McCreery, I show you Complainant's Exhibit Number 6 which is a copy of the Deed dated December 2, 1914, from Joseph F. Harden to John W. Harden, and Willie E. Harden and to which is attached the Chandler plat to which

you have referred.

A Yes, sir.

Q Will you look particularly at the plat and advise me what if any road is shown on that plat as going across the 47 acres described in that Deed?

A At Point C it shows two lines and it is written road.

Q Do the roads go across?

A Yes, they do because it describes it in the Deed.

Q I am asking you simply, sir, on this plat if there is any road shown across this property on the plat?

A The plat itself does not have to show a road as long as it indicates some point on the plat there was a road.

Q I am asking you the simple question, does the plat show any roads going across the 47 acres?

A No, sir, it does not.

Q Now, at the time the 47 acres was conveyed there is reference to this Deed, it says to use the road through the tract of land hereby conveyed as an outlet from his property which is the property of J. H. Harden to the county road. Now, what property did J. H. Harden own at the time of the execution of this Deed?

A Five acres.

Q What five acres?

A 32 acres that the 5 acres is on. You are speaking of 1912.

Q He owns that 32 acres for the purpose of identification we can say as the parcel marked "C" on Exhibit Number 2?

A He owns one-half interest in the house.

Q Now, is there any designation in the Deed, Exhibit 6, this again is the Deed to John W. Harden and Willie E. Harden of the width of the road?

A No, sir.

Q How did you arrive in instructing Mr. Redd to make the plat, he did take the width of fifteen feet?

A I did not instruct Mr. Redd to make it the width of fifteen feet.

Q How did he get the fifteen-foot width?

He arrived at the width of fifteen feet by going back and measuring the old county road and you will find the old wagon roads were approximately fifteen feet wide.

Q Rather than twelve or eighteen or twenty?

A Yes, sir.

Q And that is the way the width of the road was arrived at?

A Yes, sir.

Q I think you have admitted that the road as shown on this plat is not at the location in which it actually existed?

A No, sir, I have not admitted that.

Q I think you stated it was a meandering road?

A I said from the aerial photograph it was a meandering road.

Q You have no personal knowledge of the location?

A I walked the road.

Q Was it --

A It was a meandering road.

Q And the road which is shown on Mr. Redd's plat which you have put into evidence is not a meandering road?

A No, sir, it is a straight line nearest to the approximate area.

Q In other words, the location of the road on the plat is not the same as the location of the road as it existed on the ground?

A The meandering road is running parallel to the northern boundary and most of the road on the plat is on the northern boundary line.

Q The two are not identical?

A Physically, no.

Q Now, it is true, is it not, Mr. McCreery, that on the eastern line of your property at the time that the 1914 Deed was executed there was a road which was a county road?

A On the eastern end it was oh, Road 212.

Q And the only property which Mr. Harden had, Mr. Joseph Harden's, at the time that he executed the 1914 Deed was either Parcel "C", which laid to the west of the 47 acres, or a half interest in the house on Parcel "A".

A Yes, sir.

Q All right. And if he reserves a right-of-way from his property to the county road across Parcel "B", then the only direction he can go is to the east from Parcel "C"?

A No, sir.

Q Why not?

A Because he was reserving a right-of-way to go from the house west to the 32 acres.

Q Is that what your claim depends upon as far as the road is concerned?

A It depends upon -- he has an access both ways.

Q If he did not own the house or half interest in the house --

A He owned the house and occupied the house.

Q All right, sir. I am saying hypothetically if he did not own and were the situation then that he reserved a road from his property running through Parcel "B" to the county road, would it not be for the purpose of going east from Parcel "C" to the county road?

A No.

Q Is that the only purpose it would serve?

A No, sir. It would also serve the purpose of going to the west to County Road 413 which is old county road before, prior to County Road 155 which is now 608.

Q He wouldn't be going across Parcel "B" to do that?

A Yes, sir.

Q From Parcel "C"?

A From Parcel "C"?

Q Yes.

A No, he would be going from Parcel C, he wouldn't --

Q In other words, the question that I asked you --

A Right, right.

Q Will you tell me where you acquired from Joseph Harden his half interest in that house?

A On my Deed from all the heirs.

Q Could we see the Deed. I think all the Deeds are basically similar, are they not, sir?

A Yes, sir.

MR. WINFREE: If Your Honor please, I would like to question the propriety of this line of questioning with respect to the title to the house on Mr. McCreery.

THE COURT: I believe it is an exhibit, is that correct, so any exhibit that is in, counsel would have a right to it for the plaintiff or defendant.

MR. WINFREE: He is bringing out a question as to the title to the house which was on his residence, and I don't think this is an issue before the Court.

THE COURT: I agree there, Mr. Winfree, it is not an issue before the Court from the pleadings. However, it is in an exhibit. Anything that is in an exhibit the Court would have to allow examination to it as to either counsel assuming this is an examination.

BY MR. CAUSEY: (Continuing)

Q I show you, Mr. McCreery, Complainant's

Exhibit Number 15 which is the Deed dated April 8, 1970 from Annie Harden White to you and Mrs. McCreery and I believe you will agree it is in the form all of the Deeds are by which you acquired your interest in the five acres, and ask you to look at that and tell me whether there is any reference whatsoever to a half interest in the house?

A No, sir, because the house wasn't on the five acres.

Q Well, what on the Deed do you have to the Joseph Harden heirs?

A Clarence Harden, in Deed Book 29, page 59, July 12, 1940, bought all right interests of the heirs of the Joseph F. Harden interest in the thirty acres more or less and the house standing on the property at the time.

Q Joseph F. Harden?

A From Clarence L. Harden from the Joseph H. Harden heirs.

Q Which is this you are referring to?

A Excuse me, Hezekiah Harden heirs, this was in 1940. This was in 1950 I purchased all the heirs' interest from Clarence L. Harden on the same thirty acres and recorded in Deed Book 36, page 343, and the house was standing on the property at the time I purchased it.

Q I don't want to belabor the issue, but to simply point out, I think the record will support it, that

1 Clarence L. Harden purchased the interest of the Hezekiah
2 Harden heirs and not the interest of Joseph Harden in
3 that property who was then living. Be that as it may, let
4 me ask you this question. The description of the five acres
5 reserved in the Deed from Joseph Harden to Chesapeake
6 described that property as I recall, as being bounded on the
7 west by the lands of Hezekiah Harden, is that correct, sir,
8 or would you want to refer to the Deed? I don't want to
9 take advantage of you.
10 A The description, the five acres is adjoin-
11 ing Hezekiah Harden's property on the west -- John and
12 Willie Harden's land 47.40 acres --
13 MR. WINFREE: We concede that the Deed
14 is ambiguous.
15
16 BY MR. CAUSEY: (Continuing)
17 Q All right, what I am interested in, sir,
18 is on what basis do you conclude and this is referring to
19 the Redd plat dated September 17, 1970, of the five acres,
20 that the five acres is shaped like that? Why could it not be
21 instead of 197 feet deep and running across the whole way,
22 why could it not run across half way and be twice as deep?
23 A It is based and shaped that way because
24 it is based on two points on the ground that were located.
25 Q Do you know what those two points on the

ground are?

A One is a steel stob in the ground on the northwestern corner and one is a concrete monument on the northeastern corner.

Q Is it not true those are the same monuments which appeared as the northeast and northwest corners of the G. L. Evans plat dated February 20, 1931?

A Yes, sir, it is the same corner of the G. L. Evans plat and shows the survey of the whole tract of 32 --

Q What reason is there to believe those two corners have any relation at all to the alleged five acre reservation?

A Due to the description of the Deed which says that they were bounded, the five acres bounded by Chesapeake on the north and bounded on the south by Chesapeake, therefore it would put the five acres in the northern end of the 32-1/4 acres.

Q Why not put it further down?

A Chesapeake doesn't own any land except the north.

Q Chesapeake doesn't own land on the south?

A No.

Q We, then, have the situation that at the time this Deed was executed that at least two of the boundary

1 lines are not accurate?
2 A Yes, sir.
3 Q The description to the Hezekiah Harden
4 land then and the description as to the southern boundary?
5 A (Witness nods his head in the affirmative).
6 Q You are left then with two which you
7 consider to be accurate which one is bounded on the north
8 by Chesapeake and on the east by Willie and Joe Harden?
9 A Right.
10 Q On those circumstances --
11 A That's Willie and John Harden.
12 Q Excuse me. Under those circumstances,
13 would it not be just as reasonable to put five acres in
14 approximately this line here, wouldn't that fit the same
15 description?
16 A No.
17 Q It would be bounded on the north by
18 Chesapeake and on the east by Willie and John Harden, is it
19 not?
20 A That wouldn't coincide with the two
21 points on the ground that were found..
22 Q If the two points on the ground were
23 merely markers, to mark the outer dimension of the tract?
24 A That is your version.
25 Q What evidence do you have other than this

tract -- that is how the points were placed, is it not?

A That plat is not my evidence that I used. I used the evidence of markers that I found on the ground.

Q Which were the iron pipe and ooncrete monument?

A Yes, sir.

Q Which actually are the corners --

A That is your version.

Q What is the distance shown on the Redd plat between the pin and concrete monument?

A The distance is 1,126 feet.

Q What is the distance shown on the plat between the pin and the concrete --

A 1,126 feet, but it also says north 7 degrees 001 minute east -- that one says north 76 degrees 09 minutes 11 seconds --

Q In other words, there are the concrete monument and two pipes in there?

A Right, but different compass variations.

Q You maintain there are two pipes and two concrete monuments?

A Relatively close, yes, sir.

Q In other words, the line which you are claiming on the Redd plat is not the line shown on the Evans

1 plat?

2 A As far as the needle variation is con-

3 cerned on the compass, no.

4 Q You have got two terminal points, sir --

5 A We could say they were the same.

6 Q What I am getting at is simply they either

7 are the same or they are not. Are you prepared to say the

8 line is the same?

9 A I am not prepared to say they are the

10 same as long as the compass bearings are different.

11 Q If they are not the same, wouldn't it be

12 true that the five acres would not adjoin the property of the

13 Chesapeake Corporation of Virginia on the north?

14 A Based on this survey which is a copy of

15 the old O. M. Chandler survey of 1915, the Chesapeake Company

16 couldn't own the property on the north. But you did not

17 submit that 1915 survey.

18 Q You are talking about the Chandler

19 plat?

20 A The O. M. Chandler plat, 1915, yes,

21 which does not exclude this 32 acres. It includes the whole

22 110.64 acres that Joseph F. Harden bought in 1889 and not

23 1890.

24 Q Mr. McCreery, we seem to be going around

25 in circles. But here is the Chandler plat?

A No, sir, that is not the 1915 Chandler plat, it is the 1912 Chandler plat.

Q Where is the 1910 Chandler plat?

A I believe mine --

MR. CAUSEY: Do you have a plat of 1910?

MR. WINFREE: I presumed you had a copy of it. You are talking about the plat to Ellswoth?

MR. CAUSEY: The whole area, not just Ellsworth.

MR. WINFREE: I am sorry, I misunderstood what you are talking about. That is not a plat of the Harden tract?

A It is a plat of the whole area and it was not done by Chesapeake but by the people who owned the property prior to Chesapeake.

BY MR. CAUSEY: (Continuing)

Q That shows the straight line boundary between Harden and Ellsworth?

A 76 degrees .09 minutes.

Q Let me ask you this question.

A Yes, sir.

Q You introduced into evidence a letter from the State Forestry Department which is Exhibit Number F.

I don't believe you read the first paragraph. Read that into the record?

A (Reading). "This letter will serve as a record of the timberland examination of five acres of timberland located south of Interstate 64 on the west side of Route 608 across from your mailbox."

Q All right, sir, does that indude any portion of the five acres on the east side of Route 608?

A No, sir, it does not.

Q On the east side of Route 608 you claim however, according to the Redd plat that there is certain property which is in this five acres?

A Right, a small portion on the east side.

Q It is also true Chesapeake cut and bull-dozed portions on the east side?

A They did against the wishes and desires of the owners.

Q What recommendation did you make to them at that time?

A Of the owners?

Q Yes, sir.

A I had no interest in the five acres at the time.

Q You made no recommendation to them at that time?

A No, it should have been the right of Chesapeake to make that recommendation to them.

Q Are any of the owners here other than you?

A No, sir.

Q And so as far as you know, there is not objection made at that time to the cutting and bulldozing?

A Yes, sir, no objection.

Q What?

A No objections, I agree with you.

Q Is it not true that, Mr. McCreery, that with respect to the wooded land which was looked at by the Forestry Department on the west side of Route 608 that those trees give evidence of having been planted?

A No, sir, they don't give evidence of planting. They give evidence of natural growth.

Q You would say there was nothing in there to indicate they were in rows?

A They are not, there are no rows and I will take you down there and prove it to you.

Q You were not there, of course, at the time the trees may have begun their growth?

A No, sir.

Q I take it, 1930?

A No, sir, and neither were you nor your

foresters.

Q You would however tend to doubt the evidence of Mr. Woodson they were planted there?

A Mr. Woodson didn't verify they were planted there.

Q I think he stated he saw them being planted?

A Mr. Woodson stated he saw the five acres being planted -- no, sir. He stated he saw the 47 acres and the Oteys Tract being planted. He did not on the five acres. He went around it.

Q The record will speak for itself, if you please, sir.

A All right.

Q Let me ask you this question. Would you mind looking at this map. When did you first come upon the property, you purchased it when, sir?

A What property?

Q Your property, the thirty acres?,

A 1950.

Q All right, sir. I will show you Complainant's Exhibit Number 21 which is an aerial photograph dated October 13, 1953. Will you show to me at that point where the alleged road is which leads from the 47 acres?

A You can see the outline of the road

1 right along here. You can see it by the shadow and coming
2 up here and there is the corn crib and it goes down to the
3 old county road 212.
4 Q Where at exactly?
5 A Right along here, there it is, right
6 here (indicating).
7 Q Here?
8 A You can also make out the same impression
9 of when they put 608 in there was a four-foot mark here and
10 that impression is on 608 right down where they come in like
11 that and meandered right on in and it is also on the Harden
12 property.
13 Q Where does it go beyond there?
14 A It's all dozed -- bulldozed.
15 Q On this map, can you show it?
16 A On this map, no, sir.
17 Q It does not appear on there? Let me show
18 you the 1937 one. Now, there does appear to be a meandering
19 road of sorts?
20 A Yes, sir, you can see it continue right
21 from here and goes up on the creek up the bridge and comes
22 right here. There are the parallel roads on the ground, no.
23 I will take anybody in court that wants to and show them that
24 road up here and this road.
25 Q This road here is reasonably well
designated?

A Right, due to the fact 608 , when that was put in, they no longer went this way.

Q How long was 608 in by this time?

A This is 1937, 608 has been in approximately three years.

Q In three years that would have been grown up with no particular trace?

A It would depend on the time of the aerial photographs.

Q What training have you had in the interpreting of aerial photographs?

A I am a retired Chief Warrant Officer, Aviation Gunner and had training in aerial photography and developing design and interpretation of machine gun fire.

Q I understand that. Let me ask you one further question, sir. It has been referred to in previous testimony to an old county road running east of the property?

A Yes, sir.

Q That road, except for the fact that it has been covered by the Interstate coming through, is still in existence running in a southerly direction?

A It is also still in existence running in a northerly direction to the property.

Q On the Richardson boundary?

A No, sir, I have one acre on the northern

side of 608 and that road is my access to my one acre.

Q It is severed by a road --

A Yes, sir.

Q The old county road except for that severance is still in existence?

A Yes, sir.

Q You were not living on the premises or familiar with them in 1942 or 1943?

A No, sir.

Q My memory is you said 1950?

A 1950 is when I purchased the property and became acquainted with the area.

Q When actually was it that you constructed your cabin?

A Sir?

Q When was it that you, I think you said at first you had a four-room cabin?

A On the property which I purchased, there is a barn on the property, a corn crib on the property and an old house was there. There was a three-stool outhouse and fallen down piece of --

Q Did you use the four-room cabin as a residence at all?

A I lived in it when up here visiting during my tour of duty. I was stationed in Washington and for

1 approximately one year after I bought the property I went
2 from there to Florida. You don't want my whole military
3 history, do you?
4 A No, sir, I am not interested -- primarily
5 for one year after you bought the property, then how long
6 were you -- I think you said you were in Florida?
7 A In SX11 Airship Squadron Experimental
8 and I would come home at my leaves, I would then come home.
9 We were vagabonds up until that time.
10 Q When did you return permanently to the
11 area?
12 A We returned permanently in 1960.
13 MR. CAUSEY: All right, that is all.
14 THE COURT: Thank you, you may step down.
15
16 - - - - - - - - - - - - -
17 WITNESS STOOD ASIDE.
Testimony of
18 William H. Redd
19 [Tr.126-147] THE COURT: Next witness.
20 MR. WINFREE: Mr. Redd.
21 THE CLERK: I don't believe he has been
22 sworn.
23 MR. REDD: I have been sworn.
24
25

TESTIMONY OF WILLIAM H. REDD

WILLIAM H. REDD, a witness called on behalf of the defendants, being first duly sworn, testified as follows, viz:

DIRECT EXAMINATION

BY MR. WINFREE:

Q Will you state your name and age and occupation,, please, sir?

A William H. Redd, age 71, occupation Certified Land Surveyor.

Q How long have you been qualified as a Certified Land Surveyor?

A Since 1934.

Q Have you been pursuing that profession continuously since that time?

A Yes, sir.

Q Do you make regular land surveys in the State of Virginia?

A Yes, sir.

Q And in New Kent County?

A From time to time.

MR. WINFREE: Do you concede that this witness is qualified?

MR. CAUSEY: Oh, yes.

Q Mr. Redd, I hand you Complainant's Exhibit Number 6 which is a copy of a 1914 Deed from Joseph H. Harden to John and Willie E. Harden, conveying 47.41 acres of property in New Kent County with which there is a plat made by O. M. Chandler, Surveyor. Have you seen this map before?

A Yes, sir.

Q In the northeast or upper righthand corner or the map of that Deed, running roughly east and west, are two parallel lines with the word road written beside them. Can you state in your opinion whether the existence of that designation at that point indicates whether or not that road continues across the property?

A There is no indication one way or the other. It just shows the road there. I suppose it had to go somewhere. It evidently did go into the property.

Q Is it or is it not a practice in your profession to show a road affecting property without necessarily showing it all the way across the property?

A Yes, sir, I have done that at times.

Q What would be the reason for doing that?

A Well, that means that the road was used by that property evidently ingress or egress and the surveyors just didn't take the time to show it within the property.

Q Thank you. Were you employed by Mr.

F. D. McCreery to survey some property for him in New Kent County?

A Yes, sir.

Q Do you have with you copies of your surveys?

A Yes, sir.

Q I would like to first hand you a plat bearing your name dated September 17, 1970, showing a tract of what purports to be five acres. Did you make that survey?

A Yes, sir.

Q Will you tell the Court how you happened to survey that property and how you happened to lay it out in that particular size and shape and configuration?

A Well, it was surveyed at the request of Mr. McCreery. He produced the Deeds by which he got interest in the property. And the Deeds describing that property have already been cited as somewhat ambiguous. It described the boundaries on the north by the Chesapeake Corporation and also on the south by the Chesapeake Corporation. That was impossible because the Chesapeake Corporation didn't own, had not gotten a deed to that place at that time. They got a Deed the same time this was written. So apparently the only place for the land to be would be on the north.

Q Were you familiar with the 1930 Deed to the Chesapeake Corporation in which this particular five-acre

tract was reserved or excepted from the Deed?

A Yes, sir.

Q You are familiar with that Deed?

A Yes, sir.

Q Can you state whether or not in your opinion the location of the five-acre tract on your survey is a reasonable location of the five acres reserved in that Deed?

A Well, that seems to be the most reasonable of anything that I could devise.

Q Why would you say that?

A Because that piece of land is described, as I said, a line south of the Chesapeake Corporation -- if it had been within the property, it wouldn't have described the line south of the Chesapeake Corporation. It describes the line within the property.

Q Could you -- pardon me, go ahead.

A (Continuing) And furthermore, the corners, where the corners of the 37 acre tract is, they supposedly -- it is natural to assume they were the corners of that property also. And also all the timber in that whole area over there has been cut and reseeded in young pine. And that has a stand of old pine on it which that is a remarkable coincidence. That should be the only piece of old pine anywhere in sight.

Q This particular five acres had the old pine on it?

A Yes, sir.

Q The plat which you have in your hand is Respondent's Exhibit A?

A Yes, sir.

Q I hand you another survey marked Respondent's Exhibit E, a copy of which I believe you have there being a survey bearing your name, William H. Redd, dated May 15, 1970. Did you make that survey?

A Yes, sir.

Q Will you explain to the Court the purpose of that survey?

A It was to locate a right-of-way which was described to be in the 47 acre tract.

Q Were you familiar with that Deed? Did you read the Deed?

A Yes, sir.

Q Were you familiar with an existing right-of-way across that 47 acre tract before you made your survey, I mean the existing survey on the ground?

A No, sir, I knew nothing about it until I saw the Deed.

Q Was there any physical evidence of it on the ground at the time you made your survey?

A The only physical evidence of any road was east, an iron rod at the northeast corner. The road went on out toward 64.

Q There is --

A No road anywhere in here is left because all the land has been bulldozed over and any trace has been bulldozed over. The concrete marker was the line Mr. McCreery said nobody could find it. He said it was gone. We reached from the iron rod down there 20 and then 80 feet and there it was under a pile of debris. And we moved the debris and found the concrete monument under it and the top had been crushed by a bulldozer.

Q Did you locate it by setting a couple of scores from that iron rod?

A Well, no. I set up a compass course but that is rather unreliable itself. I turned the angle off Mr. Evans' plat for the northeast corner to the southeast corner and the angle is shown on his plat.

Q You followed the Evans survey angle?

A Yes, sir.

Q And arrived at that concrete monument?

A Yes, sir.

Q Did you have any particular reason for assigning a fifteen-foot width for the road which you platted?

A That is just the average width that those

old right-of-ways used to be. They are not necessarily fifteen feet, it might have been twelve or might have been eighteen or might have been twenty.

Q You spoke of there having been no existing evidence of the old road except east of the iron rod. You are speaking thereof upon Mr. McCreery's lands?

A That is right.

Q Could you see evidence of the existence of the old road?

A Yes, sir, the old road is still there.

Q What is its appearance?

A It just appears as an old wood road.

Q Is it on his land?

A Yes, sir, the bulldozer hasn't gone beyond that corner.

Q Does the fifteen-foot right-of-way show on your plat of May 15th, May 15, 1970, does it follow the northerly line of the 47 acre tract, the middle Harden tract?

A Yes, sir.

Q If that line road were extended, would it run up on the five-acre parcel shown on your other survey, the one of September 17, Respondent's Exhibit A?

A Yes, sir, it would run on through there.

Q Mr. Redd, I hand you Complainant's Exhibit

Number 18 being an Evans Plat of February 20, 1931, which shows 32.4 acres. Is this the Evans survey which you referred to a while ago?

A Yes, sir.

Q Where was the five acres platted by you with respect to the 32.4 acres on the Evans survey, where would that be?

A That would be west of the line on this survey -- no, wait a minute.

Q With respect to the 32.4 acres on the Evans survey?

A It is northern -- it is the northern section of the survey.

Q Does the northern line of the five acres on your survey coincide with the northern line of the 32.4 acres on the Evans survey?

A Yes, sir.

Q They are one and the same?

A Yes, sir.

Q Are the iron pipe and concrete monument on your survey of the five acres the same as the iron pipe and concrete monument on the Evans survey?

A Yes, sir, the distance between them is exactly the same.

Q Is there any significance and any differenc

in the compass directions on those two plats?

A The compass direction is not going to be the same, changes at different dates.

Q It is the same line?

A It is the same line.

Q Would you say in your opinion that the five acre tract which you have surveyed is within the 32.4 acres surveyed by Evans?

A It is the northernmost part of that 32.4 acres.

MR. WINFREE: I have no further questions.

CROSS EXAMINATION

BY MR. CAUSEY:

Q As I understand your answer to the question of Mr. Winfree, with respect to the Chandler plat which is shown as Complainant's Exhibit Number 6, which is 47.04 acres, there is no way that you can tell from that plat whether there was any road across the 47.04 acres or what the location of such a road might be?

A No, sir.

Q All right, sir. So that in your establishment of the road which you have referred to in this last plat, you simply went on the basis of a trail fixing a

1 road along the northern boundary, is that not correct?
2 A No, sir, I said there was no road to
3 the property. But there is a road at the northeast corner.
4 Q You have no knowledge of your own whether
5 that road simply terminated there and turned down and went
6 across?
7 A No, the Deed says the road went through
8 the property.
9 Q The Deed says reserved the road through
10 the property. You have no way of knowing from that Deed
11 whether the location of that road was there, do you, sir?
12 A The Deed doesn't tell you what part of
13 the property it was on.
14 Q Consequently what was done, merely you
15 allowed the road next to the northern line?
16 A That was the most logical place to put
17 it, yes, sir.
18 Q But it was not necessarily where the road
19 ran, was it?
20 A Well, there is no evidence of a road
21 there.
22 Q In other words, you can't state as a
23 surveyor that there is the place where the road was?
24 A Well, I can look at an aerial photo and
25 tell that's where it was.

Q Exactly in that line?

A Yes, sir.

Q Without meandering?

A Well, old roads have a habit of meandering.

Q In other words, you show a perfectly straight road 15 feet in width and you can't, can you say that road shown on your plat is where the former road was if it existed?

A I can say it is approximately where the former road was by looking at those aerial photos over there.

Q All right, sir. Mr. Redd, this is an aerial photo taken in 1960--

A It wouldn't be there in 1960.

Q What?

A The evidence of that old road because the roads were taken out with the bulldozer.

Q The road was not bulldozed in 1960, sir. Mr. McCreery testified it was bulldozed after that. This is McCreery's house here (indicating)?

A Yes, sir.

Q Will you show me where the road is?

A Here is the road right here, it comes out from his house and here it is right there.

Q This is the road?

A Let me make sure here now. Yes, sir, that is where --

MR. WINFREE: This is north up here (indicating).

A (Continuing) I understand that. Apparently the road -- as it was in 1960 --

MR. CAUSEY: Would you take this red pencil and put a letter from here, the letter "E" and a "E" down here to show where you locate that road which you show on the plat?

A I can't tell you exactly, it would be approximately up here -- the road veered off here and apparently the road was put over on the Chesapeake Corporation here. The property line comes in right along there.

BY MR. CAUSEY: (Continuing)

Q Where does the property line go, sir?

A See that black line there?

Q Would you mark where the road is located?

A What do you want "E"?

Q Yes.

A That property line is not shown clearly on this plat. There is an aerial photo that shows it exactly. What do you want here, "A"?

Q No, "E" to "E". I think that's right.

Let me ask you one further question if I may, sir. Would not a part of the five acres running north and south along the eastern boundary of the property show on the Evans Plat of the Harden Tract reconcile just as well with the description of the five acres reserved in the Deed as the location where you reserved it, sir?

In other words, that would be bounded on the north by the Chesapeake and on the east by the lands of Willie and John Harden?

A It says all on the south by the lands of the Chesapeake.

Q You said that is meaningless because the Chesapeake had no land to the south?

A Yes, sir.

Q Would not the strip of land five acres consist of the five acres along this boundary be just as consistent with the description in the Deed as where you located the five acres?

A It is possible.

Q Now, you stated, I think, sir, that with respect to the location of the road that the only trace of an old road that you found was to the east of the 47 acre tract? In other words, it was actually on Mr. McCreery's present property?

A Yes, sir.

Q And that you found traces then that in your survey were the only traces of an old road you found because the rest had been bulldozed?

A That's right.

MR. CAUSEY: I have no further questions.

THE COURT: Thank you.

MR. WINFREE: Wait just a minute, if Your Honor please.

REDIRECT EXAMINATION

BY MR. WINFREE:

Q I want you to look at that map in which you have just testified and indicated a position of the road, this map, but first I want you to look at the earlier map, Complainant's Exhibit Number 19, dated April, 1937, and --

A That's the one I had in mind.

Q And testify as to whether or not you can locate the then existence of the old road on that property?

A There is McCreery's house.

MR. CAUSEY: Yes, sir.

BY MR. WINFREE: (Continuing)

Q You are designating now this is north?

A That is not his house, no. I was there

at that time --

Q This is north at the top of the map, but you put your finger on --

A That's right.

Q Could you tell the northerly line of the Harden 110 acres?

A This is it right here. It appears -- it's practically a straight line.

MR. CAUSEY: Would you mind marking that with a red pencil.

A Of course, it's already marked here.

MR. CAUSEY: All right.

WITNESS REDD: What other point do you want?

MR. CAUSEY: The northern line you have just testified to.

MR. WINFREE: I am asking him in --

A If I mark that line, I will obliterate your line. The white line is the road.

MR. CAUSEY: Would it be fair to state for the record --

MR. WINFREE: It would be fair for me to ask the question. I am on redirect examination, if Your Honor please, and I think this repartee between Mr. Causey and myself is a little out of order.

THE COURT: Thank you. Mr. Causey, what is the objection?

MR. CAUSEY: If Your Honor please, Mr. Redd is indicating certain things with his finger on the map.

MR. WINFREE: Pursuant to your questioning, not mine. You have had the witness, now it is my turn to ask him questions.

THE COURT: Is it your prerogative, this is redirect examination.

The Court would ask you to restrict that to what was brought out.

MR. CAUSEY: Did the Court see where Mr. Redd indicated the northern line of the property to be?

THE COURT: Not at this particular time.

WITNESS REDD: It is impossible to tell exactly from this where the northern line is.

BY MR. WINFREE: (Continuing)

Q Would you look at your survey of the road which you laid out and orient it with respect to this survey?

A This corner here.

Q Take your survey of the old road and

orient it north and south with the known compass directions, approximate it with this photo?

A It is impossible to do it exactly.

Q Take the north of your survey --

A Here is this corner right here marked with an X, iron rod, and this concrete monument --

MR. CAUSEY: If Your Honor please, the only difficulty with this, Mr. Redd is pointing to certain places on this photograph and there is no way for the reporter or the record to show the point on the photograph to which he has pointed unless there is designated in some fashion --

THE COURT: Gentlemen at the Bar, I don't know what he is pointing to, but he has stated he can't reconcile the two on the aerial matter.

WITNESS REDD: It is impossible to identif

THE COURT: Therefore, the Court --

WITNESS REDD: You can't identify them approximately. The road is apparently approximately where I have it here. Along this line here. You can see the break in the woods here and the road follows. The road may have gone inside of this property line. There is no way of telling. You might take a -- these are, you can take cameras and put on here and see it. You might do that and

take special instruments for measuring, but you can't do it here. It might be possible to do it exact, but you have got to have the correct instrument to do it with.

BY MR. WINFREE: (Continuing)

Q Let's attempt to identify the road which you laid out. Can you lay your survey on this photograph so that is in the same relative position with the north pointing-- where is the north on your survey?

A There is the north right here.

Q Which way is north in the 1937 survey?

A Like this.

Q Then in what direction does the fifteen foot road you laid out lie and can you indicate that by letters of any part of the alphabet?

A This map isn't -- apparently it is not --

Q Where is Route 608 on your map?

A Here is 608, right here.

Q Where is 608 on the 1937 map?

A Here, the only place that the road is going to fit is here, that's the road that has been cut off through the property turned in and gone on up here. See that road, something of the road is shown on here as cut in through the property there. It doesn't correspond with what

is on the other photo. It has been changed.

MR. WINFREE: Thank you, I have no further questions.

THE COURT: Any further questions?

RECROSS EXAMINATION

BY MR. CAUSEY:

Q Now, please, sir, there is the letter "Y" and you have been indicating on the photograph that the road is running in this direction from that. Would you put the letter "X" at the other end from where the road runs -- excuse me, put a letter "Z". What scale is this map, do you know?

MR. BRAKE: One inch to four hundred feet.

WITNESS REDD: Something is haywire here.

BY MR. CAUSEY: (Continuing)

Q I am not interested in -- Mr. Redd, perhaps it will serve the purpose to put an arrow in the direction the road runs. Would you attempt to lay it out on the photograph?

A You said one inch is four hundred feet, it would be four thousand feet up there and it is only twenty-one hundred and --

Q If you would just put an arrow.

A I won't put it there if it's in the wrong place.

Q I'm not asking you whether it is right or wrong. I am simply asking you to put an arrow as to where you said it was in your initial testimony.

A Well, something is wrong. You don't get the same measurement.

MR. WINFREE: If Your Honor please, Mr. Causey is putting the defendant in a position of having what now amounts to a hostile witness. I could take the position I am now entitled to cross examination, and --

MR. CAUSEY: I think you are perfectly entitled to that.

MR. WINFREE: It would take a lot of time to bring this out. I am willing to concede the consequences of this testimony as to this witness and it throws its computation 90 degrees off from where they should be. This witness has become confused to the point of where he is disoriented exactly 90 degrees.

WITNESS REDD: I see what you are talking about now.

THE COURT: I believe the gentleman now

has indicated to the Court he wishes to change.

WITNESS REDD: That is the wrong road there, the wrong corner. Here it is, now.

MR. CAUSEY: If Your Honor please, if there is an effective means of rehabilitating a witness, Mr. Winfree's reference to the 90 degree change did it.

MR. WINFREE: I think he needed it.

MR. CAUSEY: Mr. Redd, I have no further questions to ask you, sir.

WITNESS REDD: That's the wrong road. It is this one.

THE COURT: Any further questions?

- - - - - - - - - - - - - -

Second Colloquy Among Trial Court and Counsel

WITNESS STOOD ASIDE.

[Tr.147-150]

MR. WINFREE: If Your Honor please, this respondent, these respondents, the McCreerys, rest. I don't know if there are any other respondents present.

THE COURT: If there are, they have not indicated to the court, nor filed any answer.

That concludes the evidence, gentlemen at the Bar. Mr. Sheriff, the witnesses are now

excused if they so desire, or they may remain in the courtroom.

MR. CAUSEY: Just one moment, there may be one small thing.

No, sir, we have nothing further.

THE COURT: All right, gentlemen at the Bar, it is now mid-afternoon and approximately ten minutes after three o'clock. We will take a break until fifteen after three. I believe the Court can try to fit the evidence within the law of the State of Virginia and I believe your opening statements were full enough to act as your closing arguments and I don't believe the Court would need any further argument because I believe I will come to a conclusion to the best of my ability based upon the evidence brought forward today, particularly as to related to the law of construction of instrument.

MR. WINFREE: If Your Honor please, I never find it pleasant to disagree with the Court, but we did have certain points which we feel could well be brought out to the Court's attention and I hate to belabor this matter, but I once carved an epigram on the back of a pulpit in my church, "Blessed Be He Who Knoweth When To Stop Talking And Sit Down" and that is still there in my church. I am

hesitant to talk myself out of a case. At the same time, this is a very important case to us and we feel there is very much here that we could elaborate on.

THE COURT: Mr. Winfree, this Court would never foreclude any attorney if he wishes to make an argument. I don't know that any argument could change the decision that I have in my mind as to the related evidence as to the law. I want to mention that because I thought it would save you gentlemen time at the Bar. As I have sat through the hearing today, I have tried to make notes in relation to the three cases that I think are the cases to me that are possibly on point with the issue here today.

MR. WINFREE: Neither counsel for the complainants nor respondents have presented any authorities to Your Honor and -- well, with those remarks I will abide by whatever the Court rules.

THE COURT: All right, gentlemen, now, we will take a recess.

NOTE: At this point there is a brief recess after which the hearing continues as follows, viz:

THE COURT: Gentlemen at the Bar, the Court did not mean to exclude you gentlemen from arguing.

MR. CAUSEY: If Your Honor please, I think so far as I am concerned, if Mr. Winfree wishes to argue the case, it is perfectly satisfactory and I regard myself to the right of rebuttal.

THE COURT: Mr. Winfree.

MR. WINFREE: If Your Honor please, I hardly know what to say or what to do. I feel very much on the spot.

THE COURT: Do what you desire. Anything you do will be perfectly all right with the Court. I thought maybe it would save some time.

Closing Statement of R. Westwood Winfree

[Tr.150-153]

MR. WINFREE: I don't doubt that we would save some time. Whether that would be in the best interest of my clients, I don't know. I would like if I might, to take a very few minutes, if Your Honor please, without belaboring the evidence too much. We admittedly have an ambiguous Deed, but a Deed which is not so ambiguous that there is any doubt that it reserves or shows a five acre tract. That is not a part of the ambiguity in the Deed. The Deed very clearly I think, in two or three places

it is repetitious and referring to the 32-1/4 acres less five acres and back and forth it keeps emphasizing the five acres. So the five acres is somewhere and I know Mr. Causey feels it may have been too vague to be enforceable, but that type of vagueness usually relates to a type of estate and not to the existence of a piece of property. So I feel it is solely a question of whether this -- where this five acres is located. And we feel that we have presented a reasonable hypothosis to show the location of this five acres. We have not particularly commented on the tax assessment, but it was filed into evidence for whatever it may be worth. And this five acres continues to be shown on the tax rolls for several years after the conveyance and somehow it was gobbled up presumably by Chesapeake Corporation who within a year after they got the Deed especially excluding the five acres they had it platted leaving --leaving off the five acres, but since being restored to the tax rolls. Admittedly, Mr. Redd's plat of the old road connecting with it is an approximation of the old road because the actual existence of the old road had been obliterated by Chesapeake Corporation and admittedly his location of the five acres as shown on the survey may be

subject to questions as to its precise boundaries because we don't know for certain where it is. But it is a reasonable hypothesis that it lay to the north. All the plats show swamp land to the south and the owners in reserving this five acres of land had some purpose in mind. The earlier Deed shows the road and the road is in existence and reserved the five acres for whatever purpose. He didn't reserve five acres in the swamp.

It is most reasonable to conclude that this five acres is at some point along the northerly line of a tract of the 33.25 acres by Chesapeake Corporation acquired and if by any chance the Court is of a mind to give concern to the question of adverse possession, we feel that and I hate to belabor this thing at any length, but we feel there has been neither an adverse situation for possession so far as this five acres is concerned within the meaning of the very strict principle of adverse possession. That is the burden of which is a very difficult burden for anyone to follow. And I can't conceive of any interpretation of the facts in this case which would give to Chesapeake Corporation the title to this five acres on the basis of hostile, open, notarious continuous possession where the facts

in this case are in dispute. The law requires under adverse possession that their possession be brought home. That is the case quotation used in the cases that the possession be brought home to the owner whose land is being adversely possessed. How could they bring home the concept of adverse possession when they admittedly don't know where the five acres is and have in fact -- they have brought this suit negating the concept of adverse possession. I am distilling my thoughts to a bare minimum. I am cutting corners against my better judgment. I came cocked and primed with facts, argument and law to regale the Court.

I mean that perhaps it would be a better part of wisdom for me to say no more than that. We feel the five acres exists, we feel that we have laid out a reasonable logical location for it, and we hope the Court will agree with us.

Closing Statement of John Paul Causey

THE COURT: Thank you, Mr. Winfree. Mr. Causey?

[Tr.153-156]

MR. CAUSEY: I might simply say this as a predicate to our position if I am not imposing upon the Court. This is from Section 94 of Michie's Jurisprudence on Deeds. "An exception in a Deed conveying land must describe the thing excepted with

1 legal certainty." We submit that the exceptions
2 in this case does not meet that requirement.
3 "For a valid exception, the thing
4 excepted must be described with as much particularity
5 as is required in the description of the land
6 conveyed." We submit that exception does not meet
7 that requirement.
8 "A portion of a tract of land expressly
9 conveyed by one part of a Deed is not exempted from
10 the conveyance, by an uncertain clause or provision
11 found in a subsequent part of the instrument." In
12 other words, that Deed purported to convey 33.25
13 acres and excepted therefrom so if the exception is
14 valid, the whole is conveyed, too.
15 "To effect such a result, the terms
16 of the subsequent clause must be as certain, and
17 definite as the granting clause or provision."
18 "Uncertainty in a reservation in a Deed
19 may be cured by the election of the grantor; but such
20 election must be made within a reasonable time."
21 And I have the case here of Butcher v. Creel's
22 Heirs, 9 Gratton 201 and authority for that princi-
23 pal is also borne out in American Jurisprudence and
24 Corpus Juris Secundum. There was no entry of
25 designation. The evidence is uncontraverted here

that Chesapeake Corporation purchased the property, that Joseph Harden, the person from whom it was purchased was living within half a mile of the place at the time that Route 608 was constructed and at the time that they bought the property from him, and his brother, at another location made no objection to the Highway Department taking title from the Chesapeake Corporation at the alleged locatio of the five acres. The evidence is uncontraverted, so far as Mr. Woodson's testimony that he saw pines being planted under the supervision of Mr. Gooch, Forester for the Chesapeake Corporation on this parcel of land. The evidence is uncontraverted that Woodson who cut on this land, the alleged -- well, the Harden property in 1942 and 1943, trucked the stuff right by the Harden house, even picked up Mr. Harden and took him to the store and picked him up when he came back. There was never any assertion by the Hardens or anybody else that would go ahead and, perfect as I say, the entry -- this is not adverse possession. It is because of an uncertain reservation, not reflected by entry and the showing isn't therefore for adverse possession but simply to negate the proposition that any entry was made and there has been no

1 affirmative evidence to indicate any entry being
2 made upon the alleged five acres or definition to
3 its boundaries. We submit, sir, that the rules of
4 construction, the Deed must be most strongly
5 construed against the grantor. This is the exception
6 in favor of the grantor. It goes ahead and lacks
7 certainty. It couldn't be laid on the ground there
8 and the Surveyor testified, it could just as
9 reasonably have been laid in another location as
10 the location where he laid it. That certainly is
11 an ambiguity not resolved by any of the testimony.
12 It is not actually fortified, if Your Honor please,
13 by entry. Land book references were charged to
14 Mr. Harden and didn't continue to receive the tax
15 bills during his life time and made no objection
16 and didn't argue. Very honestly, if Your Honor
17 please, I don't know, and I don't know whether any-
18 body knows what happened. All that I know is that
19 the exception in the Deed does not meet the require-
20 ments of the law as far as certainty is concerned.
21 It has not been perfected by entry, therefore it fails
22 and consequently, therefore, the Chesapeake Corpora-
23 tion of Virginia succeeds to the whole tract because
24 the exception is invalid.
25 THE COURT: Thank you for your statements.

Oral Opinion of the Trial Court

Now I will ask both of you to make notes or -- I guess the record would have it down.

I will only take three minutes and not give a written opinion. I will have it into the record, my ruling in this matter.

[Tr.157-161] Gentlemen at the Bar, you must realize there are three cardinal rules of construction of instruments in this Commonwealth, and I consider these important. Number 1 Cardinal Rule is intention of the parties prevails as drawn from the entire incident. That is Number 1.

Number 2, uncertain, indefinite, equivocal or ambiguous language should be construed against the grantor and in favor of the grantee.

Number 3, all words used must be given recognition and effect.

The cases that the Court uses are those, I believe, Conner vs. Hendrix, 194 Va. 17. The Court now goes to the case of Strickland vs. Barnes, 207 Va. page 438. It says because the Deed and plats were ambiguous in that regard, the Court couldn't decide the issue by referring only to those documents, so the Court properly admitted parol evidence to resolve the ambiguity. Of course, the Court accepted the evidence of the complaints and respondents.

The next case, gentlemen, is Santurian vs. Counts, 196 Va. 43, page 68. In this case we deal with exceptions in a Deed, which is the case here. Little need be said of the appellant's first contention. A particular description of land found in a Deed prevails over a general description. Five Michie's Jurisprudence Section 74, page 753, limits the property conveyed to that which in this case is situated between the residence of Dr. F. H. Yorkhoff and an apartment building now owned by the parties of the first part. And shows that the conveyance of the whole of Lot 12 and 13 and the apartment house thereon was not intended. Morever, as has been said, both the appellant and appellees testified that it was not the intention of the Deed to convey the apartment building, but only the property lying between it and the Yorkhoff line. We are further of the opinion that the lower Court held correctly under the evidence adduced that it was the intention of the Deed to reserve to the grantors and to exclude from the property conveyed the disputed area. Both sides agreed that the words of the reservation "that portion of land lying and being situated behind the said apartment house with a line running parallel with the side of the apart-

ment house adjoining the property conveyed by this instrument, and extending with the said parallel line to the Dr. F. H. Yorkhoff property" was ambiguous on their face. Hence, parol evidence was admissible to enable the Court to make the proper interpretation of the instrument.

Gentlemen at the Bar, it is definitely conceded in this case here today that the Deed is ambiguous, but the Court has to go to the particular description of the land itself. Without a doubt, there was the five-acre tract exempted in this Deed. We cannot get beyond that. Counsel will agree there is a five-acre tract there somewhere. If not brought forth in the instrument, it is the duty of this Court to seek parol evidence together with the instrument to determine where the five-acre tract is. That's what the Court has done. My ruling is based on the following points brought out. Number 1: There is evidence of an old road at places leading to the five acres. Would that not have been the intent of the grantor to reserve that part of the land for the use of his own land to get to the highway? Number 2: The evidence shows that there were two points involved in this proceeding, on the north, an old stob and a concrete

1 marker in place. Necessarily, the northern portion
2 of this property would have been reserved for
3 use. Number 3: The aerial photograph shows
4 that an old road was in place leading to that
5 point. Number 4: Gentlemen at the Bar, the
6 description as given in the Deed itself says on
7 the north by the Chesapeake Corporation and on the
8 south by the Chesapeake Corporation. The Court
9 considers, although the Chesapeake Corporation didn't
10 own the land up until the time of the Deed, the
11 Court considers that the Deed itself bounded by
12 the Chesapeake Corporation which is more of a
13 strengthening point than otherwise, because as of
14 that Deed, the Chesapeake Corporation did own that
15 land.
16 Gentlemen at the Bar, the Court also is
17 advised there have been many Deeds in rural areas of
18 Virginia, particularly the Tidewater area, where
19 there may be one or two boundaries that are not
20 true to form. I don't know why those matters
21 existed, but they did. Based upon all the evidence
22 brought forth here today, the Court feels like
23 because particularly the law of this Commonwealth
24 brought in by the facts that the Court would rule
25 that the five acre tract is as shown by the plat of

1 Mr. Redd brought forth here today.

2 Mr. Winfree the Court will ask that

3 you prepare a Decree in the matter and you forward

4 it to Mr. Causey for his endorsement.

5 MR. CAUSEY: If Your Honor please, it

6 would be included in the decree a motion for the

7 Court to set aside its verdict and judgment on the

8 grounds it is contrary to the law and evidence.

9 I take it you would not wish further argument

10 on that?

11 THE COURT: Mr. Causey, I don't believe

12 so. I believe that I have followed the law of

13 Virginia in this proceeding here today and I don't

14 know if it would be necessary.

15 MR. CAUSEY: The decree would show that

16 motion as having been overruled by the Court and

17 note our exception thereto and we will then probably

18 file for an appeal, sir.

19 THE COURT: I don't see any way in the

20 world this could be other than where the five acre

21 tract is there. It is tied in in my opinion by

22 three of the boundaries in the Deed. The Court

23 thanks all counsel at the Bar, officers of the Court

24 and parties and witnesses for their consideration.

25 This Court now stands adjourned.

FINAL DECREE OF THE TRIAL COURT
ENTERED MARCH 13, 1974

This cause, which has been regularly matured, set for hearing and docketed, came on this day to be heard upon the Bill of Complaint and exhibits therewith; upon the joint and several answers of F. D. McCreery and Frances M. McCreery; taken for confessed as to John G. Sowder and J. R. Francisco, Jr., resident defendants who have been regularly served with process, 21 days having elapsed since service and they still failing to appear, plead, answer or demur; upon the answer of State Highway Commissioner of Virginia; upon the petition of Alice Couch and Lucille Couch Farmer advising of the death of a defendant, J. Emmett Couch, and the order entered July 16, 1973, filing said petition and dismissing J. Emmett Couch as a party; upon the joint and several answers of the aforesaid Alice Couch and Lucille Couch Farmer filed by leave of court on January 16, 1974; upon proper proof of the due execution of the order of publication against Ida V. Sorenson, Clifton Sorenson, Willie Sorenson, Rosa H. Ellett, Inez H. Couch, Robert W. Williams, Jr., John Williams, Mamie Williams, Louise Williams, Sissie Williams, Lily Williams, Charles Williams and Lannie Williams, defendants whose addresses are unknown,

and against the defendants sued by the general description of "PARTIES UNKNOWN," 10 days having elapsed since the completion of such publication and the said defendants still failing to appear; upon the testimony of witnesses taken and exhibits filed in open court on the 16th day of January, 1974; and was argued by counsel.

It appearing from a certain deed of bargain and sale from J. H. Harden (widower) to The Chesapeake Corporation (predecessor in title of the complainant) dated April 29, 1930, and duly recorded in the Clerk's Office in Deed Book 22, page 262, that a parcel of 5 acres, which is the subject of this suit, was specifically excepted and retained by the grantor out of a tract containing 33.25 acres, more or less, said deed having conveyed the remaining 28.25 acres, more or less, but that the exact location of the excepted 5 acres was not specified in the said deed, the respondents herein being the successors in title of said grantor, J. H. Harden; upon the evidence before it the Court finds and doth adjudge, order and decree that the said 5 acres lay in the northernmost portion of the 33.25 acre tract, and that the location of said 5 acres is as shown on a plat made by William Hugh Redd, Certified Land Surveyor, dated September 17, 1970, filed herein as

Respondents' Exhibit A, which plat is made a part of this decree.

And the Court doth further adjudge, order and decree that, as of January 16, 1974, title to said 5-acre parcel is vested in the respondents in this proceeding.

The Clerk is directed to record in the current Deed Book a copy of this decree with a copy of the aforesaid plat by William Hugh Redd, dated September 17, 1970; and to index the same in the names of the parties to this proceeding.

And the object for which this suit was brought having been fully accomplished and nothing further remaining to be done herein, it is ordered that this cause be stricken from the docket and the papers placed amongst the ended causes, properly indexed.

Whereupon, The Chesapeake Corporation of Virginia, by counsel, moved the court to set aside the judgment entered herein upon the grounds that it is contrary to the law and the evidence, which motion the Court doth overrule, to which action of the court The Chesapeake Corporation of Virginia, by counsel, duly excepted.

And The Chesapeake Corporation of Virginia, by counsel, having signified its intention to appeal the ruling of the court, execution of the judgment entered

herein is hereby suspended for the period of time necessary for such appeal to be perfected.

Entered: March 13, 1974

/s/ John S. DeHardit
Judge

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR
BY THE CHESAPEAKE CORPORATION OF VIRGINIA
FILED APRIL 9, 1974

You are hereby notified that The Chesapeake Corporation of Virginia, plaintiff in this action, hereby appeals to the Supreme Court of Virginia from the judgment entered herein on the 13th day of March, 1974.

The Chesapeake Corporation of Virginia, as basis for such appeal, assigns the following errors:

1. The Court erred in overruling plaintiff's motion to set aside its judgment on the grounds that it was contrary to the law and the evidence.

2. The Court erred in finding that the 5-acre parcel reserved in the deed from J. H. Harden to The Chesapeake Corporation could, from the evidence and pleadings, be located and established.

3. The Court erred in not finding the alleged reservation to have failed because of uncertainty.

A transcript of the hearing is being this day filed with you.

Respectfully,

THE CHESAPEAKE CORPORATION OF VIRGINIA

9 April 1974

Of Counsel