216 Va. 450
CLERK SUPREME COURT OF VIRGINIA
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IN THE

Supreme Court of Virginia

AT RICHMOND

Record No. 740840

PATRICK O. McCAULEY and
THYRZA BROOKING McCAULEY

v.

FORREST A. PHILLIPS and
RAYMOND PHILLIPS

APPENDIX TO BRIEF OF APPELLANTS

Paul M. Peatross, Jr.,
Michael and Dent, Ltd.,
414 Park Street, Charlottesville, Va. 22901

George Gilmer, Sr.,
Gilmer and Dezio,
2 Court Square Building,
Charlottesville, Virginia. 22901

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Date Filed: 1-14-72

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF ALBEMARLE

PATRICK O. McCAULEY

and

THRYZA BROOKING McCAULEY,

Plaintiffs

v. BILL FOR INJUNCTION

FORREST A. PHILLIPS,

and

RAYMOND R. PHILLIPS,
Rio Road, Albemarle County,
Charlottesville, Virginia.

Defendants

TO THE HONORABLE DAVID F. BERRY, JUDGE OF SAID COURT:

Your Complainants respectfully represent as follows:

1.) The Plaintiffs are seized and possessed of certain real property located in Albemarle County, Virginia, designated as Lots I and J on plat recorded in the Clerk's Office of this Court in Deed Book 331, page 589, being the same property conveyed to them by deed of A. H. Boliek and Wife, dated June 6, 1957, of record in said Clerk's Office in Deed Book 332, page 512, and,

2.) Defendants are seized and possessed of certain adjoining real property located in said County, containing 2.79 acres, more or less,shown on a plat recorded in said

Clerk's Office in Deed Book 409, page 267, being the same property conveyed to them by deed of A. H. Boliek, and Wife, dated July 23, 1965, of record in said Clerk's Office in Deed Book 409, page 265.

3.) Plaintiffs represent unto your honor that the defendants constructed certain improvements over much of the defendants' property and from these improvements, buildings and parking areas, said defendants have collected rain and surface water and have piped and channeled said water into artificial channels, in greatly increased and unnatural quantities into Plaintiffs' property without care, in such a way as to seriously damage Plaintiffs' property, where no prior natural water course existed.

4.) Defendants, although requested to cease such acts, continued to collect and channel said waters onto the land of the Plaintiffs much to their damage, inconvenience and annoyance.

5.) Plaintiff has no adequate remedy at law or otherwise for the harm and damage done and continued to be done in the future by the defendants; that irreparable harm, damage and injury will continue to the Plaintiffs unless the acts and conduct of the defendants as complained of are enjoined.

WHEREFORE, your Plaintiffs pray that the Defendants be permanently enjoined from channeling said waters onto the property of Plaintiffs, and that

plaintiffs further pray that during the pendency of this action a temporary injunction be issued to enjoin and restrain the defendants from the acts aforesaid, and further ask the Court to compensate them in the amount of $2,500.00 for damages already done and being done to Plaintiffs' property by reason of the said wrongful diversion of waters by the Defendants.

s/ Patrick O. McCauley
Patrick O. McCauley

s/ Thyrza Brooking McCauley
Thyrza Brooking McCauley

MICHAEL AND DENT

by s/ Paul M. Peatross, Jr.
414 Park Street
Charlottesville, Virginia. 22901

Date Filed: 1-18-72

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF ALBEMARLE

PATRICK O. McCAULEY

and

THYRZA BROOKING McCAULEY,

Plaintiffs

v. ANSWER

FORREST A. PHILLIPS

and

RAYMOND R. PHILLIPS,

Defendants

TO THE HONORABLE DAVID F. BERRY, JUDGE OF SAID COURT:

The defendants answer the above styled Bill of Complaint and say:

1. The statements in paragraph 1 are true in addition thereto they have bought three lots to the northwest marked Black, McAllister and Boliek on copy of plat of Frank A. Gregg hereto attached as Exhibit "a".

2. That paragraph 2 is true.

3. That paragraph 3 is true to the extent that the defendants have made improvements by erecting buildings, paving parking spaces and grading with a cost of over $180,000.00 for land and improvements. No additional land has been drained by reason of the improvements made by these defendants which flows on the land of Complainants. They have carried water from one part of their property to the other by pipes, but the use of these pipes has

not increased flow or concentrated it on the plaintiffs' land. Where the pipe stops on their land they have emptied water on comparatively flat land so no ditch has been cut either by them or by the water. They believe they have taken all needed and proper precaution to protect Plaintiffs' land from injury. They have as an additional precaution piled rock at the end of their drain pipe to difuse the water and they have put rocks along the boundary to thoroughly scatter surface water. The water from the pipes falls on roofs, black top parking area and sodded land so that it is clear and comparatively free of sedimentary particles. Before the pipes were installed there was some erosion of bare places on Phillips' land and the water carried with it particles to settle when it slowed. Where they have filled on their property, they have used stone and vegetation to control erosion. Nothing like all the water from the property is concentrated in pipes. Much of it flows over an area over a distance of 213.4 feet. No water falling on the rear of their property enters the pipe. Where the water leaves their land they have for about 100 feet placed boards and ties along fence so as to check or stop any debris from their property before entering the land of East Coast Oil Corporation. After leaving Defendants' land, it first enters to land of East Coast Oil Corporation, Tax Map 61-120D where it is

comparatively flat and spreads out without causing erosion and without depositing soil matter in noticeable quantity. It then enters the property of Plaintiffs, Tax Map 61-120L, spreads out over a wide area where it follows a natural depression in the soil, where the flow is considerably spread out. The Defendants have examined the property of the plaintiffs and cannot find where they have been injured in any way by the water. Water runs on the property of Complainants not only from the land of Phillips, but also from the land of East Coast Oil Corporation, Tax Map 61-120D; Coleman Gorham, Tax Map 61-120N; and Ernest C. Moses and wife, Tax Map 61-120J, as a single difuse flow. This flow of water has been the natural course of the surface water apparently for many hundreds of years.

4. Paragraph 4 is denied. These defendants deny that they have been collecting and channelling water on the Plaintiffs' property. They deny they have done any unlawful act or any act for which they are liable to the Plaintiffs or that there has been any diversion of water by them on to the Complainants' land. They deny the Plaintiffs are entitled to an injunction to stop the water from flowing in a broad unchannelled expanse across their land as it always has flowed for hundreds of years. The Defendants did put a catch basin in front of their building so as not to have water from the front of the

property run through their buildings on the surface of the ground. They also turned water from their roofs into the pipe, and they put in the branch pipe to drain water from Tax Map 61-120B formerly owned by Lacy C. McAllister and wife, now owned by Phillips, property across their land and eventually with water from Defendants' other land over the Plaintiffs' property. These respondents have been in no way negligent or injured anyone. They have used care in all their operations to see that they did not injure anyone, but the water from their property has to run down hill.

The properties involved in this suit and all of the property nearby while still in Albemarle County are urban property and bring prices far too high for agricultural purposes. Defendants' property is used for business as is the property to the east and property at all four intersections of Route 29 and Route 631 are occupied by business buildings. Plaintiffs' property and considerable property adjoining it are used for residential purposes.

On June 23, 1968, we had what was called by a resident the heaviest rain in 17 years. The highway storm sewer for the first time overflowed and threw extra water on Phillips' land which of course eventually ran over the land of the Plaintiffs. An inspection June 24, 1968, showed no washing or depositing on the land

of the Plaintiffs. There is no way for Defendants to stop water from their land running on to Plaintiffs as it has done for hundreds of years. There is no way to stop rain water from higher land from flowing to lower land except to stop the rain and this is beyond the power of these Defendants.

5. Paragraph 5 is denied. The Plaintiffs have no remedy for the natural flow of rain water at law or in equity. The Plaintiffs did file a suit that is practically identical to this in 1968 and these Defendants filed a similar answer to the one they are filing now and the suit was dismissed the day before it was to go to trial. The Plaintiffs also threatened to file suit on January 12, 1970. When complaint was first made these Defendants had a list of witnesses, R. L. Leake, E. L. Leake, Contractor, W. C. Powell, Grover Forloines, Jim Towe, A. P. Williams, Bill Townsend, Percy Cummings, and others who had examined the land. We are also attaching hereto as Exhibit "B" copy of part of Tax Map 61.

FORREST A. PHILLIPS

RAYMOND R. PHILLIPS

By Counsel

s/ George Gilmer
George Gilmer, Attorney
for Defendants
Court Square Building,
Charlottesville, Virginia.

CERTIFICATE

I George Gilmer, hereby
certify that I mailed a true
copy of the foregoing to
Paul Peatross, 414 Park Street,
Charlottesville, Virginia,
on January 18, 1972.

s/George Gilmer
George Gilmer

Date Filed: 5-8-74

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF ALBEMARLE

PATRICK O. McCAULEY

THYRZA BROOKING McCAULEY

v. DECREE

FORREST A. PHILLIPS

RAYMOND R. PHILLIPS

This cause came on this day to be further heard on the papers formerly read, the evidence taken in open court on April 18, 1972, and the view of the plaintiffs' and defendants' land and adjoining properties, finding that plaintiffs are the owners of parcel 61-120L and defendants are the owners of parcel 61-120 and parcel 61-120D, formerly owned by Thomas Wood and now by East Coast Oil Corporation, and parcel 61-120C, formerly owned by L. C. McAllister, and the findings of fact made at the conclusion of the evidence filed in this cause, the Court then suggesting that plaintiffs grant to defendants a right to construct and maintain a drain across their land and that plaintiffs and defendants share in the cost of such construction and that plaintiffs secure bids for such work, and that plaintiffs have reported to the Court that they had no such bids to offer, and upon argument of Counsel, the Court finds as follows:

The defendants graded their land, erected buildings and black-topped the surface and have been conducting a

building supply business and wood working mill on their property. In improving their property they filled in some 3 or 4 feet along the south side next to parcel 61-120D. They laid on their property a pipe to take water from the north side of their land and their buildings to near the south boundary of their land and to take water from Parcel 61-120C to near the south boundary of their land and to take water from parcel 61-120C to prevent their filling from blocking the natural flow of water from parcel 61-120C (L.C. McAllister and wife) across their land but in no way increased the area naturally draining from their land to and over the land to the south of parcel 61-120D. The defendants placed large rocks and pieces of concrete at the end of the pipe to diffuse and disperse concentration of water from a pipe, and this was not denied by the plaintiffs. Defendants have done nothing to increase the area naturally draining from their land to parcel 61-120D on the south. On parcel 61-120D it naturally combines with water from parcel 61-120N (coleman P. Gorham), parcel 61-120P (W. H. Paine), parcel 61-120J (Mimosa Motel, Inc.,) and then naturally falls on parcel 61-120D. From parcel 61-120D (East Coast Oil Corporation) it naturally flows southwest along a swale or broad gently sloping low grade over sodded field of defendants to where it enters a well defined stream and drainage ditch with banks 6 feet high in places.

The Court examined the land near the mouth of the pipe and could see no evidence of either erosion or silting. There was no noticeable erosion of the south bank of the defendants' land. The water after leaving defendants' land continues with water from other lots and flows diagonally across parcel 61-120D 75 to 100 feet and then goes through plaintiffs' land in no defined bed. When there is a heavy rain it is 20 to 30 feet wide with little depth. The Court could see no evidence of erosion or silting on parcel 61-120D (East Coast Oil Corporation). After it enters plaintiffs' land it runs along a gently sloping depression to a ditch draining other land. The Court could see no evidence of silting and only a little erosion where it went under a gate on plaintiffs' land 500 or more feet from defendants' land. This erosion would probably not have been noticed if the Court had not been looking for erosion.

Both plaintiffs' and defendants' land and adjoining land are zoned M1 for light manufacturing and business by Albemarle County. Nearly all the land nearby that is built on is used for business. The residence of plaintiffs is permitted as an existing non-conforming use.

There is no evidence that defendants have negligently or maliciously used their land. They have erected buildings, and they have hard-surfaced their land to make it useful for business. This, of necessity, has increased the flow of water when it rains.

Prayer for injunctive relief is denied as there is no showing of substantial damages to plaintiffs' property. There being evidence of potential damage, however, in the event of further development or change in use of plaintiffs' property, the parties are placed on terms as follows: If, in the future, plaintiffs or their successors in title construct an underground pipe, conduit or other means of carrying the drain water through their property to the natural stream bed or ditch, they shall have the right to tap onto the discharge pipe on the Phillips' property and shall have and are hereby granted an easement for such purposes. Upon completion of such construction Phillips and their successors in title shall be liable for one-half of the cost thereof and shall be and are thereupon granted an easement to discharge water into such underground pipe, conduit or other means of carrying such water. And both parties hereto and their successors in title are granted such easements upon each other's property as are necessary and appropriate to give effect to the rights and obligations granted and imposed hereunder, and both parties and their successors in title shall be jointly liable for the maintenance and upkeep thereof from the point of discharge of the Phillips' pipe to the stream or natural ditch.

Each party shall pay one-half the cost of reporting

this case. This case is ordered struck from the docket and filed among the ended causes.

It is noted that plaintiffs, by counsel, except to the opinion of the Court and to the findings herein for the reasons more fully set forth in their brief filed herein, which exception was timely made and duly noted.

s/ David F. Berry
David F. Berry, Judge

Date: May 8, 1974

PLEASE ENTER:

s/ George Gilmer
George Gilmer, Attorney for Defendants
2 Court Square Building
Charlottesville, Virginia. 22901

Seen and excepted to as contrary
to the law and facts:

s/ Paul M. Peatross, Jr.
Paul M. Peatross, Jr., Attorney for Plaintiffs
414 Park Street
Charlottesville, Virginia. 22901

Date Filed: 5-15-74

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF ALBEMARLE:

PATRICK O. McCAULEY, and
THYRZA B. McCAULEY,

Plaintiffs

v.

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

FORREST A. PHILLIPS, and
RAYMOND PHILLIPS,

Defendants

The Plaintiffs, Patrick O. McCauley and Thyrza B. McCauley, give Notice of Appeal from the decree of the Court rendered on 8 May 1974 and assign the following errors as required by Rule of Court 5:6:

1) The Court erred in holding that the Plaintiffs were not entitled to injunctive relief as requested by their bill for injunction;

2) The Court erred by failing to award damages to Plaintiffs for injury done to their property as shown by the evidence presented at trial;

3) The Court erred in putting Plaintiffs on terms as to future installation of an underground pipeline through their property by (a) requiring Plaintiffs to pay for one-half of the installation costs and one-half of the maintenance costs of said pipeline, if they requested installation of the same, and (b) by failing to note that the installation of such a pipeline would require the pipeline to be installed through another property owned

by a non-party to this suit in order to be functional.

PATRICK O. McCAULEY
THYRZA B. McCAULEY

By Counsel

MICHAEL , DENT & BROOKS, LTD.,

s/ Paul M. Peatross
Paul M. Peatross, Jr.,
414 Park Street,
Charlottesville, Virginia. 22901

I hereby certify that a true copy of the foregoing Notice of Appeal and Assignments of Error, was mailed on the 15th day of May,1974, to George Gilmer, Sr., Esquire, Attorney for Forrest A. Phillips and Raymond Phillips, at 2 Court Square Building, Charlottesville, Virginia. 22901.

s/ Paul M. Peatross, Jr.
Paul M. Peatross, Jr.

COURT: Well, are we talking entirely about water or a combination of water and silt. Is there a difference?

PEATROSS: No.

1 COURT: Just water?

2 PEATROSS: I think we can stipulate water.

3 COURT: All right.

4 GILMER: Now, the defendants - - all right in here -

5 right here are solid. Up here is a trailer court and there are

6 houses and buildings which cause water to run down this way.

7 Phillips comes down here and runs down this corner. Now...

8 COURT: What condition is the oil company lot in

9 Mr. Gilmer?

10 GILMER: The oil company lot shows no evidence of

11 any washing or silt.

12 COURT: Is that paved in any way?

13 GILMER: No sir, just natural grass. The grass

14 isn't even cut. Apparently these yards all up here are in grass.

15 COURT: What position are you or your clients...

16 suppose everybody around McCauley decided to pave their's, where

17 would that leave McCauley?

18 GILMER: Leave McCauley.

19 COURT: Would he have to take all of the run off?

20 GILMER: There is no other way to go Your Honor.

21 COURT: Well, the question is, can the other

22 property owners so change the surface of their lot and put the

23 burden on McCauley.

24 GILMER: You cannot drain additional land on

25 McCauley because . . .

1 COURT: The question is, can you turn off the
2 water that would normally filter down through the soil and put
3 it on your neighbor just because you want to pave your lot.
4 GILMER: There is a man who did . . . .
5 exactly that and that is stated in the law case of Mason against
6 Lang.
7 COURT: In otherwords, this is a question of the
8 .....
9 GILMER: According to that you couldn't put a
10 house on a vacant lot because it would increase the flow
11 off on your neighbor. Everytime you build a highway you in-
12 crease the runoff because the highway doesn't absorb the water.
13 Every place you put a parking lot you automatically have to in-
14 crease the water and there is no other way to do business.
15 COURT: Doesn't the highway department have to
16 acquire an easement and pipe it onto a place where there is not
17 actually a water course? Unless you follow a natural water
18 course, isn't an easement required in order to put a pipe outlet
19 or is that what we are talking about here, a pipe outlet?
20 GILMER: That's an entirely different situation
21 there because the highway accumulates all there water from
22 somewhere. There is only about one-fourth of this lot that is
23 put in that pipe. It is a six inch pipe and and no one has ever
24 seen it running over half full.
25 COURT: Suppose Mr. McCauley built a dam six feet

high along his boundary, what would it do?

GILMER: It would back water up on the other land.

COURT: Well, doesn't he have the right to build a damn if it is not a natural water course? He could put anything on his property couldn't he?

GILMER: That's a case that would come up on. . .

COURT: The question is, are you going to make McCauley do that or has he got to suffer.

GILMER: I don't think he is suffering at all.

COURT: That may be an issue as to whether he is suffering.

GILMER: If you want to take the issue seriously he hasn't suffered at all. The water has been running across there ever since he bought the lot and it's never got channeled.

COURT: You are saying that it has not cut one now?

GILMER: No sir. You can go out there and see. It's just running across there in its own way.

COURT: That may be the principal issue in the case then. I don't mean to jump ahead of you there on your opening statement.

GILMER: I am glad for you to raise those questions cause a common law, civil law and modified rule in Virginia which is applied for urban property and that is that a man must

injure his neighbor but he can improve his property and if it wasn't for that you could never put up a building in the city because you would increase the drainage on the neighbor, it automatically does it. Now, in this case Mason v. Lamb, 189 Va. 348 that point is raised and discussed. This case was reported in the LRA and it's a landmark case. In this case the evidence for the plaintiff was struck. Now, the charge in this case was seeking compensation for damages done by surface water. In the notice of motion this was an act of God contains two counts, (1) that the defendant, in filling in his lot, had "obstructed" the natural flow of the surface water "in a wanton, unnecessary and careless manner," causing it to "backup" and accumulate on the property of the plaintiffs; and (2) that the defendant had raised the level of his lot above that of the adjoining land and had graded the fill down to the line of the plaintiffs' property, thereby negligently and unnecessarily pouring a great volume of surface water upon the plaintiff's property. At the trial, after the plaintiffs had concluded their testimony, the court sustained a motion to strike the evidence and a verdict and judgment for the defendant necessarily followed. To review this action of the trial court the present writ has been awarded. The properties involved, in this case had a very nice plat which I would like to show you.

COURT: What is the date of that case Mr. Gilmer?

GILMER: 1949 sir. Now, they lay down the law on this

1 and the case was dismissed. In this jurisdiction they have
2 adopted what is known as the modified common-law rule or common
3 enemy doctrine with respect to surface water. Under this rule
4 surface water is considered a common enemy and each landowner,
5 in the improvement or protection of his property, may fight
6 it off as best he can, subject to the qualification that he
7 must exercise his rights, not wantonly, unnecessarily, or care-
8 lessly but in good faith and with such care as not to injure
9 needlessly the property of the adjacent owner. That cites
10 a number of Virginia cases. Tested by these principles we are
11 of opinion that the evidence on behalf of the plaintiffs fails
12 to make out a cause of action under either count of their notice
13 of motion for judgment. With respect to the first count, the
14 burden was on the plaintiffs to show that in filling in his lot
15 the defendant acted wantonly, unnecessarily, or carelessly,
16 citing Harris Motor Co. v. Pulaski Furniture Co., and that's a
17 case where a little water runacross the face of the lot and they
18 had a right to improve their property as long as they didn't do
19 it wantonly, maliciously or carelessly. The evidence fails to
20 establish this. On the contrary, it shows that the lot was
21 filled in and graded in the usual manner, preparatory to building
22 thereon. It is true, as a result of this filling, as has been
23 said, some of the water from the Lamb lot drained northeastwardly
24 into the depression which extends between the rear of the Parks
25 and Beard buildings and the western wall of the plaintiffs' skating

rink, and flowed under the latter building. But so did the water from the adjacent properties and buildings. The plaintiffs argue that the defendant should have adopted their suggestion and should have run a ditch across the rear of the plaintiff's property to the drainage ditch to the east thereof, which, they say, would have prevented the accumulation of the water along the side of their building. Assuming that this ditch would have had such a happy result, surely the obligation to construct it across the plaintiffs' own property, in order to drain the surface water therefrom, was on them and not on the defendant. Especially is this true since the evidence shows that a large part of the water of which the plaintiffs complain came from the roof of their own building. To say that the defendant had no right to fill in the depression in his lot, but that it should have remained as a basin or receptacle for the drainage of surface waters from the adjacent properties, would deprive him of the use of his property despite the rule that he had the right to turn back the surface water at his boundary line. In 67 Corpus Juris. Waters, Sec. 292, p. 869 it is said: "Urban Property. Although there is authority to the contrary, it has been generally held, either pursuant to the common-law rule or as an exception to the civil-law rule, that the owner of a lot in a city or town may make changes or alterations in the surface thereof essential to its enjoyment regardless of the effect on the flow of surface waters, provided he has not been negligent. See also, 56 Am. Jur.

on law. In Harris v. Pulaski Furniture Company we held that the construction of a store building in the town of Pulaski, in the usual and customary way, and without negligence, was not actionable, although the foundation walls obstructed the natural flow of the surface water across the lower level of the defendant's property, and caused it to accumulate under the plaintiff's building. In the second count of the plaintiffs' notice of motion for judgment they seek to bring themselves within the principle of Third Buckingham Community v. Anderson, supra. In that case we held that the upper landowner, in the improvement of his property, has no right to collect surface water in an artifical channel or drain and deposit it in concentrated volume upon the property of his neighbor which is on a lower level. Obviously, the present record makes out no such case. Such water as falls on the defendant's lot is not collected in an artificial drain and deposited in concentrated volume on the plaintiffs' land. It is scattered and diffused over the comparatively level surface of the lot, whence, in seeking a lower level, it drains partly toward the plaintiffs' property and partly elsewhere. This is merely the unavoidable consequence of the exercise by the defendant of his legal right to improve his property in the usual and customary way. Now this property was in Norton County, near Norton. It was like this other property, outside the city but treated as suburban.

COURT: Are we dealing with suburban property, essentially here in this case?

GILMER: That is what we contend and it is so zoned by the county and it is in the city's petition for annexation.

COURT: This is on the Rio Road area?

GILMER: Yes sir.

COURT: Just at the intersection on the west side of 29 at the Rio Road intersection.

GILMER: Right side of the Rio Road intersection, yes sir. Within just a few hundred feet of it. Now, here is the boundary line. That is the crux of our case here.

COURT: In otherwords, your defense is unless there is negligence involved in the manner in which Phillip's has improved his lot then McCauley has to fight the surface water as a common enemy the best he can?

GILMER: They have done nothing to bring in additional water from outside sources. It is just water that naturally falls on there and you can't avoid the rain from falling on that land. It is going no where except on the lower basin. As far as concentrating is concerned he breaks it up on his property and it is further broken up and mixed with a lot of other water when it is crossing this artery on the property . . .

COURT: But you wouldn't dispute McCauley's right to build a dike entirely along the boundary of his lot?

GILMER: If he was building it for the purpose of

being mean the court....

COURT: Well, let's suppose he was doing it to protect his own property to keep that surface water off, if the law says it's a common enemy.

GILMER: That's a case you would have to decide.

COURT: The question is whether he has got to be left with his own remedy or whether the law gives one. That's reall....

GILMER: There is no enemy that we know he's got. There is on the far side of McCauley's lot a ditch that's as wide as from you to me and was basically eight feet deep, but that water doesn't drain off of Phillips Property. It drains off other property up there. There is no where for it to go except down here where it has been going and so, if a man can't improve his own property is right much a matter. He claims he had refused this water in as good a method as possible . . . . . that wouldn't make a bit of difference about the property. Now, the pipe was taking drainage water from the road or somewhere that didn't normally run across this land they would have a right to holler, holler needlessly because it would increase the surface water.

COURT: The increased flow of water apparently then comes from the change in the surface at Phillips?

GILMER: Change in the surface, yes sir. An

increase comes everytime a man puts a building up and puts a roof on his house. Everytime you cut a tree down you increase the runoff because there are fewer leaves there to catch the water. If you plow your land up it's got more runoff than it had before it was. If you put down blacktop it increases the runoff still more because it's less absorbing than it was before.

COURT: That's the next development in the law of development I suppose. Isn't there presently in Albemarle County what is known as the erosion control law.

GILMER: Yes sir.

COURT: When was that entered?

GILMER: I think about a year ago sir. I haven't run into that problem.

COURT: Do either one of you contend that that is applicable in this case at all?

PEATROSS: No sir.

COURT: That is not the issue?

PEATROSS: No, Your Honor.

GILMER: We don't have any erosion there and you can look at the back of the lot. We want you to view the premises and you will see that the bank that has been put there has been carefully guarded and fixed so that it won't erode.

COURT: I suppose that would be applicable if we had silt in this case, the erosion control.

GILMER: It would. Now there is a piece of property

1 running to the south of ours, just beyond this property here
2 that does run down and settle on his lot. There is considerable
3 washing, it comes down on this property over here. That is where
4 they have cut the dirt up and we have it under control where it
5 doesn't even wash. That is the only washing we have noticed in
6 the neighborhood recently.
7 COURT: Thank you Mr. Gilmer. Mr. Peatross?
8 PEATROSS: Your Honor, I didn't know we were going
9 to get in the discussion of the law at this point. I certainly
10 have my law to which.....
11 COURT: I will be glad to hear it. It might be
12 helpful in pointing a direction in the case.
13 PEATROSS: There is one distinction I think
14 possibly might be made in the case which Mr. Gilmer cited and
15 passed up to you. I am not sure I don't think that case involves
16 a collection in an artifical channel of water. It was piped
17 onto someone's property, I think that's the distinction in the
18 case. My nature case I would like to cite to the court is
19 Third Buckingham Community v Anderson. It to goes into a dis-
20 cussion of what the law is. It cites that surface water is a
21 common enemy which a landowner has a right to fight even to dump
22 off onto the land of a neighbor, however, there is an important
23 qualification in Virginia to this common law rule that the
24 drainage of surface water is subject to the important qualifi-
25 cation that is a privilege confered by it and may not be exercised

1 wantonly, unnecessarily or carelessly but is modified by that
2 golden maxim of the law that one must so use his own property
3 as not to injure the rights of another. The case goes on and says
4 that a landowner cannot collect surface water into an artificial
5 channel or volume, or precipitate it in greatly increased or
6 unnatural quantities upon his neighbor to the substantial injury
7 of the latter. This is what we think is being done here.
8 COURT: What year is that case you are now quoting?
9 PEATROSS: This is a 1941 case. 178 Virginia 478.
10 The law if reaffirmed in a later case on the 229 Supplement in
11 a 1964 case involving Virginia law which involved similar
12 problems and reaffirms this law which I am reading here now.
13 This case goes on to say that you cannot collect water in
14 quantity and force it upon your neighbor and that this is true
15 although no more water is collected than would have naturally
16 flowed upon the property in a different condition, for it is
17 evident that, while a given piece of land may receive a large
18 amount of surface water without injury thereto when it flows
19 gently thereon from natural causes, yet when collected and
20 discharged in considerable volume at a given point, it may be-
21 come very destructive and injurious. That's what we say has been
22 done here. It's been collected in unnatural quantities, it is
23 piped from the front of his lot all the way down through that pipe
24 and we are saying that the evidence will show that there was no
25 water course coming down here prior to the time this pipe was

inserted. There was no bed of water flowing down through the McCauley Property, there was no bed of water in the open field out there. Water was absorbed, there was no water course whatsoever. But, the major source of this water is this pipe. We are saying that this pipe was stopped up then....

COURT: You are asking the court to require the pipe to be plugged?

PEATROSS: Right.

COURT: Convert it to surface drainage only?

PEATROSS: If the collected surface water were stopped we would not have the water problem that we have now. We think the law is clear that you cannot collect it in an unnatural manner into a detour channel and dump it. We think this is careless action that they erected this pipe so it would dump right there and it does injure the land of the McCauley's. This is our point and we think the law is clear. The law doesn't allow one to do this, to collect water and we do think that the McCauley's have been damaged. We think there is evidence to show that there is damage that has been done to this property and if continued it will continue to damage it. He has taken steps to try to prevent the damages as much as possible. Since 1968 he has tried to resod the grass and fill in his garden and whatnot but if this continues it will continue to wash out his property and we think there is damage in a substantial amount.

COURT: Gentlemen, in both of your presentations

1 in your opening statements it appears that a lot of the factual
2 information is undisputed and that is, that the Phillip's Lot
3 has been changed by the leveling of the surface, by paving a
4 portion of it and collecting in catch basins and discharging
5 the surface water through a pipe and a difuser onto the oil
6 company lot where it has been by natural flow of the land
7 eventually gets on the McCauley Property. Mr. Gilmer's position
8 is that it's a natural improvement which has occurred and the
9 amount of surface water which is discharged is no greater than
10 would have been otherwise discharged taking into account the
11 right to improve and Mr. Peatross says that the catching of this
12 water in the catch basin and discharging it through the pipe has
13 increased or in concentrated form has increased the effect on
14 the McCauley Property. Now, I don't suppose to that extent there
15 is any great dispute in the evidence. The fact is the under
16 ground drain and catch basins are on the Phillips Property and
17 discharges the water through a pipe and Phillip's has placed a
18 defusing device of some sort at the exit at the pipe. The big
19 question will be whether or not the law, as applied from the
20 cases you all have cited and the manner in which Phillip's has
21 undertaken to catch and discharge this water is such that the
22 court would require a change particularly at the outlet or dis-
23 charge area of the pipe. Mr. Peatross apparently takes the
24 position that the pipe itself is the unnecessary element carrying
25 water from the catch basins and had Phillip's merely left his

lot without a catch basin or discharge pipe he would have no complaint. Maybe you all can stipulate a great deal of your evidence and it does seem to me that it does raise a substantial issue as to the law rather than to the essential facts in the case but I will leave that to you all. Get your evidence into the record. It may be an important matter to each side and it could be a factual basis for a decision should be in the record as well as from the evidence and your opening statements so I will leave you all to that and if you have photographs or other evidence that you wish to present that can be examined by respective counsel and placed in evidence by stipulation I will allow you time to do that if you would like to do it. It might help to clarify right from the beginning.

GILMER: I think a view is the main thing that is going to clarify it and I think it will appear on view that if those catch basins were filled over and the roof water was drained you would have exactly the same thing and when the water got to his place it wouldn't be an inch wider than what it is now. I think a view of the premises will show that.

COURT: I don't want to take a view and have the effect of blocking the essential facts from the record so I think we would be wise to get some of the facts in the record and then we will take the view at the appropriate time, at the break of some of the conclusion of the evidence. Now, do we have anything that would require identification of the parties any further

than the pleadings have already shown. That is,.....

PEATROSS: Your Honor, I did have some pictures that you just mentioned, those taken to Mr. Gilmer. We are going to let Mr. McCauley explain these different pictures and what the pictures show when he testifies. If Mr. Gilmer has any pictures I will be glad to consider them being entered.

COURT: If the pictures can be generally stipulated as representing the condition of the respective lot, I think that can be all of the identification. Now, the oil company that has been shown on the sketch is identified in Mr. Gilmer's pleadings as Eastcoast Oil Corporation, is that the proper identification? Mr. Peatross, would that be stipulated by you that that identification is sufficient?

PEATROSS: Yes sir.

COURT: Can you put a little line on that generally to designate north and south Mr. Peatross?

PEATROSS: Yes sir.

COURT: How would 29 run relative to that?

PEATROSS: 29 is here Your Honor.

COURT: 29 runs a little east of north so you might have an angle, say of 45 degrees, up through that oil company lot and that might be truer the north line. Maybe I am looking at it exactly backwards. I think the reference to the....Mr. Peatross, the sketch in the file indicates that you are right the first time, south would be the opposite....the way this is

shown the line would be 45 degrees through the McCauley lot and north would be at the bottom of that....that way would be north, is that correct?

PEATROSS: Yes sir.

COURT: That's the way it is shown on this. Actually it is upside down so if you draw a 45 degree line across that north would be at the bottom. Now, I suppose you all would want that sketch introduced as an exhibit on either side.

GILMER: I have no objections.

COURT: All right, we will let that be Plaintiff's exhibit A or 1 whichever, you may have already started some.

REPORTER: I have, I am at 28.

COURT: All right, let that be according to the number then.

PLAINTIFF'S EXHIBITS 1-28 marked by the Court Reporter and Sketch entered as 29.

COURT: Can we stipulate that it's an eight inch pipe? I think you show that on the sketch don't you?

GILMER: Yes sir.

PEATROSS: Yes sir. Mr. Gilmer asked me about that and he said that is correct.

COURT: The drain pipe then which is the principal source of the complaint in this case is an eight inch pipe.

PEATROSS: Yes sir.

COURT: How many of the exhibits then are in

a position to be stipulated? Do you have any question about any of them at this point?

GILMER: The list of questions I have got as to the grading of it, I am not objecting to any of those pictures.

COURT: All right sir.

GILMER: Some I think are not relevant but I am not objecting.

COURT: Do you have any that you wish to....

GILMER: Not at this time.

COURT: All right.

GILMER: I may want to select them, I have got a lot of pictures.

COURT: All right then, we will allow the pictures that the plaintiff has tendered to be filed as exhibits, the court will admit them in the sequence on the numbers 1-28 and 29 is the sketch. All right Mr. Peatross, you may call your first witness.

PATRICK O. MCCAULEY, Having been duly sworn testified as follows:

DIRECT EXAMINATION

By: Mr. Peatross

Q Mr. McCauley, would you state your name and address for the court please?

A Patrick O. McCauley, Route 8 Box 423

1 Charlottesville.

2 Q What is your occupation?

3 A I am Superintendent at the truck terminal for

4 United Postal Service.

5 Q And where do you presently reside?

6 A At Route 8 Box 423, off Rio Road just west of

7 Route 29.

8 Q I direct your attention to Plaintiff's Exhibit

9 29 on the board, does that properly show the location of where

10 you presently live?

11 A Yes.

12 Q Under the designation of the McCauley Lot, is

13 that right?

14 A That's right.

15 Q Would you tell the court when you moved to this

16 location?

17 A 1958, I think it was in June.

18 Q Would you describe for the court the neighbors

19 which were nearby?

20 A At the time, the first house up on Rio Road was

21 Ulysses Black, the second was Randolph Bolling and the third was

22 Miss Minnie Bolling.

23 Q Did you build your residence at that time?

24 A I had it built, yes.

25 Q You moved in in June of 1958 or approximately

1 that time?

2 A Approximately.

3 Q Would you describe the condition of the

4 property as shown in yellow on the chart and designated as

5 Phillip's?

6 A Well, the part from Rio Road straight back was

7 open field, it was grown up some and the little L off to the

8 bottom of that map was in woods with one small barn on it.

9 Q Did you go out and observe this property that

10 you were going to purchase before you built your house?

11 A Yes we did.

12 Q Did you talk to the real estate agent about it?

13 A It was a person to person sale.

14 Q From your own personal observation at the time

15 you moved there and in observing your lot, did you ever observe

16 any water on this lot at that time?

17 A No.

18 Q Did you have occasion to view the lot that is

19 now owned by Phillips?

20 A Yes.

21 Q Did you ever see any water on that property?

22 A No.

23 Q Did you ever see any collection of water?

24 A No.

25 Q Would you explain to the court how you would

1 happen to remember what you observed? Anything particular
2 strike you?
3 A You mean as to lack of water?
4 Q As to your observation of the land at that
5 time?
6 A Well, we used the lower part of the land for
7 a pony field. Mr. Bolling owned it at the time and he let us
8 use that and I mowed it off and cleaned it and there was no sign
9 of any water or path of water.
10 Q Did you observe this property when it rained?
11 A Yes, I could see it at all times.
12 Q Did you ever see any collection of water when
13 it rained?
14 A No.
15 Q Did you ever see any movement of water across
16 your property at all?
17 A No, not what you would call any mass amount.
18 Q Do you recall the time that Phillip's Building
19 Supply purchased the property as shown on that map?
20 A Yes.
21 Q Do you remember approximately what year?
22 A I would say around 1964, I am not sure of the
23 date.
24 Q Do you remember what buildings went up on that
25 property?

1 A Yes I do.

2 Q Could you explain to the court what buildings

3 they were?

4 A The one that has the office, the warehouse or

5 part of what is a warehouse and shop.

6 Q After the construction of these buildings which

7 you have just mentioned did you notice any movement of water down

8 the back of that open field or on your property?

9 A No.

10 Q Do you remember when they made any further

11 improvements to their property?

12 A Yes.

13 Q What time do you remember as next observing

14 improvements being made?

15 A I believe in the spring of 68.

16 Q What improvements were being made to the

17 property at that time?

18 A Well, they were cutting down part of 29 North

19 to relieve the vision and they were bringing the fill dirt from

20 there and bringing it over and putting it on the back of their

21 lot and leveling it off.

22 Q Do you remember any other improvements that

23 were being made at that time on the back part of their lot?

24 A They, at that time, had started to dig a ditch

25 to put in, what we are assuming to be a pipe .

1 COURT: Mr. McCauley, which is the back part you
2 refer to?
3 A It would be down at the water, that would be
4 the part.
5 COURT: Talking in terms of north, east, south or
6 west. Now, you see the red arrow going north, what direction
7 would it be when you say the back of the lot?
8 A It would be south.
9 COURT: The south part of the defendant's lot.
10 Is that where the fill dirt was added?
11 A Yes sir. Along the southwest part where on
12 the map the word Phillips is written.
13 Q Mr. McCauley, did you notice anything else being
14 done other than the filling in of dirt?
15 A Well, they were digging, it seemed to be at
16 the time an open ditch, we didn't know what the purpose for it
17 was to be.
18 Q Did this construction give you any concern at
19 all?
20 A Yes it did.
21 Q Why?
22 A Because I realized that if we were to have
23 a storm at the time it would fill us with red mud.
24 Q Did you take any action to try to contact
25 Phillip's?

A Yes I did.

Q How did you take this action?

A Well, I contacted a local lawyer and he wrote a letter for me which I presented to Phillip's.

Q Your Honor, we would like to enter this letter into evidence. I would like for Mr. McCauley to read it, it is not a very long letter.

COURT: All right, be admitted as Plaintiff's Exhibit 30. No objection Mr. Gilmer?

GILMER: No sir.

COURT: All right, be admitted.

PLAINTIFF'S EXHIBIT number 30 so marked at this time by the Court Reporter.

A Dear Mr. Phillip: Your recent property improvements have resulted in water drainage conditions that eventually in the event of a good rain is going to damage my property. I therefore give you notice that you should get rid of your rain water in some other way than by collecting it and allowing it to flow in a concentrated force against my land. I intend to take court action against you to prohibit you from dumping this collected water on me and recover from you any damage I may suffer because of this situation.

COURT: What is the date of that?

A April 9, 1968.

Q Mr. McCauley, as a result of that letter was any action taken by Mr. Phillips?

A That is when they came down and put the pipe and cover the ditch here.

Q Did they change the direction of the ditch?

A No, not that I know of.

Q Did they do anything else to this improvement of the back part of the property?

A Not at the actual time. Later on they did put some rock then they went to cross ties for a catch basin and put splash type rock in that and later on they came back again and laid boards across the bottom of the fence row to try to profuse water or try to profuse it.

Q Going back to the date of April 9th, the date of that letter. After that first construction was completed... let me back up. Prior to that time, had you noticed any water moving across your property?

A No sir.

Q Had you noticed any water moving down across the oil company's property?

A No.

Q After this construction was completed around the 9th of April, did you notice any movement of water across your property?

A You mean with the pipe.

Q After the pipe had been installed?

A It was a long time because it was a dry summer. The first time was, let's see.

Q Do you have some notes there?

A I have some notes of different times.

Q Do those notes coincide with these photographs?

A Yes they do.

Q Your Honor, I don't know the best way to approach this. He has the description that he took in the way of notes for each of these photographs and what they show. I don't want to take up the courts time.

COURT: Did you prepare the notes that you are referring to?

A Yes sir.

COURT: Well, you may go ahead and get general with the information that you referred to then we will try to tie it in with the photographs specifically Mr. Peatross. I think it would be better to get a general view of the case first before we go into the specifics.

Q Mr. McCauley, when the first rain came what happened?

A The first one was a small rain if I recall correctly and it made a small creek across the property, enough that you could see the water running above the growth of the grass.

Q Could you estimate the depth of this water?

A The first time.

Q The first time?

A The grass is normally cut at about two and a quarter inches so it must have been say three inches.

Q Did you notice the width of this water when it moved across the land?

A That first one I would say approximately six feet.

Q Did you observe the source of the water?

A Yes, the water was coming out of the pipe at, I would say, half the speed for the size of the pipe.

Q In your estimation what is the diameter of the pipe?

A Eight inches.

COURT: Are you meaning to infer that the volume of water was about half of that pipe in size?

A Yes sir, that was on the first small rain.

Q Would you describe the course of that water as it came across the property or from the time it left the pipe until the time it came across your property?

A The map that you have there is very accurate.

Q Did this water flow entirely down across your lot?

A Yes, it cuts my lot in half actually and goes

to the creek bed which is further off the map on the west side of the map.

Q Do you recall the next time that it rained?

A Yes.

Q Would you describe to the court what you observed at that time?

A It was what you would call a normal thunder storm and I observed the pipe and it was coming out at what, of course it's impossible to get it completely full because of your air pressure, it has to have a certain amount of leeway but it had all it would take and it was shooting out of the pipe at maybe six to eight feet. This was before they had put in any of the splash or pipe thing.

Q Would you describe the depth of the water as it came across your property at that time?

A Six to eight inches in width, under twenty feet. I measured one time at about nineteen foot two inches I believe and one other time I measured eighteen feet, six inches. So, it is in the area of twenty feet wide.

Q Mr. McCauley, do you as to your own personal knowledge know from what source this water comes?

A Only what I have seen because I have to go by there of course to go to work, to the mail box or anything else and it seems to come from the drain in the north of the map there and I also notice they put a small one in on the McAllister

1 Property over to the catch basin and of course the pipe running
2 the rest of the way down. I don't know exactly how many drains
3 they have off of the buildings that go to this one channel basin
4 but the whole northside is geared to run into that one drain
5 pipe.
6 COURT: What is the normal slope of the land
7 in that area, towards your property?
8 A Yes sir.
9 Q Do you recall Mr. McCauley when it rained again?
10 A Because of the first ones and we were a little
11 more interested in it, the next time it rained I don't believe
12 we were home and when we got back it was after the rain or at
13 the end of the rain and it was still a large creek and my
14 brother had borrowed my camera so I didn't get a picture. I
15 went to get it and when I got back it had stopped raining and
16 of course the creek stops when it stops raining, usually in a
17 period of a half hour afterwards.
18 Q Do you have any information as to the time it
19 takes for the water to collect and come across the property?
20 A When a thunderstorm breaks loose it runs from
21 ten to fifteen minutes before it actually runs onto our property.
22 Q Now, these particular rains that you have
23 described, do you recall which dates they generally cover?
24 A I have them listed here.
25 Q What approximate dates are they?

A The first one was June the seventeenth, nineteen sixty-eight and June the twenty-third was a big rain, that was the one we wasn't there, excuse me.

Q After each rain subsequent to those you have mentioned does the same water problem occur?

A Yes, depending upon the amount of rain.

Q How severe or hard does it have to rain before you have any water at all running across your property?

A Now, not a shower of course, but like this last month we have had some fairly heavy just normal rains, it wouldn't be considered thunderstorms and we have had creeks across there.

Q Following these times that you have mentioned have you continued to have water problems when it rains?

A Yes.

Q Did Mr. Phillips attempt to make any improvements during the summer of this time?

A All through that summer he kept adding dirt and things. Of course, there was no defusion at all at first and after they realized what was happening they added some splash rock and then they added other defusion but it was done along gradually over the summer.

Q Coming on up to recent times now, do you still have a water problem?

A Yes.

1 Q Is it as severe as it was originally?

2 A Yes.

3 Q Why?

4 A They have done nothing to stop the water, it

5 just slows it down but it doesn't stop it.

6 COURT: How much does it spread?

7 A How much does it spread?

8 COURT: Yes sir. Does it make a wider channel

9 than twenty feet now as a result of the defusing?

10 A No sir. It runs, the heavier rains runs about twenty

11 feet across my property. The defusion is along the fence row

12 on the southwest part of Phillip's, it is not right at us. It

13 does defuse out but it comes back of course into this one

14 creek bank.

15 COURT: Where is the dividing line between the

16 business zone and the residential or is the whole area including

17 your property zoned for business?

18 A It is zoned either business, manufacturing or

19 commercial.

20 COURT: Your lot is....

21 A A business lot with a residential house.

22 COURT: How far does that extend in the southwest

23 direction, the commercial zone or business?

24 A From this direction it would go over to the

25 property known as Berkeley Community.

1 COURT: All the way over to that?

2 A It's only a rocks throw from my property.

3 COURT: Is that where the stream that catches this

4 run off surface water....

5 A It comes down to about the entrance to the

6 Berkeley Subdivision.

7 COURT: How far in feet would that be Mr.

8 McCauley?

9 A Two thousand maybe, from our property to the

10 entrance to Berkeley. That is just a rough guess.

11 COURT: All right, fine.

12 Q Mr. McCauley, do you recall what the zoning

13 was for your property when you originally moved there?

14 A We had no zoning law.

15 Q When the zoning laws first came into effect

16 what was your property zoned at?

17 A Business.

18 Q Was this after the time that Phillip's had

19 moved to the present location?

20 A Yes.

21 Q Turning our attention to damages Mr. McCauley,

22 have you suffered any particular damages as a result of this

23 flow of water across your property?

24 A Yes.

25 Q Would you describe to the court what they have

1 been?

2 A Well, there is trouble with the septic tank

3 since the creek runs over the end of my septic field. I have

4 lost dirt out of the garden area, we have lost the use of that

5 land for any purpose of cultivating, gardening or anything we

6 would want to do.

7 Q Let me ask you about your septic system first.

8 When was this septic system installed?

9 A When the house was built in the spring of

10 58.

11 Q How often do you have to have this septic

12 system pumped?

13 A Normally I couldn't say. I am not an expert

14 in that field.

15 Q How many times have you had it pumped?

16 A Well, we delayed putting it off in hopes of

17 stopping the water situation and we have only had it pumped the

18 one time but it definitely needs it again.

19 Q Have you had it pumped prior to the time that

20 any water problem existed?

21 A No.

22 Q After you did have the water problem did you

23 have an occasion to pump it?

24 A Yes.

25 Q What did you discover when this system was pumped?

A They got a large amount of backfeed into the.. I was there when it was pumped...they got a large amount of back feed into the tank which means that there is a lot of water that shouldn't have been in there and from my observation I would say that it is because we have lost a part of the septic field itself. Being covered with the creek and the sifting out through the dirt and backing up through the tank. At least cutting off the use of the probably twenty-five percent of it.

Q Had you ever had any problem with this septic system prior to the time the water ran across your property?

A No sir.

Q Would you describe the condition of the property now? Since the water has moved across it?

A Well, along the line the grass has turned black in spots. Of course it comes out and goes back, depending upon the amount of rain. It is quite soggy and you can sink down in the grass. After a rain it is three or four days before I can cut my grass in that area.

Q After you had your septic pumped would you describe your condition of the field at that time?

A Well, at the time it dried up as it should be and it lasted for maybe two or three months until we had another hard rain and of course I was back just like I was. It is still the same way.

Q Now turning your attention to your garden. Have

1 you suffered any specific damages regarding the water?

2 A Yes, it has washed out the two lower rows of

3 my garden and we replaced the dirt on that one time and it did

4 it again so we replaced it the second time then we quit. It

5 would now take about six pickup loads of dirt, roughly, to fill

6 it back to its normal....

7 Q Did you lose any specific crops so to speak

8 the time the waters first came?

9 A Well, the first time we lost a row of onions

10 and a row of corn and the second time we lost a row of tomatoes

11 and we don't use that anymore, we just quit using it because it

12 was no good. It is still cultivated but we don't plant it.

13 COURT: What is the size of your lot Mr. McCauley?

14 A It's 450 feet on the back and 176, I think,

15 feet and the front is 190 feet. It is an angle on the lower

16 southwest end.

17 COURT: What are we talking about, a half to an

18 acre of land?

19 A No sir, it's almost one and a half, I don't

20 know the exact measurements.

21 COURT: One and a half acres?

22 A Yes sir.

23 Q Mr. McCauley, has there been any other damages

24 which you have suffered other than the septic system and the

25 garden?

1 A Well, we had a culvet under the creek and that
2 washed out because it couldn't take all the water. We used that
3 to get across to mow the grass on the other side of the creek
4 and at the time we had the ponies out there and we used that to
5 pull the pony cart across.
6 Q Did you try to replace this culvert?
7 A Yes, I replaced it once and it washed out again
8 so I left it.
9 Q Are there any other damages?
10 A Well, I contributed the loss of one apple tree
11 to it because that was at the edge of the line and it just
12 seemed to lay over for no reason, it was in the opposite direction
13 than the wind blows so I assume that it became loose in the dirt
14 and ready to fall over.
15 Q Did the flow of water affect this tree?
16 A I would assume that it did. I am not an
17 expert in that regard.
18 Q Are there any other damages that you can think
19 of that you haven't mentioned, to your yard or anything?
20 A Well, of course everytime it rains it makes
21 these small pockets in the sod and I have had to continuously
22 fill those and replant and in my gate area it washes out
23 regularly, it is washed out some now and in other places that
24 I have to continually put a small amount of dirt back on.
25 COURT: Do you have any damage to your house itself?

A No sir. My house is sitting approximately fifty feet away from this area.

Q Are you able to use the area of your yard where this water comes across?

A No, I haven't anymore during the rainy season and especially on the septic field. The children aren't allowed to go on it.

Q Turn to your garden again Mr. McCauley. Do you have any estimate of how many loads of dirt it would take to replace what has been washed away?

A I put three on it the first time, pickup loads and four the second time and I would estimate now six to eight loads to fill in, that is pickup not dump loads.

Q Do you have any estimate of what a pickup load of dirt would cost?

A I see it advertised in the paper at $15.00 delivered, that is top soil. I haven't bought any recently and I really don't know the cost.

Q How much did it cost to have your septic system pumped when you had it pumped?

A The pumping itself was $35.00 and we had to have it dug up previous to that and covered up after the man is gone.

Q Do you have any estimate of what you spent in grass seed to replace spots on your property?

A That wouldn't be a large expense. I would say ten dollars over this period of ten years. Four years.

Q Have you had to do any fill in around the area of your gate?

A Constantly.

Q How much dirt have you lost around that area, do you have any estimate of that?

A I just take maybe one wheelbarrow about half full and fill it up each time we have a heavy rain.

Q Do you have any idea how much it would cost to replace the apple tree?

A No, I replaced it myself so I didn't have any expense but to have someone like a nursery come out I would guess it would be around $15.00 for them to plant one.

Q Witness with you Mr. Gilmer

CROSS EXAMINATION

By: Mr. Gilmer

Q You say the wind blew your apple tree over?

A No sir.

Q The wind was blowing when the apple tree fell wasn't it?

A I don't recall that it was blowing. If it had been blowing it would have been from the opposite direction.

Q I thought that's what you said, the tree fell

in the opposite direction than that of which the wind was blowing?

A Right. In otherwords, it could hardly fall into the wind.

Q Now, your lot is that area shown on that map?

A Yes it is.

Q It runs much further south and it runs much further to the west?

A It runs right much further south, not a whole lot to the west.

Q Now, when you bought that property it was in grass wasn't it?

A Yes it was. Grass and woods.

Q All the water from up there where Phillip's lot is and the back of those three lots there drained down your way?

A We didn't get any water. I don't know where it went.

Q It slopes in that direction don't it?

A There is a slope in part of that yes.

Q Then, the area to the east of the Phillip's Property, that slopes down into your property to doesn't it?

A Part of it slopes in that direction, part of it the other way.

Q Part of it slopes toward your direction. You never noticed any water running on the surface until Phillip's

1 made this change?

2 A That's correct.

3 Q Now, at first when he started doing some work

4 up there you were afraid you were going to get red mud weren't

5 you?

6 A Yes.

7 Q Did you ever get the red mud?

8 A No sir.

9 Q What is your property worth now?

10 A The tax value is $23,500, I believe.

11 Q Twenty-three thousand what?

12 A $500.00, I believe.

13 COURT: Have you had a new assessment?

14 A That is the new assessment.

15 Q Is that the assessed value or the appraised

16 value?

17 A That is the assessed value, the appraised value

18 was in the range of $60,000.00. The reason for the difference

19 is because an assessment for tax purposes they have to give you

20 the minimum on the business rate. On resale the property in

21 that area is very high.

22 COURT: If your property were resold Mr. McCauley

23 would that require that it be used as business. Does that change

24 the zoning?

25 A Yes sir. It is zoned business now. It can

1 only be used for business.

2 COURT: If you sold it it could not be used as

3 a residence after you sold it could it?

4 A I don't know the law on that sir.

5 COURT: Could you gentlemen enlighten the court

6 on that as to what the effect of a sale of Mr. McCauley's

7 property would do with zoning?

8 A I don't think the sale would affect it at all

9 but destruction by fire or something might affect it.

10 COURT: It seems to me that his would constitute

11 a continuing exception or variance and once the character were

12 changed it would no longer be entitled to have that variance.

13 GILMER: Once it's changed, yes. The sale wouldn't

14 be a change, it could still be used as a residence.

15 COURT: I see.

16 GILMER: Whether he uses it or someone else uses

17 it doesn't matter but if the house were destroyed they couldn't

18 rebuild it.

19 COURT: So, it would continue in the present

20 situation as long as the house could but you could not build

21 another dwelling on it then.

22 GILMER: I think that's the law.

23 COURT: The $60,000.00 you say is the appraisal

24 for business property?

25 A That's correct.

Q Now, where this water from the Phillip's property and the other adjacent property crosses your land how wide is it when it enters your land?

A Fifteen to twenty feet.

Q After it gets on your land does it get wider or narrower?

A It stays pretty close to the same until it hits the garden fence area.

Q How far is the garden fence area?

A Roughly seventy-five feet.

Q Then when it hits the garden fence area how wide is it?

A It breaks up and scatters then. Part of it goes down through the bottom of the garden and part of it drops off over to the creek itself.

Q Could you give us some idea of how wide it is?

A Through the garden it keeps in a line and it's only maybe two foot wide and the part going into the creek it scatters out to maybe fifteen feet wide.

Q When we have a heavy rain do you ever notice any water running off your house?

A Out of the gutters, of course.

Q Yes and did they make a stream?

A Very little.

Q Your gutters didn't make a stream running across

1 the grass?

2 A Very little.

3 Q There is a big ditch to the west of your

4 property that crosses your land doesn't it?

5 A Yes.

6 Q How deep would you say that ditch was in inches

7 please?

8 A To clarify it first, there is a spring up there.

9 It is actually a creek bed and it may be eight foot at one

10 place.

11 Q About how wide?

12 A Maybe ten feet.

13 Q And none of that water at the point where that

14 ditch passes your house comes off of Phillip's land does it?

15 A And goes into that ditch?

16 Q Yes, it eventually does. The ditch passes your

17 house going southeast before any Phillip's water can enter it

18 because your house is on high ground and separates it isn't it?

19 A Only the part of Phillip's land that is..that

20 is in houses, there are three new houses and it does drain down

21 the road and some of it crosses at the building there.

22 Q From the business property you see up there

23 none of that can get to it can it, just past your house?

24 A That's correct.

25 Q It does drain a big area there doesn't it, some

1 twenty acres or more doesn't it?

2 A I don't know the acreage.

3 Q Does this water from Mr. Phillips property cut

4 a channel anywhere on your property?

5 A I have prevented it from doing that by constant

6 care. I do have a cut through the garden, yes.

7 Q Cut through the garden, that's the only cut

8 that has been done?

9 A The only one that is visible now.

10 Q That is about 75 feet from Phillip's line?

11 A Roughly.

12 Q That was after the water had spread out to a

13 distance of 15 to 20 feet and then came to gather and cut?

14 A Yes sir.

15 Q Have you had any trouble with the depositing of

16 silt on your property?

17 A Very small.

18 Q Enough to talk about?

19 A No sir.

20 Q What do you plan for Mr. Phillip's to do with

21 the water off the roof of his buildings?

22 A Stop it from coming on my property.

23 Q How do you suggest he stop it?

24 A That would be his problem, not mine.

25 Q You have no suggestion to make on how to stop

1 that water from coming off the roof of his buildings?

2 A No sir.

3 Q Now, all that area there on 631 and 29 North

4 is pretty well built up in business property isn't it?

5 A Right.

6 Q The city is proposing now to annex that into

7 the city isn't it?

8 A The part south of Rio Road, yes.

9 Q The part south of 632. That would take in your

10 property and Phillip's.

11 A Right.

12 Q There isn't any farming within a mile of yours

13 is it?

14 A Within a mile, yes sir.

15 Q Who is farming within a mile of your property?

16 A I can't say this minute. Carroll Walton was

17 farming right up pass the dance hall, or what use to be a dance

18 hall.

19 Q What does he raise, corn?

20 A I don't know.

21 Q You say he is farming, does he just have some

22 horses?

23 A He is not a professional farmer. He was

24 raising, I assume hay for his horses. I don't know for a fact.

25 Q Do you know anybody around there planting wheat,

1 corn or any such crops and doing farming for a living?

2 A No, no more than small gardening.

3 Q That's what I meant, within a mile. Now, this

4 water from Phillip's crosses the oil company property before it

5 gets to yours doesn't it?

6 A Yes sir.

7 Q Have you ever noticed any cutting on that oil

8 company property?

9 A Yes.

10 Q Does it cut a ditch?

11 A Small ones.

12 Q Now, when you brought that letter over to Mr.

13 Phillip's didn't you ask him first thing, do you want to buy

14 my property?

15 A I did.

16 Q Before you gave him the letter?

17 A Yes sir.

18 Q Did you give him a price?

19 A No sir.

20 Q He couldn't do much buying without a price could

21 he?

22 A He said he wasn't interested.

23 Q You told him then you were going to sue him

24 didn't you?

25 A I gave him that letter.

1 Q Did you also tell him you were going to sue him?
2 A I don't recall.
3 Q You did sue him in the summer of 1968 didn't
4 you?
5 A I believe that date is correct, yes.
6 Q Then you dismissed the suit the day before the
7 trial?
8 A I didn't, no sir.
9 Q Well, your attorney did?
10 A Yes sir.
11 Q Did he do it at your request?
12 A No sir.
13 Q Then, in the winter of 1970 you threatened him
14 again with a suit, didn't you?
15 A My attorney did, yes sir.
16 Q Your attorney did. When did you file the suit?
17 A You will have to ask my attorney, I don't know.
18 COURT: That speaks for itself Mr. Gilmer. It
19 was filed on the 14th of January, 1972.
20 Q That's all I have of this witness.
21 COURT: Mr. McCauley, what can you give us as to
22 an estimate as to the height of the fill that was made on the
23 Phillip's Lot by the moving of dirt?
24 A Roughly six feet or five feet.
25 COURT: Any further questions?

PEATROSS: Yes sir.

REDIRECT EXAMINATION

By: Mr. Peatross

Q Mr. McCauley, has Mr. Phillip's ever approached you about this water problem in any effort to solve it between you?

A No.

Q Did he attempt to discuss it with you when you delivered the letter?

A No.

Q He never has discussed it with you personally?

A No.

Q No other questions Your Honor.

COURT: Anything further Mr. Gilmer?

GILMER: No sir.

COURT: You may stand aside Mr. McCauley.

Witness stood aside.

MRS. PATRICK MCCAULEY, Having been duly sworn testified as follows:

DIRECT EXAMINATION

By: Mr. Peatross

Q Mrs. McCauley, would you state your name and address for the court please?

A Theresa Brookin McCauley, Route 8 Box 423, Charlottesville.

Q Do you reside on the property designated McCauley property with your husband?

A Yes.

Q Do you recall when you moved to that property?

A Yes. June of 58.

Q Would you describe to the court what the land area was and the conditions of it at that time?

A Well, as Pat has said the land which is now Phillip's was grown in sod with some fruit trees where the buildings are, right back to the south and above us on the north part was woods and a small barn.

Q Did you, at that time, observe any water that was flowing down onto your property?

A No.

Q Did you observe that property when it rained?

A Yes.

Q Did you ever observe any water coming down through the field that is now Phillip's property?

A No.

Q Would you describe the slope of the land where your property is? The field that was then Phillip's Property.

A Yes, it sloped...all of the houses were on that road, we built our house where we did because it would line

1 up with the other houses. It drops to the back and at 29 it
2 does drop to the back so it was lower in the back.
3 Q In otherwords, does the property slope down
4 towards your property then?
5 A Yes.
6 Q But you never observed any water coming down
7 that slope, is that correct?
8 A Right.
9 COURT: Mrs. McCauley, you are referring to the
10 back you mean the south part of your property?
11 A Yes sir, sorry.
12 Q Do you recall when Phillip's Building Supply
13 came and purchased that property?
14 A I do.
15 Q. Do you remember when, approximately the date?
16 A Not really, no.
17 Q. Do you remember approximately what year?
18 A It was in the sixties, I don't remember.
19 Q Did you notice any water problem after they
20 moved onto the property?
21 A No, not at the time.
22 Q Did you ever have any complaints from any of
23 your neighbors about water problems?
24 A No.
25 Q Do you recall when Phillip's made improvements

on their property?

A Yes.

Q Do you remember what dates these were?

A Are you referring to the filling in of the dirt?

Q Yes.

A Yes I remember when it was done.

Q Do you remember approximately when it was done?

A Yes, I think it was sixty-eight.

Q Up until this time had you ever had any water problems whatsoever, with water running across your property?

A No.

Q Would you describe the improvements that were made on the south part of the Phillips Property with the filling in, how did they go about it?

A They filled it in level with the dirt that was taken from 29 and then they put the drain pipe which we have been referring to today in.

Q Are you familiar with the letter which Mr. McCauley delivered to Mr. Phillips?

A I am.

Q Were you alarmed about any water problems which could exist?

A Yes.

Q Why?

A Because that is our home.

Q Why did you think there would be a water problem?

A Well, when they changed the lay of the land and put the pipe in the water had to come to us.

Q In fact, did you have a water problem after these improvements were made?

A Yes, the pictures will show it.

Q Would you describe to the court what the pictures show and the type of water problem you were having?

COURT: Let me see those pictures if I may while she is referring to them. I think they have been admitted into evidence, have they not?

PEATROSS: Yes sir. Your Honor, Mr. McCauley made some notes on the individual pictures and we would like to have that admitted. Some of it might not be admissible, I don't know. Do you have any objection to the description of the pictures Mr. Gilmer?

COURT: You have got a written summary of them?

PEATROSS: These are what he prepared and typed up himself.

COURT: Let Mr. Gilmer take a look at that. Maybe that will dispense with a lot of questions. The photograph marked Plaintiff's Exhibit number 10, dated 7/3/68 shows the creek the day after a big hail storm, do you recall that?

A Not specifically, because that has been sometime ago.

COURT: 7/2/68 is the date.

Q Mrs. McCauley, did Mr. McCauley prepare these notes and take these pictures?

A He took all of the pictures. Of course, I am aware and saw the notes but it has been sometime. To remember each one in detail I could not do that.

Q Any objection Mr. Gilmer?

GILMER: No sir.

COURT: We will accept those then as a narrative summary of the pictures as an exhibit. Plaintiff's Exhibit and I think it will help to save time all the way around.

PLAINTIFF'S EXHIBIT Number 30 so marked at this time by the Court Reporter.

Q Mrs. McCauley, would you then generally describe what you observed that the water did to your property? The first time you saw it.

A Yes, we observed it as we have ever since.

Q Do you recall what depth this water was?

A I wouldn't know exactly.

Q Do you recall what width the water was?

A Of course I know what Pat has said about

1 measuring it.

2 Q Do you recall from your personal observation?

3 A I am always there, yes.

4 Q How wide, approximately, from your personal

5 observation would you estimate the water to be?

6 A Well, I would say fifteen to twenty feet but

7 it does depend on the size of the rain.

8 Q How heavy a rain would you need...would there

9 need to be in order to have any water at all moving across the

10 property?

11 A Any shower at all the water will come out of

12 the pipe but as to making a creek on our property it has to be

13 an average size rain but by it being piped off any water will

14 come out of the pipe.

15 Q How far does this water come across your

16 property would you estimate?

17 A It comes across at an angle similar to that

18 over there.

19 COURT: That would be running from east to west

20 would it not?

21 A Right.

22 Q Do you recall Mr. Phillip's doing anything to

23 try to correct this flow of water after it originally came

24 across your property?

25 A I don't think he corrected the flow but he

1 did add the splatter rock and the different things that have
2 been brought out before to delay the water.
3 Q Did the amount of water decrease as a result
4 of that action? To the best of your knowledge.
5 A Not to the best of my knowledge but maybe to
6 delay, it would take more rain to get to us maybe because of the
7 path that it follows. Not much change I would say.
8 Q Do you continue to have water problems today
9 under normal thunderstorms and heavy winter rains?
10 A Yes.
11 Q Is it approximately the same width that you
12 described before, the water itself?
13 A Right, depending on the rain.
14 Q Mrs. McCauley, in what way have you observed
15 your property being damaged or injured by this water?
16 A Well, the drainfilled area stays soggy and I
17 don't like for the children to play in that area. Of course,
18 after the rain and depending on the size of the rain it is wet
19 through there.
20 Q During the rain and if the water is moving
21 across your property do you have any reason to go to any other
22 part of your lot or would you?
23 A Yes, the gate he has between our yard area
24 which is fenced because we have a dog, the gate is right in
25 the middle of where the water flows. I have an incinerator in

1 which burn trash I would have to wade right through it if I went
2 that way.
3 Q Do you recall that you had to get your septic
4 system drained?
5 A Yes.
6 Q Did this eleviate the soggy yard around the
7 system?
8 A For a time.
9 Q Does this soggy condition exist today?
10 A Yes.
11 Q Do you do any gardening personally?
12 A Yes, Pat and I together.
13 Q Has the water affected your garden?
14 A Yes, it washed out approximately the last two
15 rows. We just don't use it anymore.
16 Q Do you recall any other damages that you have
17 suffered, that you personally observed?
18 A Well, I think that has been brought out by Pat
19 but the washing out at the gate and after he filled it in so
20 many times he did put some stone in it and they are visible now
21 as the dirt has washed out. There was a hole right where you
22 would open the gate and then the grass spots that have washed
23 away.
24 Q The damages which Mr. McCauley mentioned, have
25 you personally observed all of those also?

1 A I have.

2 Q Witness with you Mr. Gilmer.

3

4 CROSS EXAMINATION

5 By: Mr. Gilmer

6 Q Ever since you have lived there the water that

7 ran off the Phillips lot was going to run down across you wasn't

8 it?

9 A It didn't in a stream.

10 Q It didn't in a stream but there was no where

11 else for it to run was it?

12 A Water runs down hill but we had no stream.

13 Q The water also runs across your property from

14 the oil company lot doesn't it?

15 A That lays back toward our property.

16 Q It slopes that way so water can't run uphill.

17 And up there where the trailer courts are, that water had to run

18 back to your property didn't it?

19 A The land lays that way.

20 Q That's what I mean, the land lies that way so

21 on a dry dusty day you can tell which way the water would run.

22 The water would run in back of those slopes back of those houses?

23 A Yes.

24 Q The front slopes to the road that comes down

25 in front of your house?

1 A That's right.

2 Q You have only had your septic tank pumped out

3 once in how many years you been using it?

4 A I suppose it was ten years and we had it

5 pumped.

6 Q How many years have you lived there?

7 A Since 58.

8 Q That's all.

9 COURT: You may stand aside Mrs. McCauley.

10 Witness stood aside.

11

12 CARLOS COGGINS, Having been duly sworn testified

13 as follows:

14 DIRECT EXAMINATION

15 By: Mr. Peatross

16 Q Mr. Coggins, would you state your name and

17 address for the court please?

18 A Carlos Coggins, 109 Valleydale Drive, Lynchburg,

19 Virginia.

20 Q What relation do you bear to Mr. and Mrs.

21 McCauley?

22 A Brother-in-law. Mrs. McCauley is my wifes

23 sister.

24 Q Mr. Coggins, did you have an occasion to visit

25 with your brother-in-law when they first moved to their present

1 location?

2 A Yes I did.

3 Q Did you have occasion to walk out in the yard?

4 A Yes I did.

5 Q Did you have occasion to observe the landscape

6 of the area including their yard and around it?

7 A Yes I did.

8 Q Would you describe to the court what you

9 remember seeing?

10 A I remember the area in yellow on the chart over

11 here, I guess it was the northeast portion and it was in tall

12 grass the first time I ever saw it. Now, the area that is north-

13 west, in the lower portion had trees on it and a barn.

14 Q Do you ever recall seeing any water flowing

15 off of that property onto the property of your brother-in-law?

16 A No I did not. There is a general slope or it

17 could be described as a general slope, it would take another

18 five foot area to build it up in the back for that distance.

19 Q Do you by chance remember when Phillip's

20 Building Supply moved on that property?

21 A I would not because we have lived in North

22 Carolina and for several years we have lived in Lynchburg and we

23 only make visits back and forth and I don't remember the year.

24 I remember when it was built but I have no idea when it was.

25 Q Do you remember observing any improvements made

1 to the southwest portion of the Phillips Property where the
2 filling in took place?
3 A Yes I do.
4 Q Were you there at the time the filling in
5 occurred?
6 A I was there shortly after.
7 Q Had any pipe been installed at that time?
8 A Yes it had.
9 Q Did you have an occasion to observe....strike
10 that. Up until that time had you ever known or seen any water
11 problem in the area on that property after Phillip's had moved
12 on it?
13 A No, I had not. In fact, many times when we
14 visited, especially in the summertime, we played croquet
15 on the area that now would be to marshy to play on.
16 Q But you played croquet there?
17 A Very definitely.
18 Q Was this after Phillip's was built?
19 A No, that was before.
20 Q You didn't observe any water problems at all?
21 A No sir.
22 Q Did the court for the croquet playing go over
23 the septic system of the property?
24 A Yes it did. In fact, the area we played croquet
25 is there in the area of the arrow.

1 Q After the improvements which we mentioned a
2 minute ago were made to the southwest portion of the Phillip's
3 property did you observe any water problems when you visited
4 with your brother-in-law?
5 A Yes I did. I don't know the date but I do
6 remember one occasion specifically. It was during the summer,
7 I do know this and it was rather late in the evening and a storm
8 came up and the rain came. In a half hour we were out in the
9 yard and under his porch and he remarked that we would see it
10 come out of the pipe shortly. It wasn't long until he and I
11 were out and at that time the water, I did see it coming out
12 within two inches of the top of the pipe. It was spurting out
13 at least six or eight feet. That was before any splash barriers
14 were made.
15 Q Do you recall observing the movement of this
16 water across Mr. McCauley's property?
17 A Yes I do.
18 Q Would you describe that for us?
19 A At first it spread on the oil company property
20 and continued spreading and of course came into my brother-in-
21 laws property. I don't remember the width, I would say it was
22 at least ten or fifteen feet in width.
23 Q Do you recall how deep it was? Did you wade in it?
24 A We didn't wade in it as I recall.
25 Q Have you had occasion since that time to visit

with your brother-in-law and where any water problem was apparent?

A I was up one time last summer and water was running in his garden. I didn't keep a mental recording of this but I did see water running in his garden last summer. I didn't go up and look at the pipe but I do specifically remember seeing water in his garden. I was also up the week before Easter this year and it wasn't raining and hadn't rained in several days but I was out in the yard walking around myself and almost mired down before I saw it.

Q What condition then would you describe Mr. McCauley's lot, in what condition would you describe it as being in now?

A He had a very nice lot I thought before this. As I said, we enjoyed playing games in the back, playing with the kids and playing croquet and so forth and of course I also remember the rock garden they had in the same area at one time. Now, it cannot be used for either of those.

Q Have you noted any specific damages which have occurred to the McCauley land?

A Well, I have certainly seen the potholes and the erosion of the garden.

Q Have you noticed anything else specifically that has changed?

A Not specifically.

Q You did mention something about when you did play croquet?

A You can definitely no longer play croquet there for several days after it rains. As I said, when I was here the week before Easter, I believe it was the week before, it had been several days since it had rained and I mired down in the same area.

Q Do you know why this particular area is soggy and is unuseable as a croquet course now?

A Because of this water that has been dumped on this property.

Q Is his entire yard soggy or murky or just one particular area?

A Just the area on which the water flows.

Q Are you aware of the land structure down below the garden?

A Yes I am.

Q Has there been any change in this particular area as to water problems that you can recall?

A I remember that we use to cut across the stream on a little bridge he had and I remember the last time we were up, the week before Easter, my little boy got lost in the woods and I went over to see if I could find him and the bridge was no longer there. It has been washed out.

Q Witness with you Mr. Gilmer.

CROSS EXAMINATION

By: Mr. Gilmer

Q When you first knew of that property, all of the land shown there as Phillip's drained down towards the McCauley property didn't it?

A I say at that gradual slope, yes.

Q The rear of the lot marked in black also sloped that way didn't it?

A Yes sir.

Q And the back of all those lots up there on the eastside of Phillip's property sloped that way didn't they?

A I don't know that much about how long there lots are or how wide but I would say that a good portion of their lot slopes the other way.

Q Some slopes each way?

A Right.

Q There was a low place in the Phillip's Property where it sloped both ways from both east and west wasn't it?

A Right.

Q That's all.

COURT: You may stand aside, thank you.

Witness stood aside.

PEATROSS: Your Honor, Plaintiff's rests.

COURT: All right, Mr. Gilmer.

GILMER: All right, Mr. Phillips.

1 FOREST A. PHILLIPS Having been duly sworn testified
2 as follows:
3 DIRECT EXAMINATION
4 By: Mr. Gilmer
5 Q When did you start in business at this location?
6 A December 20, 1965.
7 Q What was the condition of the property when you
8 started there?
9 A It was just a big lot and the back part sloped
10 very bad towards Mr. McCauley's property.
11 Q Your name Mr. Phillips?
12 A Forest A. Phillips.
13 Q Now, how did the property fall to the east and west
14 of your slope?
15 A It falls very fast, you say east and west?
16 Q East and west of your property?
17 A My property is about level land.
18 Q Yes sir but I mean when you first went there.
19 How did the land to the east and west of you slope?
20 A Well, it was lower on the east than it was on
21 the west.
22 Q Did any water west of your property drain into
23 it?
24 A Yea.
25 Q The water from the east, how did that drain?

1 A That's draining back into it to through the
2 center of the property.
3 Q Has anything been done there to increase the
4 water shed that flows down toward the McCauley Property?
5 A The water would normally go to the south.
6 Q Have you done anything to cut or change the
7 normal direction of the water flow?
8 A No sir, none whatever.
9 Q Now, you and your son own and run that business
10 I believe?
11 A That's right.
12 Q Now, have you....has your business grown since
13 you have been there?
14 A Yes it has.
15 Q Has it necessitated more buildings?
16 A Yes.
17 Q How about storage areas?
18 A We have a storage shed.
19 Q Now, you did put in a pipe there. In what area
20 does that pipe drain?
21 A You mean the length.
22 Q Describe the area, what part of your land is
23 drained into that pipe?
24 A That pipe drains the front side of our building
25 to the north of our building.

Q That water normally runs to the south does it not?

A That's right.

Q So, you had to put a pipe in there I believe to keep it from running through that building, didn't you?

A That was the only way we could do it.

Q Now, have you made a calculation of the area that drains into that pipe?

A Yes, roughly 19,000 square feet.

Q How many square feet in that property?

A Approximately 121,000 square feet.

Q Do all the gutters from your buildings empty into that pipe?

A No sir, not but two of them.

Q How near full have you seen that pipe running in hard rains?

A The fullest I have ever seen it was about three inches.

Q Have you ever seen it over half full?

A No sir, I never had.

Q Have you looked at it after rains and when it was raining?

A I have in daylight.

Q Have you looked at the property as shown on the map as the oil company property?

A Yes I have looked at it.

Q Have you seen any washing, draining or cutting on that property?

A None whatever.

Q The water from your place does cross that property doesn't it?

A Yes.

Q How defused is the water that crosses that property? How wide an area does it cross?

A I imagine spreaded out about six feet.

Q How wide is it where it enters the McCauley property?

A Probably six feet or less.

Q Is there any ditch cut on the McCauley property?

A None that I can see.

Q After suit was filed, did you get a group of men to, one at a time, look at the McCauley Property for damage?

A I did.

Q Did you get any reports of damage whatsoever?

A None whatever.

Q I believe all that area shown there is for business and is actually occupied mostly for business isn't it?

A That's the way I understand it.

Q Now, I believe you all first got a letter about April of 68?

1 A That's right.

2 Q Threatening you with a suit?

3 A Right.

4 Q Did he say anything about buying the property

5 before giving you that letter?

6 A Yes, Mr. McCauley came in the office and asked

7 me if I wanted to buy his property and I said no and he said,

8 well I haven't any choice but to hand you this and he had that

9 letter dated April the ninth, 1968.

10 Q Was there any way at that time that you could have

11 used his property?

12 A No sir, I don't think so.

13 Q At that time did you own enough land for your

14 business?

15 A Yes sir.

16 Q Since then have you bought any adjoining

17 property?

18 A Yes sir, we bought two other pieces of property

19 that joins.

20 Q Now, did they sue about this property. Did

21 McCauley sue you once before?

22 A He entered a suit once before in 68.

23 Q Was that suit ever tried?

24 A No sir.

25 Q How close to the trial date was it dismissed?

A Within one day.

Q Have you any malice towards the McCauley's?

A None whatever.

Q Have you ever knowingly done anything to try to injure?

A No sir I haven't.

Q Would you try to injure?

A No sir I wouldn't.

Q As a businessman have you tried to cultivate goodwill?

A I have.

Q All people?

A All people.

Q Do you have any smoke on your property?

A No sir.

Q What do you do with your refuge?

A We haul it away.

Q About the time they filed suit in 68 was any of the tall grass cut extra short?

A I...not that I know of.

Q Now, what have you done to try to keep the water from your property from damages?

A Well, I put the ties across the fence, put rocks there and up on the bank where we put the fill I put board across there and put rock on it.

Q Did you put anything at the mouth of the pipe?

A Yes, I put ties, built a crib and put rock in it.

Q Did you put anything on the line between the oil company property and the McCauley's Property to check the water?

A On the oil company?

Q Yes sir.

A I didn't put anything on the oil company.... yea I put them ties down the fence.

Q Down the fence between the McCauley's and the oil people?

A Between us and the oil people.

Q Did you ever put anything on the fence line between the McCauley's and your property?

A No sir.

Q Has there been any washing of red mud or anything from your property that you know of?

A No sir, none that I know of.

Q Have you seen any channels cut in the fill you put on the southend of your property?

A No sir.

Q Have you had anybody suggest anything that you haven't done that you thought would reduce the force of that water going on the McCauley's property?

A No sir. I haven't had anyone to tell me anything that I haven't done.

Q Now, what water runs on the McCauley Property besides that originating on your property?

A Water off the Ward's Trailer Sales, the motel and the Eastside Coast all runs down into that ravine.

Q Has it been running down there ever since you knew the property?

A Yea, as far as I know.

Q How about on the west side, does any water from there run down there?

A Yes, on the west side water does come off of that property.

Q Comes off the other property, runs on yours and then runs on down to the McCauley's?

A That's right.

Q Now, has the pipe that they are talking about ever increased any cause for the water to flow on the McCauley's Property that wouldn't otherwise go on there?

A No, I don't think so.

Q What is your address Mr. Phillips?

A 800 Park Street.

Q Your land is in the area of the cities proposed annexation isn't it?

A It is.

Q Do you know of anybody that's doing any active farming within a mile of your property?

A No sir I do not.

Q Have you known anybody to do any farming there since you put your business up?

A No sir.

Q Witness with you.

CROSS EXAMINATION

By: Mr. Peatross

Q Mr. Phillips, when you purchased this property on Route 29, did you notice any water running downhill after you moved on to it.

A Yes, after we moved onto it water was running downhill.

Q In concentrated form?

A Not in concentrated form, no.

Q In any type of creek or stream?

A Yes, that property had a ravine just about in the center of it.

Q How wide a creek or stream did you observe down that property?

A It depends on how hard it rained.

Q Well, on a normal thunderstorm summer day.

A Well, three or four feet wide.

Q Have you ever observed water running down the McCauley's Property?

A Yes, the water has run down on the McCauley's.

Q Have you ever observed water running across his property?

A Yes.

Q How wide?

A It has been spreaded out to six feet.

Q Why did you have an occasion to be down there looking at his property during a thunderstorm or afterwards?

A I operate a business and I have occasion to go down to check in on what I have got in.

Q This southwest property that has been filled in and graveled off as a lumber yard, did you observe water prior to that time running down on Mr. McCauley?

A Yes, it's been running down there.

Q Do you remember any specific dates or times this occurred?

A No, I do not.

Q Did you receive any complaints from Mr. McCauley concerning water running on him at that time?

A No sir.

Q How much of a southern portion of your lot was open field before you constructed this last storage lumber lot?

A About 300 feet by 150 feet.

1 Q And you are saying water ran over that property
2 and was not absorbed by that property, is that right?
3 A Well, it's possible.
4 Q It's possible?
5 A Yes, that's in back of the shop and has gravel.
6 Q You stated that approximately 19,000 square
7 feet of your lot is drained by that drain, the northwest portion
8 of your property by the office, is that correct?
9 A Including the roofs and the area in front, it's
10 about 19,000 feet.
11 Q Off of what buildings does water drain into
12 this drain?
13 A Off of the left side.
14 Q Does water also drain to the catch basin behind
15 the warehouse to a mineral drain in back of the McAllister
16 Property?
17 A It drains over past the McAllister Property.
18 Q Does any other water collect in this eight
19 inch pipe that goes down to the McCauley's?
20 A There is possibly some from the McAllister
21 Property.
22 Q Have you done any other recent work to your
23 property in the way of improvements, to the southwestern portion
24 of your lot?
25 A I haven't done anything to the southern end of

1 it except what I done in 1968.

2 Q Have you done any clearing to the southeast of

3 that lot?

4 A Yes.

5 Q What did you do with the debris and trees that

6 you cleared?

7 A Well, the stuff is laying there on the yard

8 and the logs are laying there on the yard.

9 Q Does this cause any water problem that you

10 know of in the road?

11 A As far as we know it didn't, we used caution as not

12 to do it.

13 Q Did you make any observation of any work that

14 Mr. McCauley had to do?

15 A No.

16 Q You have heard Mr. McCauley testify to certain

17 thunderstorms in the summer of 1968. Did you personally observe

18 any effect of those storms?

19 A Well, I guess after some of them I went and

20 took a look.

21 Q And you stated that at that time or the time

22 you observed water running across the property at never anymore

23 than six feet in width?

24 A I would say so.

25 Q Do you have any estimation as to the depth

1 of that water that you observed coming down hill?

2 A No more than two or three inches the way it

3 was spread out.

4 Q Have you personally visited on the property of

5 Mr. McCauley and walked over this land where this water is

6 traveling?

7 A I have not.

8 Q Have you observed anything that has happened to

9 the garden area of his lot?

10 A I have not.

11 Q Have you ever observed him doing any gardening

12 work in that area?

13 A No, I have not.

14 Q How often would you estimate that you have an

15 occasion to go down there and look at the McCauley Property?

16 Prior to the time the water problem arose, that he has complained

17 about.

18 A I see it practically every day.

19 Q Is this since the water problem has come about?

20 A No, just normal times. I go down and never look at it.

21 Q You go down a lot of times and never look at

22 his property?

23 A I don't go to look at his property.

24 Q My question was, how many times you have

25 occasion to go down there and observe his property at all. I

1 am directing my question prior to the time that the pipe was
2 installed. Did you have any occasion whatsoever to go down and
3 look at his property?
4 A Yes, I went down there several times and looked
5 at it. I wanted to try and see what was happening to it.
6 Q This was prior to the time Mr. McCauley was
7 making any complaint to you about any water problem. Did you
8 have an occasion to go down and look at it?
9 A I looked at it when he made a complaint.
10 Q You didn't look or observe the property later
11 on?
12 A No.
13 Q Since the pipe was installed and since the time
14 he made the complaints, have you had occasion to go down and
15 observe his property?
16 A I have been down there various times and looked
17 to see if I could see any damages.
18 Q And there was nothing visible that you saw
19 causing him injury or damage?
20 A None whatever.
21 Q Have you had occasion to take pictures of the
22 property around Mr. McCauley's property?
23 A I haven't. My son has taken quite a few.
24 Q When you were improving your property in this
25 southwest portion where you were filling in and constructing the

drainpipe did you ever consult Mr. McCauley about the drain system?

A No I did not.

Q Were you aware of any potential water problems that might exist.

A No, because I was trying to take precautions not to do Mr. McCauley any damage. I didn't want to harm it.

Q So, as far as you knew, the fact that you collected this water and channeled it down to that pipe you didn't see any possibility that damage or water problems could occur on the McCauley Property?

A No, none whatever.

Q No further questions.

REDIRECT EXAMINATION

By: Mr. Gilmer

Q Mr. Phillips, your business there, what type of business are you carrying on?

A Retail lumber business.

Q Do you have a mill there?

A Yes, we have a small mill.

Q How many people do you employ?

A We have got about 27.

Q What volume of business do you do a year?

A About a million and a half dollars.

Q Has the business grown since you have been there?

A It has.

Q Grown every year?

A Yes sir.

Q Now, people come there and buy at your place or do you deliver stuff to them?

A They come in and buy it and we deliver it after they buy it.

Q How many trucks do you have that deliver?

A We have eight trucks.

Q That deliver?

A That's right.

Q That's all.

COURT: Mr. Phillips, just a couple of questions I would like to ask you. Now, if your lot had not been changed by grading, how close to the low point in the lot would the present drain pipe be? Is that placed anywhere in the low point of the lot?

A It's probably within eight feet of it, something like that and where the drain pipe hits the water slopes back then to a point and it goes through the fence at the same spot that all the other water goes and always did.

Q If you had not changed the grade of your lot by any addition to fill dirt or by fill dirt or any change of moving other dirt, the water which was not absorbed would have

been discharged in the same direction as the pipe now discharges?

A That's right. We haven't changed the location of the water going off the other property.

Q What has been changed mostly is the rate of absorption of the water into the ground isn't it?

A I think that's it.

Q So more water is being discharged off of your property than previously because of the change in absorption?

A I would think so.

Q But part of your lot is not paved and does absorb some of the surface water?

A That's right. About 300 feet of it is not asphalt.

Q Any further questions by counsel. You may stand aside.

Witness stood aside

Lunch break. View of the property taken immediately after recess for lunch.

COURT: All right, Mr. Gilmer. Let the record show at this point that the court has taken an extensive view of the property of both the complainant and the respondent having gone on the property with counsel for both parties and the proceedings are now continuing on the basis of the evidence to be presented by the respondent.

1 GILMER: I have a plat and it's his right at the
2 intersection of 29.
3 COURT: No objection to this being introduced Mr.
4 Peatross?
5 PEATROSS: No your Honor.
6 COURT: Be admitted as Respondents Exhibit 1.
7
8 RESPONDENTS EXHIBIT 1 so marked at this time by
9 the court reporter.
10
11 RAYMOND R. PHILLIPS, Having been duly sworn
12 testified as follows:
13 DIRECT EXAMINATION
14 By: Mr. Gilmer
15 Q You I believe are Mr. Ray Phillips?
16 A Raymond R. Phillips, 2503 Northfield Road.
17 Q You are the son of Forrest Phillips, who
18 testified before lunch?
19 A That is correct.
20 Q You and he together conduct the Phillip's
21 Building Supply?
22 A That is correct.
23 Q How long have the two of you been in business
24 there together?
25 A Since December of 1965.

Q Has your business grown?

A Yes sir, considerably.

Q Now, what kind of business do you all do there?

A Building materials, retail building supplies.

Q How many do you employ?

A Between 25 and 28.

Q About what volume of business do you do a year?

A Over a million and a half.

Q How many delivery trucks do you have?

A Seven or eight.

Q Do you do all you can to build up goodwill for the company?

A Yes sir I do.

Q Have you ever done anything willfully on purpose to injure Mr. McCauley?

A No sir.

Q Have you done anything to try to prevent injury to him?

A I don't know of anything we have done to him.

Q What did you do at the mouth of the pipe?

A We put splash rock, put ties up and put rock in it to spread the water on the oil companies land.

Q Is that effective to spread the water?

A Yes sir, it sure is.

Q How wide would you say it spreads it?

A Eight to ten feet.

Q Do you know of anything more you could do to minimize the wash of the water on the building supply property?

A No I do not.

Q What did you do along the trench line there?

A We put planks along the fence line to try to catch any silt and slow the water up.

Q Did you do anything to the slop of your property to keep it from washing?

A Yes sir, we put rock and seeded in it grass.

Q Did you plant the honeysuckle on the southend or did this just come up natural?

A It came up naturally.

Q Have you all, since you have been there, done anything to increase the area of the drain onto McCauley?

A We paved the drive, the area that is blacktoped around the building.

Q Of course that prevented the absorbing of water so more run off but have you done anything to increase the area that drains on the McCauley's?

A No sir. Water always runs down hill.

Q Any water run down there now that may not have run down there then?

A No sir, the land has always sloped downhill.

Q When you all bought that property, how did the

1 water run?

2 A To the south.

3 Q Did it run from the east and west to that

4 central area?

5 A East and west it would come into a slope into

6 a little valley.

7 Q Was there a stream down that valley or not?

8 A Pardon.

9 Q Was there any running water down that valley?

10 A Not on our property.

11 Q After rains?

12 A After rains, yes sir.

13 Q It didn't set after a rain?

14 A No sir.

15 Q Did that water running down the valley do any

16 cutting?

17 A It washed gravel.

18 Q How wide was the stream there before you all

19 filled in? When the rain would come?

20 A Oh, maybe a foot.

21 Q When you put the pipe in, how close did you put

22 it to where that drain had been before?

23 A Within a foot.

24 Q Do you agree with what your father testified to

25 about the notice in April from Mr. McCauley?

A Yes.

Q About the suit filed and dismissed?

A Yes.

Q The first suit in 1970?

A Yes.

Q And the present suit in 72?

A Yes.

Q Did you do anything to avoid that hearing of 1970?

A No sir, we were ready to go to court. We wanted to get it over with and settled.

Q When were you notified that the case wouldn't be heard?

A The day before we were suppose to go to trial.

Q Since you got that threat of a damage suit in 68, have you watched the McCauley Property?

A Yes.

Q Have you at anytime seen any washing on that property?

A No.

Q Have you seen any place where it silted?

A No.

Q Have you made any calculation about the precentage of water that flows on the Phillips Property and runs through that pipe?

A On a square foot basis, about 20,000 square feet.

Q Out of how many thousand?

A 121.

Q Does the rest of it run across in a stream or percolate over the whole bank?

A Over the entire area. We have gutters on the left side of the building that go down on the east side towards 29. All of that runs on its own directly towards Mr. McCauley's Property, which is not in a pipe?

Q How wide is that water when it leaves your land and goes on the oil company property?

A About two feet.

Q From the extreme east point to the extreme west point, where it runs down that bank is only two feet?

A You mean on the oil company property?

Q I mean, how wide an area you front on the oil company about how many feet, 150?

A 150.

Q Over how much of that 150 feet does water run on your property onto the oil company property?

A 55 feet.

Q Now, when it leaves the oil company property about how wide is it?

A About three feet wide.

Q Then after it gets on McCauley, how wide is it?

A It spreads out to somewhere between 10 and 15 feet.

Q Do you know of any farming land within a mile of that land?

A No, I do not.

Q What do you do with the shavings and sawdust?

A Haul it away.

Q You don't burn anything on the premises?

A No sir.

Q Did you notice the way McCauley was cutting his grass during the summer of 1968?

A Yes sir. I took a picture of Mr. McCauley cutting the grass in the path where the water runs and he cut it down to the bare earth.

Q Now, do you have a picture to show?

A Yes sir.

Q Any other pictures showing that bare spot?

A Yes sir, there is some there.

Q Did you take that picture?

A Yes sir, I have taken all of those pictures.

Q I hand you here a picture of the plant. Is that the way of the original soil?

A Yes sir.

Q I hand you a picture and ask you for the date

of that one?

A August 3, 1968. I took it.

Q Does that show a change?

A It shows that we have put the rock in and the splash block.

Q Here is one, what is the date on that picture?

A September 15th.

Q Is that the way it looked on that date?

A Yes sir.

Q When the water came out of that pipe how full have you ever seen that pipe?

A Possibly half full.

Q Have you looked at it during and after hard rains?

A After hard rains I have gone down there since this situation arose.

Q Have you ever seen any erosion from that pipe, water coming out of that pipe?

A No sir.

Q Has it cut any holes where it dumps out first?

A No sir.

Q Have you seen any place where it has cut through the oil companies property?

A No sir.

Q Now, before it left the oil company property

what water mixed with it.

A You have got water from the east which is the trailer property, you had the Mimosa Motel water coming from the east and the oil company off the otherside.

Q Did any come from the west of your property?

A We got water from the Bolling Property, the McAllister Property and the Black Property.

Q Did you have a number of men look at that property after getting notice in 68 about damages?

A Yes we did.

Q Anyone of them report anything?

A No sir.

Q I want the judge to see these.

COURT: Mr. Gilmer, I have already received, I assume you have asked for these to be admitted into evidence, defendant's exhibits 2, 3, 4 and 5. Is there any objection to those Mr. Peatross?

PEATROSS: No Your Honor, no objection.

COURT: Be admitted as defendant's exhibits and what number do you have being proposed at this point? Six through forty-seven.

DEFENDANT'S EXHIBITS 1-47 so marked at this time by the court reporter.

A Defendant's exhibit number 6 was taken February

1970, it shows the pipe with the splash block installed, the oil companies land and Mr. McCauley's Property.

Q I hand you Defendant's Exhibit 7 and ask you what that is?

A That is a picture looking back towards the bank which has been filled in and the path where the water comes through the fence.

Q Now, . . .

COURT: Any objection to those Mr. Peatross?

PEATROSS: No Your Honor, I have seen them.

COURT: Admitted as Defendant's Exhibits six and seven.

Q I hand you here Defendant's Exhibit number 8 and ask you what that is?

A This is a picture taken on 2/14/72, a picture of the McCauley Property looking towards to the north.

Q What is that there?

A 2/14/72, that's the date.

Q What's the date of that one?

A This is 3/17/72 showing the water coming out of the pipe.

Q That's exhibit number 9.

COURT: Any objection to these Mr. Peatross?

PEATROSS: No, your Honor.

COURT: 8 and 9 be admitted.

A This is exhibit 10 taken on 3/10/71. It shows the path of the water. The path the water would take across his property.

Q Does it show any washing?

A No sir.

Q There is exhibit number 11.

A This was taken April, 1972 of the oil company property where the water runs across and there is no visible signs of washing.

Q Exhibit 12, explain that for me.

A This is dated 4/13/72, this is a picture where the water runs across the oil company property looking directly into the back of Mr. McCauley's house, at the point where the water enters.

Q Defendant's Exhibit number 13.

A Exhibit 13 was taken on 4/13/72. A picture of Mr. McCauley's garden which he apparently had just plowed recently. It also shows a brush pile where it appears that water has run into.

Q Is the garden spot washing there?

A No sir.

COURT: All right, we have defendant's exhibit 10, 11, 12 and 13. Any objection to these Mr. Peatross?

PEATROSS: No Your Honor.

COURT: Be admitted.

Q Here is exhibit number 14.

A Taken April, 1972. This is a picture of Mr. McCauley's house and the path the water flows across. There is no apparent wash.

Q Here is exhibit number 15.

A This was taken on 2/14/72 of the oil company property and there is no wash there.

Q Is that where the water crosses from your property?

A That is correct.

COURT: Any objection to exhibits 14 and 15?

PEATROSS: No, your Honor.

COURT: Be admitted.

Q Number 16?

A That is taken on the oil company property looking back towards Phillip's Property where the splash rock is and where the water would flow?

Q Any washing?

A No sir.

Q Now,....

COURT: Does that conclude the pictures?

GILMER: No sir. We have several more of them. I hand you exhibit 18, what's that a picture of?

A It's dated 4/12/72. It's standing above our bank overlooking the oil company property and the corner of Mr.

1 McCauley's Property where the water would go. There is no
2 visible sign of wash.
3 Q Exhibit number 17, what is that?
4 A This was taken on 2/3/72. It was raining
5 considerably. It's a picture of our property where the water is
6 running downhill around our lumberyard.
7 COURT: All right, I have got before me exhibits
8 16, 17 and 18. Any objection to these Mr. Peatross?
9 PEATROSS: No Your Honor.
10 COURT: Be admitted.
11 Q Here is number 19 and I ask you what that is?
12 A Taken February 26, 1970, it's standing on our
13 property overlooking the oil company property and part of Mr.
14 McCauley's property. No visible signs.
15 Q Exhibit number 21.
16 A Taken 2/14/72. A picture of Mr. McCauley's
17 garden before it was plowed up.
18 Q Any visible evidence of washing?
19 A No sir.
20 Q Now....
21 COURT: Any objection to exhibits 20 and 21?
22 PEATROSS: No Your Honor.
23 COURT: Be admitted.
24 Q I show you number 19 and ask you what it is?
25 A This was taken on 10/30/68. It is to the left

of the splash rock and it shows water coming from the east. This was before we put up a chainlink fence.

Q I show you exhibit 22.

A This was taken 4/12/72. It is a picture looking back towards Mr. McCauley's house towards the east across the creek towards the shed.

Q The creek runs down the west side of Mr. McCauley's house?

A That is correct.

COURT: Any objection to exhibits 19 and 22?

PEATROSS: No Your Honor.

COURT: Be admitted.

Q Here is 23.

A That's taken on 4/2/72. Looking across Mr. McCauley's property towards the gate. No signs of any washing.

Q Number 24.

A That is looking back towards Mr. McCauley's Property towards the east and across the ravine where the creek runs.

Q None of that water gets to the creek from your house until it gets beyond the McCauley's house?

A Beyond the little shed.

COURT: Any objections to exhibits 23 and 24?

PEATROSS: No sir.

COURT: Be admitted.

1 Q Here is exhibit 25, would you tell the Judge
2 what that is?
3 A That is also looking across the creek back
4 towards our area where the path of the water would come and the
5 brush pile which possibly dams the water up.
6 Q Number 26, what is that?
7 A That's a picture of Mr. McCauley's back yard
8 taken on 4/13/72.
9 Q Exhibit number 27.
10 A That's on the oil company property right at
11 Mr. McCauley's property looking back towards where the water
12 would come through.
13 Q Exhibit 28?
14 A This was taken on 10/30/68 before we put the
15 splash in, we had railroad ties along the fence to hold the
16 water back.
17 COURT: Any objections to exhibits 25,26,27, 28?
18 PEATROSS: No sir.
19 COURT: Be admitted.
20 Q 29?
21 A This is on the southend of the land that has
22 just been excavated, volkswagen property, across the oil company
23 and back towards the Phillip's Property.
24 Q Here is picture number 30?
25 A This was taken 2/3/72. It shows water other

than coming out of the pipe. Coming from the east.

Q Here is exhibit number 31?

A This was taken on 2/3/72. It had been raining and I just took the picture of Mr. McCauley's property where the water runs across.

Q Number 32.

A This was taken on 2/3/72. It's a picture of the eastside of our lumberyard showing the water that is running downhill and not in a pipe.

Q Is that before it gets to the pipe?

A Yes sir, that's before it gets to the pipe.

COURT: Have you seen all of the photographs?

PEATROSS: Yes sir I have.

COURT: Any objection to any of them?

PEATROSS: No sir, no objection to any of them.

COURT: I'll admit them as Mr. Gilmer introduces them then without objection on the part of the plaintiff's counsel.

A This was taken 9/26/68. It shows water on the otherside of the chain fence which comes off of the trailer company and it's running south, downhill.

Q Running in the direction of the McCauley's Property or away from it?

A It's running down, it's a natural curve.

Q Exhibit 34.

A This was taken 3/17/72 and it shows the path of the water going across the oil company and partially Mr. McCauley.

PEATROSS: Your Honor, I have no objection to these pictures but unless there is some specific point I can't see going through each one of them.

COURT: It looks like to me we are getting to the point of being repetitious, how many more do you have Mr. Gilmer?

COURT REPORTER: Forty-seven.

COURT: All right, get those in and we will consider those. I think we are getting a lot of duplication.

Q This is exhibit 47.

A Taken 6/6/68. It's before we put the splash rock in and it shows the oil company and Mr. McCauley's property. No signs of washing. This is taken 3/14/72, exhibit 45 and it is up on the hill from the oil company looking down into the ravine where the water runs and Mr. McCauley's Property?

Q Exhibit 46.

A Taken 9/15 and it is the back view of the Mimosa Motel showing where the gutters run off of the house and run back toward their property and eventually end up on the oil company property and onto the McCauley Property?

Q Does that go into your pipe before it goes on the McCauley Property?

A It does not go in our pipe.

Q No sir but does it blend after....

A It blends on the oil company property.

Q It doesn't come on your land and it doesn't go in your pipe?

A It comes across our land.

Q Here is exhibit 35.

A That's a picture of the oil company and Mr. McCauley's property looking toward path of water.

Q Number 36.

A That's a picture of the splash rock and the path of the water across the oil company and Mr. McCauley.

Q Exhibit 37.

A That's just a picture of the splash with the rock in it, looking on top of it.

Q 38?

A That's a picture of the bank and the splash rock and the honeysuckle up over it.

Q 37?

A That's a picture of the splash rock and the oil company property.

Q Exhibit 40.

A That is the oil company property looking back toward our bank where the water would come through.

Q Exhibit 44?

A That's looking at the oil company property and

1 Mr. McCauley's Property where the water would come through.

2 Q Number 43?

3 A That's looking over the oil company property

4 and the path where the water would go.

5 Q Number 42?

6 A That's a picture of Mr. Gilmer standing in the

7 splash rock and the oil company property and there is no sign

8 of wash on the oil company property and that was taken last

9 Friday.

10 Q Am I standing just about in front of the pipe?

11 A Yes sir.

12 Q Here is picture 41?

13 A That is taken right at the fence where the

14 water comes through.

15 COURT: Is that all the pictures?

16 GILMER: Yes sir.

17 COURT: Allright, the pictures then that have been

18 introduced then, in case we have missed any will be admitted as

19 defendant's exhibits 1-46, one through 47. I know we have a

20 lot of repetition in here.

21 Q Why did you put in the splash rocks and ties

22 and large rocks?

23 A To spread the water when it came out of the

24 pipe and slow it down and when it left our property to go out

25 in the same force that it originally would go out.

Q Have you discussed the best way to slow down water and spread it out with people?

A Yes sir.

Q Has anybody been able to suggest anything better than your method?

A We have talked to numerous contractors and they think this is the only solution and they don't know how to make water run up hill.

Q Witness with you.

CROSS EXAMINATION

By: Mr. Peatross

Q Mr. Phillips, you stated that prior to any improvements on the southern part of your lot you had noted this water running downhill, is that correct?

A What do you mean prior to the time...

Q Prior to the time the pipe was installed on the back part of your lot?

A We had a lumberyard on the lower part of that lot before we filled it in.

Q Did you notice any water running down there?

A Yes.

Q You stated that it was about a foot in width, is that correct?

A Yes.

1 Q Did you notice how far this water went down-
2 hill?
3 A It went downhill but I didn't pay any attention
4 how far it went.
5 Q Did you ever see it cross the McCauley's
6 Property?
7 A I never paid any attention to it until we were
8 served notice on it.
9 Q When he served notice on you, is this the notice
10 you are speaking of on 9 April, 1968?
11 A Yes.
12 Q In that notice he wasn't actually complaining
13 of any water coming down on him at that time but the possibility
14 of such, is that correct?
15 A I believe his letter said we were concentrating
16 water on him.
17 Q Didn't the letter say that in the event of a
18 good rain the water would come? He wasn't complaining about the
19 water coming on him at that time was he?
20 A I....
21 GILMER: I think the letter speaks for itself Judge.
22 COURT: I think it speaks for itself. That would
23 not be anything other than intrepretation of the letter and I
24 think it is unnecessary to go into that Mr. Peatross, it's
25 covered in the letter itself.

Q Mr. Phillips, you stated that approximately 20,000 square feet of the property collects this water which you channel into this pipe and you stated that included the front paved area. How many buildings does this cover in square feet also?

A It covers the office, which half of the roof which is 50 by 50, it covers the other part of the building which is 120 feet long.

Q Does it cover any part of the warehouse behind the office?

A It covers part of it, yes.

Q These buildings are included in your statement of 20,000 square feet of area that collects this water?

A Yes.

Q I notice that a number of your pictures were taken during 1972. In your opinion, would you call this an exceptionally rainy spring or had it been an exceptionally rainy winter?

A I think we have had right much rain, yes.

Q Have you ever seen the water that moves across the McCauley's Property after a normal thunderstorm?

A Yes.

Q Have you ever seen it after a heavy winter rain?

A Yes.

Q Would you say we have had those type of rains this year?

A Yes.

Q Do any of your pictures indicate any water moving across the property after such a rain?

A Yes. Some of the pictures there show where the water run across.

Q How much water does that picture show run across?

A I'd say the path was about four or five feet.

Q Any estimate as to the depth of that water?

A No.

Q Mr. Phillips, I show you Plaintiff's Exhibit number 10, which is a picture of water moving down through Mr. McCauley's Property. The picture was taken on the 3rd of July, 1968, have you ever seen water moving down across that property in that fashion?

A Not in that fashion, no sir. I could not have come out of the pipe that much to do that.

Q I show you a picture taken on 7/13/68 which is Plaintiff's Exhibit 15 showing the pipe that Phillip's constructed and water gushing out of it. Have you ever seen water come out of it in that fashion before?

A Yes.

Q What was your estimation, the amount the pipe

is filled up with water as it's coming out there.

A I'd say about half. There is water coming around each side, all of it isn't coming out of that pipe.

Q I show you Plaintiff's Exhibit number 9 taken July 3, 1968, it shows the McCauley's garden. Have you ever seen their garden washed like that from water coming from that pipe, any water washing down?

A I have seen water across his property, yes.

Q Have you seen water in his garden like that?

A No.

Q You have never seen water in his garden like this before?

A No.

Q Have you taken part in any clearing up that was done on the southern part of Phillip's Property from the point of the pipe over to the woods and the private road?

A Yes.

Q What was done with the debris that was taken from that area?

A Logs left to the right and the stumps and all were pushed over to the fence.

Q Do you know of any problems with water in the road caused by that clearance?

A Have had no complaints.

Q Have you ever seen Mr. McCauley out there

1 cleaning up?

2 A No.

3 Q You stated that the water when it enters the

4 McCauley Property is about three feet in width, is that correct?

5 A Three to four feet.

6 Q And you say it spreads out to ten to fifteen

7 feet?

8 A Yes.

9 Q Any idea how deep that water is?

10 A No.

11 Q No further Your Honor.

12 COURT: Anything further Mr. Gilmer?

13

14 REDIRECT EXAMINATION

15 By: Mr. Gilmer

16 Q What is the hardest rain you have known around

17 here in the last ten years?

18 A Camille, when Camille came through here. I

19 don't remember the date.

20 Q Do you remember the year?

21 A It was three years ago, I believe it was.

22 Q I believe it was September 21, 1969 wasn't it?

23 August 1969.

24 COURT: I believe the witness indicated that he

25 is not sure Mr. Gilmer. That is as much as we can get from him.

Q Thank you. That's all I have to ask him.

COURT: Thank you Mr. Phillips.

Witness stood aside.

JIMMY WHITT, Having been duly sworn testified as follows:

DIRECT EXAMINATION

By: Mr. Gilmer

Q State your name and age sir.

A My name is Jimmy Whitt and I am 38.

Q What is your present occupation?

A Real Estate Broker and developer and an engineer.

Q How long have you been connected with the development of property around Albemarle?

A Thirteen years.

Q What training have you had as an engineer?

A I graduated from the University of Kentucky with a B.S. in Mechanical Engineering.

Q Did you, at Mr. Phillip's request, examine the McCauley Property?

A I did.

Q When was that?

A The first time I examined it was on Monday, June 24, 1968.

1 Q Could you see any water damage there then?

2 A No sir and it had rained extremely hard the

3 day before.

4 Q Have you seen it since?

5 A Yes sir, I was there again yesterday.

6 Q Have you seen any damage from water washing?

7 A No sir.

8 Q There is a septic tank on that property and

9 they say they pumped it out once in ten years. Have you had

10 experience with septic tanks?

11 A I have had installed a number of septic tanks

12 in Albemarle County, yes sir.

13 Q How often do you have to pump them out?

14 A I would say the average tank in Albemarle County

15 probably once every five or six years.

16 Q Do they tend to do a better drainage job or

17 less drainage job after they have been in a number of years?

18 A Well, in Albemarle County after a number of

19 years you can expect them to break apart. I know several that

20 I put in 12 or 13 years ago have caused trouble in the last two

21 years that they never caused before.

22 Q I believe you were out there this morning and

23 went over the McCauley Property?

24 A I was out yesterday.

25 Q Could you find where the septic tank was located?

A I saw indications of a septic tank line.

Q Does the ground lie so the water from the Phillips Property would be running over that septic field?

A I don't believe that the water would get that high.

Q Would it be possible for an 8 inch pipe to discharge enough water on a fairly level slope to make a stream ten or fifteen wide and six inches deep?

A No sir, not without a pump there.

Q Witness with you.

CROSS EXAMINATION

By: Mr. Peatross

Q Mr. Whitt, you said you went to the McCauley Property yesterday?

A Yes sir.

Q Did you go on the property itself?

A I did not.

Q You observed it from what point?

A The Phillips Yard, the lower side of the property.

Q You say that your recommendation is, according to your professional knowledge, that septic tanks in Albemarle County should be pumped every five or six years, is that correct?

A No sir. I stated that the average tank without trouble, in my opinion, would need to be pumped every five or six years.

Q If a tank is pumped how long would you estimate it would last before it needs pumping again?

A I had one tank in Hessian Hills that was pumped in February of this year and was pumped three times the following week.

Q Is that an exception to the general rule though?

A I think it probably is but the ground in this particular area was saturated.

Q Is it extremely unusual that a tank would last ten years in your opinion before it needs pumping?

A I would say that was an exception.

Q Have you ever seen this particular pipe we are talking about with water exiting from it?

A Yes.

Q When was this. You mention June of 1968.

A No sir, I buy materials out there so I see it.

Q You see it any other time?

A I was there yesterday and saw it.

Q I didn't quite catch what you said as to your opinion as to the location as to the McCauley's septic tank. How did you say you evaluated where that was?

A Without going and evaluating the location, I couldn't see anything. There was some seepage on the base of the hill but unless I physically examined the property I would be unable to tell you how the drain lays.

Q Assuming that water does go over even the end of this septic field, is it possible for this water to flood the septic field?

A Not if the septic tank was put in properly, no sir.

Q No way that this water could flood into it, is that right?

A It could drain into the lines somewhat but it would have to get up rather high and if it was put in properly it wouldn't do that.

Q I hand you Plaintiff's Exhibit number 12, this is a picture that was taken on 13 July, 68, it shows a stream of water down through some property and according to Mr. McCauley it is his property. Such a stream as that passing over a septic tank, is it possible that it would flood it?

A If the septic tank was below the level of this yes but not if the septic tank above this. That water didn't come out the pipe either.

Q This water didn't?

A Not all of that.

Q How do you know?

A There is no way a 8 inch pipe could carry that volume of water. A 8 inch pipe is 25 1/8 square inches and it can't carry that kind of water.

Q Is it a physical impossibility for an 8 inch pipe to carry this much water even if it pumps full blast for 24 hours, it can't put out that much water?

A If you pump it yes but not by drain feeders.

Q By drain feeders how much would you estimate to be from this eight inch pipe?

A Probably a stream about a foot wide and three inches deep.

Q If water was damned up and delayed as it came out of the pipe, could it collect and come down in this volume?

A Not unless the dam breaks.

Q In otherwords, water cannot be delayed at where the water exits from the pipe and collect there and come down in this volume, is that what you are saying?

A Not as long as the delay was still there, no sir.

Q How much of this particular stream that I showed you would you estimate an 8 inch pipe would feed only a foot wide and three inches deep?

A Somewhere in that vicinity.

Q From your observation of the septic system which you saw yesterday in the McCauley's yard, would you recommend

that that be replaced or pumped at this time?

A I couldn't tell you. I would have to examine the tank and the lay of the land.

Q If a tank is pumped how long would you estimate it to remain in a proper condition before it would need pumping again without any evidence of sogginess or odor of the tank or things of that nature?

A Normal family of four. . .it takes five gallons to flush it out.

Q Is this an exception or a general rule?

A Of what?

Q Is this the general rule that every tank could need pumping for a four family person every month?

A I am not saying that. I am saying the tank itself would fill up.

Q The drain fields would also depend on the tank and the size?

A The size of the tank, whether you have a garbage disposal, whether you put the washing machine into it, there are too many variances for me to give an opinion on that.

Q Is there usually more than one tank along with drainage field?

A There is a tank and a distribution box but normally not more than one septic tank.

Q No further questions.

COURT: Mr. Whitt, did you see the receptacle of the catch basin up in the yard itself?

A Yes.

COURT: Could you estimate what length pipe that might be from the first catch basin in the front of the building to the discharge?

A I can give you an approximation, that building is 122 feet long and I would say the length of the pipe probably is in the neighborhood of a 150 feet to the catch basin.

COURT: How far would it be from the first catch basin all the way to the discharge at the end of the pipe?

A I would say, to be safe probably 400 feet from the first basin to the back side.

COURT: Do you have any idea what the fall might be in that distance?

A It looks to be a fair amount of fall but it would not create a great rush of water coming out.

COURT: Now, this matter of the amount of water coming out of there, would the fall or the head of water behind that effect the weight of discharge? The more drop or fall there was the more volume it would carry.

A Yes sir.

COURT: Talking about the drainfield and septic tank. Isn't it a fact that a septic tank is pumped only for the purpose of removing slud rather than moving liquid?

A Theoretically that's true but practically that's not. If the drain fields themselves are inserted properly there would be no way to pump and except the solid but in Albemarle County you don't find that to be the case.

COURT: The problem arises then to the rate of absorption in the drain field itself rather than the septic tank?

A That's right.

COURT: Otherwise, you would only pump the sludge?

A Right.

COURT: Your opinion as an engineer is the surface water problem with regard to the circulation or the absorbing of the area around the drain field?

A Yes sir, it has a bearing on it. When we take the preparation test you are required to saturate the ground when you take that test because it is obvious that land under water will not hold drainage but the state requires state standards.

COURT: The amount of surface water would be a matter considered rather than the drain field itself?

A Could possibly, yes sir.

COURT: All right. Thank you. Any further questions?

GILMER: No sir.

COURT: You may stand aside.

Witness stood aside.

JAMES B. TOWE, Having been duly sworn testified as follows:

DIRECT EXAMINATION

By: Mr. Gilmer

Q Please state your name and occupation please sir?

A My name is James B. Towe and I am an insurance agent.

Q Did Mr. Phillips ask you to inspect the McCauley Property for him for damages?

A Yes sir.

Q About when was that?

A The first time was in June of 1968.

Q Have you seen it since?

A Yes sir, on several occasions.

Q Have you ever seen any washing brought on by water on the Phillip's Property?

A Erosion.

Q Yes sir.

A No sir.

Q Have you ever seen any settlement on it?

A No sir.

Q Have the conditions on the Phillip's Property changed materially since the first time you inspected it?

A I think to the extent that the splash rock were

1 put in, yes sir. I think probably more ties were put along the
2 fence.
3 Q Witness with you.
4
5 CROSS EXAMINATION
6 By: Mr. Peatross
7 Q How many times have you been out and inspected
8 the McCauley Property?
9 A It would be....I would say four or five times
10 since 1968.
11 Q Have you noticed any change in their property?
12 A None to my recollection.
13 Q How long did you view the property each time
14 you went out on the four or five occasions?
15 A Five minutes.
16 Q Did you go down to the garden area?
17 A Yes.
18 Q Did you go to the creek area?
19 A Only going on the lower company property or
20 on the Don Mann Volkswagen Property.
21 Q Did you ever observe any water moving across
22 the McCauley Property?
23 A No.
24 Q You have never seen any water?
25 A No.

Q Have you ever seen any water discharged from the pipe?

A Yes.

Q Do you remember when?

A I think in August of 68 and it was raining at the time and we went down to see what it looked like and I observed water coming out of the pipe.

Q At what way, fast, slow?

A Not with any force whatsoever.

Q Just sort of drippling out?

A Not drip, drip, no.

Q Running out slowly?

A Running out slowly.

Q Have you ever walked on the McCauley property?

A I haven't.

Q Do you handle the insurance for the Phillip's Building?

A I handle some.

Q No further questions.

COURT: Mr. Towe, you may stand aside.

Witness stood aside.

PERCY CUMMINGS, Having been duly sworn testified as follows:

DIRECT EXAMINATION

By: Mr. Gilmer

Q Mr. Cummings, I believe you keep the books for Phillip's don't you?

A Yes sir, I am their accountant.

Q How long have you been there?

A Since 1965.

Q In 1968, did Mr. Phillip's ask you to inspect the water situation between his property and the McCauley Property?

A Yes, we walked around the property.

Q Did you make a thorough inspection?

A Yes sir. We looked on the east side and you could see the contour of the land there that Phillip's had paved the area of the land there and they had some silt and water that came across the other property onto them and we went down to the southside and....where they had done the filling and saw what they had done there to keep the water from being heavy in a concentrated flow, it was spread by rocks and ties and to keep the silt from going onto anything.

Q Was the water clear or dirty?

A Well, when I was there it wasn't raining but the water is clear.

Q Did you examine the oil company property where the water crosses before going on to McCauley?

A From the Phillip's property, yes.

Q Did you see any washing?

A None. The only thing you could see was where the grass had been bent down by water crossing it.

Q Did you see any evidence there of deposits of silt?

A None.

Q Did you look across on the McCauley Property?

A Yes sir.

Q Did you see any washing over there?

A No sir.

Q Any evidence of silt?

A None.

Q How often probably have you looked at it since?

A Probably three or four times.

Q Have you ever seen it doing any damage to the McCauley Property?

A No sir.

Q Have you looked at it after it has rained and the water was running down there?

A No sir, I never actually saw water flowing across it.

Q Witness with you.

PEATROSS: No questions.

COURT: You may stand aside Mr. Cummings.

Witness stood aside.

1 AMON WILLIAMS, Having been duly sworn testified
2 as follows:
3 DIRECT EXAMINATION
4 Mr. Gilmer
5 Q How old are you Mr. Williams?
6 A 52.
7 Q What is your occupation?
8 A Building contractor.
9 Q How long have you been a contractor?
10 A Eighteen years.
11 Q Did you at the request of Mr. Phillips examine
12 the water situation between him and McCauley in 1968?
13 A Yes sir.
14 Q What did you find?
15 A I couldn't find any wash or anything at this
16 particular time at all.
17 Q Did you see any washing on the oil company
18 property before the water got to McCauley?
19 A No sir.
20 Q Did you see any washing on the McCauley
21 Property?
22 A No sir.
23 Q Did you see any deposits of silt?
24 A No sir. I couldn't see any damage.
25 Q Have you examined the property since?

A Yes sir. I was up there yesterday.

Q Did you see anything?

A No sir.

Q Have you had experience with septic tanks in Albemarle County?

A Yes sir, we have put some in.

Q About how often do they need to be pumped?

A Well, it depends on the area they are in. Some places in Albemarle County take very good and some just don't take very good. I have some in eight or ten years that haven't been pumped at all and I have some that have been in about a year and have had to be pumped. It depends on the soil they are in.

Q So, it's hard to give an average.

A Yes it is. It is no way really, you can sort of estimate or guess at it.

Q But ten years is a good life?

A Yes sir. It is not many that has been in ten years that hasn't been pumped.

Q Septic tanks generally percolate better or less better after they have been in a number of years?

A After they are in a few years you have to pump them more often usually.

Q Witness with you.

CROSS EXAMINATION

By: Mr. Peatross

Q Mr. Williams, when you observed the property did you say you observed the property yesterday, the McCauley Property?

A Yes sir.

Q Did you notice any spots in the yard?

A One brown spot just a little to the right going down into the hollow there.

Q On the McCauley Property?

A On the McCauley Property, yes sir.

Q Did you notice any loss of earth under the fence on the McCauley Property?

A I couldn't tell. I wasn't on his property. I was standing on the bank looking from a distance.

Q Have you ever walked on his property?

A No sir.

Q Have you ever walked over his septic field?

A No sir.

Q If the septic system is drained after ten years for example, the first time is ten years, how long would you estimate it to last before it is drained again, can you tell?

A You never know. It depends on how much use of course. It would be hard to say it would have to be pumped this year or next year, it is just something that you have to wait and see what happens.

Q You stated that you installed a number of septic tanks, have you ever pumped them?

A I advise them if they need pumping.

Q Do you do it yourself?

A No sir, get somebody else. I haven't actually done the pumping myself. I get Mr. Kirby or somebody like that.

Q How many times have you gone out and observed the McCauley Property for damages?

A Once in 1968, I believe in June and yesterday.

Q So you have been out there twice to observe the property?

A Yes.

Q No further questions.

COURT: Thank you Mr. Williams.

Witness stood aside.

EDWIN LEAKE, Having been duly sworn testified as follows:

DIRECT EXAMINATION

By: Mr. Gilmer

Q Mr. Leake, how old are you?

A 45.

Q What is your occupation Mr. Leake?

A Building contractor.

Q How long have you been in that business?

A 13 years.

Q Did you examine this property of Mr. McCauley's for water damage?

A Once in 1968 and week before last.

Q Did you find any water damage?

A No sir.

Q Didn't find where water was cutting?

A No sir.

Q Either time?

A Either time.

Q How much experience have you had with septic tanks?

A I don't install them at all.

Q You have had connection with buildings that have had septic tanks haven't you?

A That's right, yes sir.

Q Have you ever pumped them out?

A The people that owned the homes had them pumped out after I suggested it.

Q Do you know how often they have to be pumped?

A I have one at home that has to be pumped every six years.

Q Is that normal experience?

A I would say it was normal.

Q That's all.

CROSS EXAMINATION

By: Mr. Peatross

Q Mr. Leake, you say you are a building contractor?

A Yes sir.

Q Do you purchase building material from Phillip's Building Supply?

A That's correct.

Q You ever been on the McCauley Property itself?

A No sir.

Q How many times have you viewed it?

A Twice.

Q How long did you view it each time?

A Five to ten minutes.

Q No further questions.

COURT: You may stand aside Mr. Leake

Witness stood aside.

EDWARD WOOD, Having been duly sworn testified as follows:

DIRECT EXAMINATION

By: Mr. Gilmer

Q Mr. Wood, I believe you work for Mr. Phillip's don't you?

A Yes sir.

Q How long have you worked for him?

A Ever since 65, when they first opened up.

Q Would you give your initials?

A Edward Lee Wood, Route 8 Box 428, Charlottesville.

Q Did Mr. Phillips ever ask you to inspect the McCauley Property for water damage?

A Well, not really. No more than working there. I live in the Bollings House. I moved there last year on Friday, the 13th of March.

Q Oh, so you live right there?

A That's right.

Q When did he first ask you to inspect it?

A When this came up in 68.

Q Did you find any water damage at that time?

A Not from where I was then. The only place that I have been is where the catch basin is at and I couldn't see any damage from there whatsoever.

Q Did you look to see if there was any damage on the oil company property?

A I couldn't see any whatsoever.

Q How often do you look down that way for damages?

A Since 1968. I would say from 65 since I came to work in the shop we used to have six by sixteen foot ties right in back where the barn used to be. I have seen water going that way, quite a bit of water and that was before any

1 pavement or anything was put in.

2 Q You have seen quite a bit of water then?

3 A Right.

4 Q How do you say the water is going that way now

5 as to compare it with the way it is going today?

6 A It has continued to always go on the McCauley

7 Property.

8 Q It always continued to go on it?

9 A Yes sir. Also, dated February 15 of this past

10 year, of 72 on Sunday morning I got up and what had made me pay

11 attention to it I do some trapping in the water and I was going

12 to check my traps and I said, I won't get to check no traps today

13 cause it's been raining right hard and my wife said, yea it

14 really rained. She said, did you notice out front down through

15 those woods and this is not concerning Mr. Phillip's Property,

16 this I think is property of Caleb Stowe which is probably 30

17 acres I would guess and coming down that hollow to what I had

18 seen on Mr. Phillips was as five times as much water coming down

19 which would have to go through Mr. McCauley's Property before

20 it would hit in the line to where Mr. Phillip's water would

21 come into it.

22 Q So that was much greater, what was coming down

23 west of...

24 A I'd say right at the lase before it hit the

25 ditch it was spread to 50 feet of water. I didn't walk down in

1 the woods or anything I just looked out the door. It looked like
2 to me to be a foot and a half deep.
3 Q That's a pretty big ditch in there isn't it?
4 A Well, I have never really been there and looked
5 at it but what I could see from the fence it looked like right
6 smart of a ditch there.
7 Q When you saw the water running off the McCauley
8 Property around 65, was it spread out or running in a ditch?
9 A Well, it would go down to the ravine, it wasn't
10 a very big stream. It could have been more at numerous times.
11 I just noticed that night, we went back in the back to get the
12 ties in the rain and I noticed water running down there which I
13 really didn't even give this a thought. This was even before
14 any suit was mentioned or anything. In fact, we use to park our
15 cars in back next to the barn and that was when we first opened
16 up, or maybe we had been opened a year.
17 Q When the water ran down there was it a place
18 where the water ran near or some distance from where the pipe was
19 located?
20 A Near as I can tell it had gone right next to
21 where the pipe runs now. It is the low part of the ground and
22 naturally the water is going to run to the lowest point.
23 Q In the low part of the ground?
24 A Yes sir.
25 Q Does it slope into both sides?

A That's right.

Q How wide would you say the water was that you saw running down that place where they installed the pipe?

A A foot and a half or something like that.

Q About how deep?

A Maybe an inch or inch and a half.

Q It rain down just about where that pipe is today?

A That's right sir.

Q Witness with you.

CROSS EXAMINATION

By: Mr. Peatross

Q This water that you observed running down the hill prior to the time the pipe was put in, did you remember how far it reached down the hill?

A I didn't really pay that much attention to it because it wasn't anything concerning, that was before but after this had been discussed with me by Mr. Phillips that there was a suit bringing up this water....

Q But I am asking you before, you don't recall how far down hill it went?

A I didn't see any pipe going under ground, it was running on top of the ground then.

Q Did you ever see it go across the McCauley

1 Property?

2 A Well, I couldn't really say. At that time, no.

3 If it was running on the ground at Mr. Phillip's, it had to run

4 on top of someone else.

5 Q It wasn't any possibility that this water could

6 be absorbed in the ground?

7 A I wouldn't think so, not the way it was running

8 across.

9 Q Was the Phillip's Property fully paved as it is

10 now?

11 A No sir.

12 Q Was it an open field down there?

13 A We had lumber all through it. There hadn't been

14 any pavement or anything, this was when we first opened up.

15 Q Was the oil company land still open field?

16 A It was an open field, yes.

17 Q After the pipe was installed, did you observe

18 any water running across the McCauley Property?

19 A After my attention had been called to it, yes I

20 have seen water go across it.

21 Q How much water did you observe running across

22 the property?

23 A I really haven't looked at it when it rained

24 that hard. I would say about two years ago, that was before I

25 moved out there, I was down at the lower building getting some

lumber out and it started raining. I had to make trips back and forward to get the lumber in the shop and I walked down in back and looked and what water I saw then, I would say it was a normal shower and I seen very little water running across it then. I say a stream maybe a foot wide.

Q But you haven't observed it when it rained hard?

A No sir. The mention of this past February the 13th, which I didn't go because it was still raining and I didn't go back there then to look but I had noticed this water that was coming from this Caleb Stowe Property which is approximately, I would say, thirty acres and of the hard rain, all of the rivers were out of their banks, and it was, what I could see that was coming out of the pipe, there was ten times as much water over there as the lay of the land would have to go through Mr. McCauley's Property.

Q But you say you didn't see any water at that particular time going over Mr. McCauley's Property because you didn't go down there to look?

A No sir, I didn't go down there and look at the pipe but I did see the water which was not concerning Mr. Phillips.

Q No further questions.

COURT: You may stand aside sir.

Witness stood aside.

GILMER: Defendant rest.

COURT: Any rebuttal Mr. Peatross?

PEATROSS: Yes. I would like to recall Mr. McCauley?

COURT: All right Mr. McCauley.

PATRICK MCCAULEY, Having been previously sworn testified as follows:

DIRECT EXAMINATION

By: Mr. Peatross

Q Mr. McCauley, concerning you septic tank when was it installed on your property, do you recall?

A 1958.

Q When was the first time you had this septic tank pumped?

A 1969.

Q Had you had any problem whatsoever with your septic system up until that time?

A No.

Q What was the result of your pumping this septic tank? What happened after you pumped it?

A Well, in a month or two months, I didn't time it exactly, it needed it again.

Q What was the condition of your drainage fields after you had it pumped, immediately after you had it pumped?

A They dried up and stayed that way for two or three months.

Q Any soggy conditions on top of your yard or septic system?

A Not during that period no.

Q During those two months following the time it was pumped, it rained causing water to come across your property near the drainfield?

A Yes.

Q And you say one to two months later the soggy condition reappeared?

A That's correct.

Q Have you been advised by the county health inspector or any other person of authority that you should have your septic tank replaced?

A No, there hasn't been anybody out there at all.

Q At the time you had it pumped did someone come out there and inspect it?

A Yes.

Q Was any recommendation made to you?

A Yes.

Q What was that recommendation?

A That I add some more lines to compensate for what I had lost underneath the stream.

Q Underneath what stream, the stream of water?

A The stream of water that comes down when it rains.

Q Did you undertake those changes?

A No I did not.

Q What did you do, anything?

A Speak to counsel.

Q Did you have your septic tank pumped at that time? After the county health inspector had been out there?

A Yes.

Q You say that that did eleviate the problem temporarily?

A Yes.

Q Witness with you Mr. Gilmer.

CROSS EXAMINATION

By: Mr. Gilmer

Q There is a much bigger stream that runs down west of your house in that gulley isn't it and runs on down to the east of it?

A Right. No west.

Q West is where the big stream comes?

A That's where the creek is.

Q That is what washed out the bridges wasn't it?

A It hadn't washed it out in years previous to the problem that I have now, no.

Q How much bigger would you say the volume is in a heavy rain in that creek in back of your house?

A I'd say it runs pretty close to the same.

Q Pretty close to the same?

A In fact, I believe more comes down from the Phillip's Property than comes down the creek itself. That takes longer, it's running over all ground.

Q And yet that creek has got banks there as much as eight feet high, just about at your property hasn't it?

A It has a good reason. It was a hog pen for years. That was the watering for the hogs on that creek.

Q It is close to 20 feet wide isn't it?

A I would say the way it is cutting it's headed for the road.

Q Do you think the water from the pipe washed your bridge away?

A I think the combination of all of it could, in fact I know it did.

Q How big was the stream? You say where the creek has washed away? How deep was it?

A How deep was it at the bridge itself?

Q Right at the bridge when it first washed away?

A I had three nine inch pipes through there on a triangle, it was enough water that it wouldn't take that, it went over top and washed it out.

Q Three pipes wouldn't take the water?

A Correct.

Q That's all I have to ask him.

REDIRECT EXAMINATION

By: Mr. Peatross

Q To reemphasize my point Mr. McCauley, do you recall ever seeing any water washing down on your property or in the fields that now belong to Mr. Phillip's prior to the time that pipe was installed?

A No. I would have reasons for knowing.

Q And would you again reemphasize those reasons?

A Well, for one thing we had a boxer dog in the woods of the oil company and he use to run particularly when it rained, most of the time he would run through a cool thunder storm and they would run along the fence and we would watch many times yet we never saw any water over in that direct area. We also, at one time, had an incenerator which was made up of just loose blocks sitting to keep the wind from blowing with gaps in it, sitting in what is called the little area and that sit there for a couple of years. It never washed even the ashes out of that, it couldn't possibly have been water running down there.

Q Was this directly in front of the fence there where the water enters your land?

A You will recall when you were out there this morning, there was a white pine basically in the middle of the stream, it was approximately six feet to the southeast of that

pine right near the fence row, which is at the lowest point. Also, our garden we used that from the first year we moved out there and we haven't enlarged it at all. We never had the wash-out problem until this period 1968. That little white pine was set out in 1958. There is no way in the world you could have dug a hole and loosened the ground and it sit there through the first thunderstorm, it is bound to have washed it out.

April 18, 1972

COURT: Gentlemen I must confess that there is a lot of law to be considered in this case today and I'm not undertaking to avoid the issue. I am going to make certain observatio and finding of fact and some preliminary rulings on the law as applied to this case. I haven't had an opportunity to read all the cases. I think counsel have been very diligent in their research of the law but there are so many varying situations that may be only fair to the parties to review the law thoroughly As to the facts in this case, I am in a position to make certain finding of facts which I think should be made at a time when they are the freshest in the mind of all the parties. And having viewed all of the photographs and heard the testimony and viewed the exhibits and having gone upon the property of both the complainant and the respondant and viewed the general area, the Court makes this preliminary finding of fact and that is that the whole area is undergoing a transition from a former rural residential type of development to a heavily concentrated business and commercial development, that when the problems arose with regard to this property and the Phillips property, there was no zoning in Albemarle County and since that time zoning has been effected. Prior to the zoning, of course, there would have been somewhat the same situation with regard to the rights and responsibilities

with surface water but the peculiar part of zoning is that having designated this area business and commercial in a sense the development of a business like Mr. Phillips is encouraged. It's not left to chance any longer. By virtue of zoning and County planning Mr. Phillips' activity is the very type that is recommended for the area and Mr. McCauley's activity is the type that is being phased out. I think the whole case has to be examined in that light. I do find as a matter of fact that the evidence clearly establishes that considerable flooding occurs of the McCauley property, that the volume of discharge from that pipe on the Phillips property is such that rather extensive surface flooding occurs after a heavy run off of rain but there is no substantial evidence of any destructive force here. The Court accepts the photographs as ample evidence of Mr. McCauley's statement and Mrs. McCauley's statement that a considerable inconvenience and temporary damage is inflicted by that flooding. There is further evidence that the area is saturated with the moisture but that doesn't necessarily relate to the destructive force of the discharge. The only evidence of any destructiveness is that of the removal of the soil which Mr. McCauley testified to and is unrebutted but having viewed the premises it seems to me that the major impact on the McCauley property is that of the saturation of soil itself with an excess of moisture, which result from the surface water flowing. The very question that every area of

1 development has to face and is being faced here and that is
2 when a transition is made from one type of use to another,
3 what are the responsibilities of the parties with regard to
4 each other and how are they changed. You can view this case
5 somewhat in the light of a future development of the same
6 situation that might exist in the Barrack's Road Shopping
7 Center - what use to be wooded and grassed and vine covered
8 is now acres and acres of paved area which cannot absorb one
9 drop of water. Now the fact is when development occurs which
10 makes that change the water has got to be channeled off some-
11 where and the question in this case is whether or not Mr.
12 Phillips in his use of his property has engaged in an activity
13 which is unnecessary or negligent or maliciously damaging to
14 the McCauleys. I don't find any evidence of maliciousness
15 and very little evidence of any intentional damage. The intent
16 is there to discharge it in that pipe but the question is
17 whether or not that pipe creates anymore damage than it would
18 if it were allowed to seek the same flow from the surface.
19 It seems to me that the discharge force is somewhat broken
20 up by the device that has been installed at the discharge end
21 of the pipe. And that's borne out by the fact that there is
22 very little erosion. I saw no evidence of any silting of the
23 area when I viewed it. The pictures disclose no silting,
24 which to me is one of the most amazing things in all about the
25 case. In spite of the damage to Mr. McCauley, it shows a

1 considerable amount of effort in planning in the way that
2 discharge has been handled. I'm frank to say that I don't
3 see how in the world it's kept from silting but there is no
4 evidence of it. And the damage to the drain field while
5 the Court does not find any occasion to disbelieve it, still
6 leaves the question unanswered as to whether or not it's
7 coming entirely from this or whether even if it were, Mr.
8 Phillips is answerable in damages. That's the big problem
9 in this case. Mr. McCauley's own statement I think may be
10 the key to the problem in this case when he made the statement
11 that what use to be his hog pen for years is now changed. And
12 this is the very thing that all of us have to face. It may
13 be progress, it may not be progress but it's a change we all
14 have to face. I don't lack sympathy for Mr. McCauley's
15 predictment but the fact of the matter is as far as the monetary
16 value of the property that Mr. McCauley now occupies as a
17 resident, were it not zoned business would not be nearly as
18 high as it apparently is right now zoned business. It may be
19 one of the prices or one of the penalties that have to be paid
20 for that change from residential to business use. He's down
21 hill from the area that Mr. Phillips occupies which the Court
22 can't change. One of the hazards of being on the down hill
23 side from surface drainage. I don't know of anything at this
24 point from the facts and from having viewed the premises that
25 Mr. Phillips could do other than abandon the underground

1 discharge pipe altogether and convert it to surface run off.
2 And if he did that, I can't see any indication that the damage
3 to Mr. McCauley will be any less as the matter stands now.
4 And it certainly would have to be kept in line that Mr. Phillips
5 in converting that property to business use could cover the
6 entire area with a blacktop pavement or cover it with a
7 warehouse so that there would be absolutely no absorption
8 left in the land at all. That water has to be discharged
9 somewhere. The only relief that the Court really could
10 consider giving Mr. McCauley would be allow him to go up there
11 and tap on to the pipe and run it underground to the stream
12 if that would be of any benefit to him. And the next man
13 who occupies it may want to do that, may have some effect
14 on the resale value of Mr. McCauley's property.
15 MR. GILMER: Well we certainly would be very glad
16 to let him tap on to it if he wants to - there is no objection
17 there.
18 COURT: It may require some adjustment in the
19 discharge or putting an elbow in it because you are crossing the
20 property of the third party in order to tap directly on to it.
21 MR. GILMER: Well we could fix it so it could be
22 tapped on by putting an elbow in it without going on the
23 Oil Company's property.
24 COURT: That to me is about the. . .
25 MR. GILMER: He could run it right around here or try

1 to get permission from the Oil Company to let him cross there.

2 COURT: I am going to reserve final decision in this

3 case in order to evaluate the law more fully. But having

4 viewed it at this point, I don't want to mislead the parties

5 into thinking that this is by any way - any means a final

6 decision but viewing what appears to be the law and the

7 circumstances here and the changing nature of the whole area

8 the Court certainly could not encourage Mr. McCauley to think

9 that there is going to be an injunction granted to the extent

10 of closing up that discharge pipe. I think it would be

11 entirely out of keeping with the right of Mr. Phillips to

12 enjoy the use of his property which is zoned for business

13 as compared to Mr. McCauley's property which is also zoned

14 for business. And that the damage and the interference with

15 the use of Mr. McCauley's property when balanced with the right

16 of Mr. Phillips to use and enjoy his must give way except for

17 some reasonable efforts of changing the damages if Mr. McCauley

18 wants to exercise that right and the Court will consider

19 placing some terms on Mr. Phillips if necessary to afford him

20 that right. But at this point the Court will not be disposed

21 toward granting the type of relief that is sought and that is

22 that the discharge pipe will be stopped or Mr. Phillips

23 required to eliminate that altogether. I very frankly think

24 that Mr. McCauley's damages would be just as great if the

25 Court allowed that because the surface water would then have to

come off the property and eventually wind up in the same area. The thing that seems to me to be the basis of the problem is the changing of the surface of the Phillips property so that the water is not absorbent, it's got to go somewhere and will eventually wind up on Mr. McCauley. Mr. McCauley can litigate his damages by carrying it on down to the stream bed - I think that would be the only relief that would really mean anything. Certainly for the purposes of developing his property for business it may have great value and if not afforded at this time it might be something that he could not take advantage of later. Now the Court will reserve final judgment, allowing counsel to submit any briefs on the law that they wish. I have analyzed the facts as fully as I can and if counsel will prepare a memorandum of law and submit it at your convenience then I will certainly consider that and view these cases in more detail. Do counsel have any motions at this point?

GILMER: No, Your Honor.

PEATROSS: No, Your Honor.

COURT: All right, we will consider the evidence closed and the Court will view the memorandum.

IF PRINTING OF THE FOLLOWING EXHIBITS DOES NOT SHOW ENOUGH DETAIL OR IS NOT CLEAR ENOUGH AS REPRODUCED, PLEASE REFER TO ORIGINAL PICTURES ON FILE WITH THE CLERK.

Appellants' Exhibit 1

Appellants' Exhibit 2

Appellants' Exhibit 3

Appellants' Exhibit 4

Appellants' Exhibit 5

Appellants' Exhibit 6

Appellees' Exhibit A

Client:

Appellees' Exhibit B