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214 Va. 388

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 8237

CUSTIS FISHING AND HUNTING CLUB, INC.,
A VIRGINIA CORPORATION,

Appellant,

v.

WADE C. JOHNSON, ET ALS.,

Appellees.

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MOTION FOR JUDGMENT
Filed May 11, 1970

* * *

Plaintiff, Custis Hunting and Fishing Club, Inc., moves the Court for judgment in its favor for the following reasons:

1. By deed dated May 2, 1904, and recorded in the Office of the Clerk of the Circuit Court of King William County in Deed Book 19, page 480, plaintiff acquired from Robert E. Lee, Jr. and his wife, Juliet Carter Lee, a certain tract of land containing 50 acres, more or less, more particularly described by a plat attached thereto, together with "the Mill Pond, adjoining thereto, as now existing, to the fullest limit of the said Mill Pond, the whole of said Mill Pond not appearing on the said plat . . ." A plat of the said Mill Pond is attached hereto as Exhibit A, and a bench-mark map showing the elevations of Custis Mill Pond is attached hereto as Exhibit B, both of which are prayed to be read as a part of this motion for judgment.

2. The above-mentioned property owned by plaintiff has been used exclusively for over 60 years since the aforementioned conveyance, by plaintiff as a hunting and fishing club. No other person, persons, or body of persons has any claim, interest or right to any portion of the above-mentioned Mill Pond or bed thereof.

3. For over 60 years since the aforementioned conveyance, plaintiff has enjoyed actual, open, continuous, uninterrupted, exclusive, peaceful and quiet possession of the subject tract, Mill Pond, and bed thereof, under color of title so as to give notice to all persons of its claim of fee simple ownership, and in a manner inconsistent with the existence of title in another.

4. For over 60 years since the aforementioned conveyance, plaintiff has continuously and vigorously exerted its rights of fee simple ownership in and to the fullest limits of said Mill Pond and bed thereof under color of title thereto, in an open, notorious, visible, actual, exclusive and hostile manner.

5. By deeds of record in the Circuit Court of King William County defendants purport to have become the record owners of certain lands adjacent to or near a portion of the Custis Mill Pond. Com-

mencing on or about April 15, 1969, one or more of defendants, or others at the instance and connivance of one or more of defendants, have engaged in acts of encroachment upon plaintiff's property, specifically the said Mill Pond, under claims of ownership thereto, or claims of a right to the use thereof, and have thereby interfered with plaintiff's rights to the peaceful enjoyment of and exercise of dominion over the Mill Pond and bed thereof.

6. Plaintiff alone has complete title and all rights to said Mill Pond and the bed thereof as well as other land conveyed in the deed mentioned in paragraph 1 of this motion for judgment.

7. Neither defendants, nor anyone else who is not a member of said hunting and fishing club, have the right or authority to fish in said Mill Pond, or use said Mill Pond, or bed thereof, in any way whatsoever, without plaintiff's permission.

8. A dispute having arisen between your plaintiff and the defendants as to the true location of the boundary line of the tracts of land owned by your plaintiff and that of defendants, plaintiff, in accordance with Section 8-836 of the Code of Virginia, prays as follows:

a. That this Court ascertain and designate the true boundary line or lines between the property of your plaintiff and that of the defendants, in accordance with the provisions of § 8-836 of the Code of Virginia.

b. That this Court allow to the plaintiff the full cost of this suit including as a part thereof, reasonable attorney's fees for the service of plaintiff's attorney.

c. That the plaintiff be awarded such other and further relief as this Court shall deem just and proper.

* * *

RULINGS OF COURT

[274] * * *

The Court: Gentlemen at the bar, the Court will not render a written opinion in this matter, and what I say today will be the opinion of the Court, and the court reporter will take it down and it will be a part of the record.

[277] * * *

My decision will be brief. I will not take more than five minutes.

First of all, the Court rules that at the present time and at the time of the institution of this suit the Custis Mill was not in operation, hence, the Court does not deal with this as a public utility, upon which all grist mills were previously set about to be a public utility by franchise from the state, and had a right to backwater on the land.

Based upon the following cases which the Court has heretofore put in the record, so I will not give you the names of the cases again, but only the citations in the various reports—171 Va. 129; 195 Va. 317; 199 Va. 967—based upon those three cases, upon the conflict of evidence of the witnesses for the plaintiff, upon the conflict of [278] the evidence of the witnesses for the defendants, the Court rules that the Custis Mill Pond has not acquired by adverse possession or prescription the land which is shown to be under the Seaton Line. The evidence of the defendants only carries his property to the line as is shown on Exhibit D.

As to the second point of this case, the Court rules that the Custis Fishing and Hunting Club owns that part of the Custis Pond by grant as shown on Exhibit D introduced by the plaintiff. There is a continuing grant from the time of George Washington down to the present time of the grant as shown on Exhibit D, and as now constitutes the pond with the exception of those parties who are not parties here today and of those owners who are defendants, of the land below the Seaton Line.

As to the third phase of the case, gentlemen at the bar, the Court calls your attention to the case of 203 Va. 467, Wickouski v. Swift. I call the name of that case because this case is very important at this point. It is a question now as to whether or not the plaintiff should choose to fence across the mouth of these coves. I believe one is called Ice House Cove. The other has another name [279] which is in the record. But, anyway, that is a matter that this Court is not called upon to answer in this proceeding.

Gentlemen at the bar, I will state further that the Court honestly believes this is the law of Virginia. I have done some work on this matter. I do not believe there could be any other decision than this. I believe all counsel at the bar in a sense have prevailed. I believe the plaintiff has prevailed and I believe the defendants have prevailed.

Thus, I would require counsel at the bar to prepare the order together and submit it to the Court. I believe it would be proper in this case that you gentlemen prepare the order because there are certain matters as to the survey if you should decide as to whether one should be made, or what have you. So I would ask counsel at the bar, since both have prevailed in this matter, if they would prepare the order and submit it to the Court at a time convenient to you.

The Court thanks all of you again for your consideration in this case.

* * *

ORDER
Entered September 20, 1972

It appearing to the Court that the style of the pleadings herein is Custis Hunting & Fishing Club, Inc. v. Wade C. Johnson, et al., when in fact the correct name of the plaintiff is Custis Fishing & Hunting Club, Inc., upon motion by counsel for the plaintiff, consented to by counsel for defendant, it is Ordered that the pleadingss herein be and the same are hereby amended to the extent that the style shall be Custis Fishing & Hunting Club, Inc. v. Wade C. Johnson, et al.

It further appearing to the Court that a certain plat filed with the defendants' Answer to plaintiff's Interrogatories marked Exhibit "H" was also inadvertently marked Exhibit "H," upon motion by counsel for plaintiff and consented to by counsel for defendants, it is Ordered that the aforesaid plat marked Exhibit "H" be and the same is hereby removed as an exhibit herein.

* * *

FINAL ORDER
Entered September 20, 1972

This cause came on this day to be heard on the plaintiff's Motion For Judgment, the defendants' Answer and Grounds of Defense, the evidence heard by the Court without a jury and was argued by counsel.

The Court being of the opinion that plaintiff has failed to establish title by adverse possession to that portion of the pond lying south of "Seaton's Line" immediately opposite defendants' land, it is so Ordered.

It appearing to the Court, however that plaintiff has established title to that portion of Custis Mill Pond north of the line shown as "Seaton's Line" on Exhibit "D" by grant, it is Ordered that plaintiff

is the owner in fee simple of Custis Mill Pond north of the line shown as "Seaton's Line" on Exhibit "D."

It further appearing to the Court that "Seaton's Line" has been located on the ground and is shown as a line having a bearing of S 60° 19′ E on a plat drawn by Charles H. Fleet & Associates dated February 21, 1972, filed herein as Exhibit "R," it is Ordered that the aforesaid line having a bearing of S 60° 19′ E shown on Exhibit "R" be and the same is hereby established as "Seaton's Line."

It is further Ordered that a copy of the aforesaid plat by Charles H. Fleet & Associates, with a copy of this Order, be recorded in the Clerk's Office of the Circuit Court of King William County, Virginia.

It is further Ordered that the transcript of the hearings held on September 15 and 16, 1971 and August 7, 1972 shall become a part of the record.

Enter: September 20, 1972

/s/ John E. DeHardit
Judge

* * *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR
Filed October 18, 1972

Custis Fishing & Hunting Club, Inc., by counsel, hereby gives notice of its intention to appeal from the final order entered herein on September 20, 1972.

No transcript, statement of facts, testimony or other incidents of the case will hereafter be filed.

Assignments of Error

Custis Fishing & Hunting Club, Inc. assigns as error the following:

1. The Court erred as a matter of law in finding that the plaintiff had not established title by adverse possession to that portion of Custis Mill Pond lying between "Seaton's Line" and the water line of defendants' land to the south thereof.

2. The Court erred as a matter of law in not finding that plaintiff had acquired title by reason of its prior peaceful possession under color of title to that portion of Custis Mill Pond lying between "Seaton's Line" and the water line of defendants' property to the south thereof.

3. The Court erred in admitting into evidence the "Dabney Plat" marked as Exhibit "11."

* * *

DEED DATED MAY 2, 1904

This Deed, Made this Second day of May, 1904, between Robert E. Lee, and Juliet Carter Lee, his wife, of King William County, Va., parties of the first part, and the Custis Fishing and Hunting Club, Incorporated, a Corporation, duly chartered under the laws of Virginia, party of the second part; Witnesseth, that in consideration of the sum Twenty-Two Hundred And Fifty ($2250.00) Dollars, of which the sum of $750.00 has been paid in cash, and the sum of $1500 is secured to be paid, the said Robert E. Lee and wife do grant and convey unto the said Custis Fishing and Hunting Club, Inc., with ~~general~~ special warranty; All that certain tract of land, as described in the metes and bounds of the plat hereto attached, being 50 acres, more or less, together with the Mill, Dwelling House, and all other buildings thereon, and with ~~general~~ special warranty, all their right, title and interest, whatever the same may be, to the Mill Pond, adjoining thereto, as now existing, to the fullest limit of the said Mill Pond, the whole of said Mill Pond not appearing on the said plat; and the rights, ways, privileges and appurtenances thereto belonging, or in anywise appertaining, lying and being in the County of King William, in the State of Virginia, about Two and a Half Miles in a North-Easterly direction from Sweet Hall Station, a station on the Southern Railway. It being all of the property now and long known as the "Custis Mill" property, and is the same property devised to the said Robert E. Lee by his grandfather, George Washington Park Custis, who died in October 1857, and whose Will was recorded in Alexandria County, Virginia.

The said Robert E. Lee covenants that he has the right to convey the said land and buildings to the Grantee, that he has done no act to encumber the said property, that the Grantee shall have quiet possession of the said land and buildings, free from all encumbrances, and that they, the said parties of the first part, will execute such further assurance of the said property as may be requisite.

Witness the following signatures and seals:

/s/ Robert E. Lee (Seal)

/s/ Juliet Carter Lee (Seal)

State Of Virginia,
County of King William, to-wit;—

I, J. H. Gary, a Justice of the Peace for the County aforesaid, in the State of Virginia, do certify that Robert E. Lee and Juliet Carter Lee, his wife, whose names are signed to the foregoing and annexed writing, bearing date on the 2nd May, 1904, have acknowledged the same before me in my County aforesaid.

Given under my hand this 16th day of May, 1904.

My Commission will expire on 1907.

/s/ J. H. Gary, J.P.

In King William Circuit Court Clerk's Office,

June 1st, 1904. This Deed was presented and, together with the Certificate and Plot annexed, admitted to record.

Teste:
/s/ G. C. Garrett, Clerk

EXCERPTS FROM REPORTER'S TRANSCRIPT OF TESTIMONY OF SEPTEMBER 15 AND 16, 1971

[3] * * *

Mr. Cogar: I should by way of preface to my remarks call the Court's attention to the fact that the caption in this litigation identifies the plaintiff as Custis Huning & Fishing Club, when it is, in fact, Custis Fishing & Hunting Club. We would like to move to amend the pleadings to reflect the correction.

The Court: By consent of counsel, when the order is prepared in this matter I believe by a paragraph in that order you could amend the pleadings.

[14] * * *

Testimony of Charles H. Fleet

Direct Examination

By Mr. Ellis:

* * *

Q What is your occupation? [15] A Civil Engineer and surveyor.

* * *

Q Did you have occasion to construct a map of the Custis Pond located in King William County, Virginia? A I did.

[16] * * *

Q (Referring to document in witness' hand) Is that Exhibit A? Would you open the other document, please.

Now, can you identify what has been marked for identification as Plaintiff's Exhibit Number A, Mr. Fleet, and tell the Court what that is? A It is a map that I made using a bench mark on the Mill Road to get the elevation of the water in Custis Pond.

Q What is that elevation, according to that plat? A I don't see it on here. The printing is—the elevation is what? 92-5.

Q What does that mean, 92-5? [17] A It is the elevation above sea level.

[23] * * *

Q Mr. Fleet, I hand you a copy of what you have identified previously as the bench mark, and ask you to refer to it again, and, if you can, explain to the Court the elevation of the water in the Custis Pond. A The elevation—I might say the bench mark put there by the United States Coast and Geodetic Survey is 22-59. You go down a hill to the pond, and that elevation instead of being 92-5 is 9-25.

Q 9-25, what? A Feet above sea level.

Q When you say 9-25, do you mean 9.25 feet? A 9.25 feet.

Mr. Ellis: I will ask that this plat be marked as Exhibit L, and introduced into evidence as such.

The Court: Plaintiff's Exhibit Number L.

[37] * * *

Testimony of Daniel McCarty Thornton

Direct Examination

By Mr. Cogar:

Q Please state your name, sir. A Daniel McCarty Thornton.

Q When were you born, Mr. Thornton? A 1885.

Q Where were you born? A In Richmond, Virginia.

Q What is your business? A I am a real estate broker and insurance agent.

Q How long have you been in that business? A About twenty-five years.

[38] Q What did you do prior to that? A For thirty years I was with the Richmond Hotels, Incorporated.

Q Are you still active in the insurance and real estate business? A Yes, I am.

Q Are you familiar with the Custis Pond which has been discussed in earlier testimony here? A I am very much, yes.

Q Are you a member of that club? A I am.

Q When did you become a member? A 1936. Thirty-five years ago.

Q Were any of your relatives members of this club? A Yes. My father was, but before him, my uncle, Hay T. Thornton.

Q What was his connection with the club? A His connection with the club was that he was the one requested by his four friends to reach an agreement with Robert E. Lee, Jr.

[40] * * *

Q How old were you when the title to this property was acquired? A Nineteen years old.

Q Were you living with your father? A Yes.

Q Were you familiar with their negotiations for this property? A Very much so.

Q Do you know that this was your first knowledge of the Custis Club? A Yes.

Q And you were present when the plans were formulated for the formation and incorporation of the club? A Yes.

Q Now, in the interest of brevity, without trying to step on anybody's toes, is it correct that you have familiarized yourself over the years with the history of the club? [41] A Very much so.

Q What sort of documents have you studied, and how did you gain your knowledge of the history of the club? A Largely by what we call registrars which we keep from time to time in which each member of the club enters his catch of fish, or in hunting his achievement in hunting. But, in addition to that they frequently narrate certain historical events of importance, one of which I have right here.

Q All right. We will get to that later. Other than what is reflected in these log books to which you referred, from what other sources did you gain your knowledge of the history of the club? A Well, largely across the dining room table when my father and uncle were so intensely interested in what they were doing. I heard a good deal in that way. And also with the older members of the club.

Q Now, is it also fair to say that which is obvious—that from your personal observation as a member you have gained knowledge? A It is.

Q Now, Mr. Thornton, have you made it your business to, at my request, search through your records to find certain accounts, printed accounts, of Custis Pond? A I have, sir.

[42] Q Mr. Thornton, I hand you an attested copy of an article which appeared in the May 7, 1905 issue of the Times-Dispatch of Richmond, Virginia, and I ask you if that contains an article pertaining to the Custis Club? A Yes, sir.

Q Would you read the headlines of that article to His Honor, and the sub-headlines. A All right. "Famous Ground for Fishing Club." Heading. "Lands owned by the Father of His Country in Use. Local Citizens Own It."

Q All right, sir. That is sufficient. The article speaks for itself. A Yes.

Q It deals with the club's acquisition of certain lands for a fisherman's club, is that right? A That's correct, "Fishing club being formed." It is quite faint.

Mr. Cogar: If Your Honor Please, we would offer this as Exhibit Number M.

The Court: Exhibit Number M.

* * *

[43] Q Mr. Thornton, I now hand you what looks like a supplement of some sort from the Richmond Times-Dispatch, dated September 18, '49, and ask you if this came also from your records? A Yes, this came from my records.

Q What does that purport to show? A It purports to show first the picture of the clubhouse taken from a boat in the water, and also shows a group of guests, some of whom were members of the club. (Indicating) Here is my father and my uncle here, and other members, prominent citizens of the city, invited down in 1907, just two years after the clubhouse was built.

[44] * * *

Q I have here, Mr. Thornton, an article under date of February 1957, from a publication known as Virginia Wildlife written by John

H. Gwathmey entitled "George Washington fished here." A I am familiar with that.

Q Did this come also from your records, sir? A Yes.

Q Is it fair to say that this article which appeared in Virginia Wildlife in February 1957, is the same article that had previously appeared in the exhibit that was just introduced? A I think it was the same article, yes.

[45] Q The author of that article was John H. Gwathmey? A Right.

Mr. Cogar: We offer that as Plaintiff's Exhibit Number O.

Mr. Spratley: May I see it.

Mr. Cogar: Excuse me, Mr. Spratley.

Note: Mr. Spratley observed the paperwriting.

The Court: Plaintiff's Exhibit Number O.

[46] * * *

Q Mr. Thornton, I hand you this document and ask you if you will identify it, please.

[47] * * *

Q Will you tell the Court what that is, Mr. Thornton. A This is a joint meeting of the Board of Directors, a report of that, signed by Hugh R. Lewis, who was the secretary-treasurer at that time, and this is dated 1938.

Q Were you a member of the club at that time? [48] A Yes.

Q Did you attend that meeting? A I did.

Q Do those minutes accurately reflect the business of the meeting conducted at that time? A Well, I haven't studied this piece of paper, but I think from what I see it does. Yes, I remember this because it related to the directions as to the number of fish and the size of fish to be taken from the pond.

Q The document speaks for itself. A I remember the very meeting.

Mr. Cogar: We offer that as Plaintiff's Exhibit, if Your Honor please.

The Court: P.

* * *

Q Mr. Thornton, on certain exhibits which have already been introduced, there is identified the location of a dam on the western side of the pond to the north of the clubhouse. Are you familiar with the location of that dam? A On the western side of the clubhouse?

Q No, sir. On the northern side. [49] A Oh, well, yes. I thought you said western. On the north side of the clubhouse.

Q To your knowledge has this dam ever broken? A Yes. Several times. And partially broken several times. Not completely.

Q When so far as you are advised did the dam first break? A 1913, as far as I recall. Now, earlier years when I was not a member I would not know.

Q Was the dam repaired? A Each and every time repaired, yes.

Q Do you have some indication from the official records of the club of the repair of that dam in 1913? A I have very much official records. I started to say a while ago that in these registrars that we have kept from the beginning of the club, each and every member was required to put down his catch that day. And on one particular day the vice president, whose name was J. F. Wingfield, wrote a little piece of history pertaining to the breaking of the dam.

Q All right, sir. Would you read that to the Court. A All right. It is dated September 15 to September 27, 1913. J. F. Wingfield. "I was on business seeing the dam repaired, which was a very bad break. Water was very [50] low. Only three feet deep in the channel. It took two weeks to repair the dam with fifteen men and carts."

Q That is the main dam that you are referring to? A It is.

Q Are there any other dams? A Well, we built nine years after this in the year 1922, what was known as a cofferdam.

Q What is a cofferdam? A A cofferdam is a dam built in the pond fifty feet from the main dam, and it comes up only to about two-

and-a-half feet of the surface of the water, so that if the main dam would break the water would go down only two-and-a-half feet and save the rest of the pond.

Q That was originally constructed in 1922? A Right.

Q After 1913, to the best of your knowledge you say the dam had broken more than once. When, if at all, did it break next? A Well, in 1935, very heavy rains throughout the State of Virginia, broke most of the ponds as we understood from the newspapers. Our dam partially broke from heavy rains in 1935.

Q What was done about that break? [51] A That was repaired in an ordinary way.

Q By whom was it repaired? A Oh, repaired at the direction and at the cost of the Custis Club.

Q Do you know what the cost was? A No.

Q Was the cofferdam damaged at that time in 1935? A No. That held the water back in 1935, because that was built in 1922. That break that you are referring to was thirteen years later in 1935, and it held three-fourths of the water in the pond and most of the fish—the cofferdam.

Q Is that cofferdam in its present state the same as it was when it was put in there in 1922? A No. Deterioration. It has gradually been washed lower, and it is not as high now as it was when it was put in.

Q Have there ever been any improvements to it? A Yes. That was a very dramatic thing. In 1940, new earth was pushed into that cofferdam from the northern side of the pond by a bulldozer.

Q What was the purpose of pushing this earth onto the cofferdam? [52] A Because the cofferdam at that time had deteriorated some and was not as high as it should have been. It was not as high as it was originally.

Q Who was responsible for raising the cofferdam in 1940? A Our Board of Directors instructed the chairman of the house committee to secure personnel that would do this work.

Q Have there been any other improvements to the dam in the last twenty-five years by the club that you are aware of? A I was

just trying to establish within twenty-five years. We had an old spillway in the eastern end of the dam that deteriorated. It was made of wood. We had to build a new spillway at the cost of $9,000.00 in the nearer end—well, say the southern end of the dam, or the other end of the dam—to take the place of the spillway that had deteriorated.

Q Approximately when was that done? A Oh, shucks! 1957. I have the notes right here.

[54] * * *

Q Is the elevation of the pond maintained at the same level throughout the year? A Very definitely and positively it was.

Q It has been maintained at the same level? A At the same level except for—shall I go ahead?

Q All right. A Except the rule of the club was that between March 15 and June 15, for ninety days, the water was lowered [55] about two-and-a-half feet upon the advice of the Game and Inland Fisheries Commission to expose the edges of the pond so that with freezing and thawing it was thought that the exposed part, or the bottom of the pond, that edge, would be better bedding for fish during the breeding season.

Q When you lower the elevation of the pond is it visible? Can one observe from walking on the banks that the water has been lowered? A Oh, very definitely, because it is exposed maybe five or six feet at the edge of the pond.

Q Has anyone to your knowledge ever complained to the club about— A No, no.

Q Let me finish my question, Mr. Thornton. A Oh. Excuse me.

Q Has anyone ever complained to the club about this practice of lowering and raising each year? A No, we have known of no complaints from anyone.

Q Now, as I understand it, the purpose in raising and lowering it is to help to cultivate the growth of fish in the pond. What other things has the club done over the years to enhance the fishability of the pond?

[56] * * *

Q Has the club done anything else other than what you have mentioned to improve fishing conditions in the pond? A Yes. Several things. One of the many things was to build hurdles out in the pond, which are round places, and which cedar trees are put into the mud and a space of maybe twenty feet in the circle with wire and posts around it so that young fish would have a place of retreat to get away from the older fish trying to devour them.

Q How long has that practice been carried on by the club? A That practice, out of the sixty-seven years, I would say probably forty years.

Q Do you know whether or not there was any effort prior to the building of hurdles to increase the growth of fish in there? A Yes. We older members of the club observed frames built with two-by-four lumber and about three feet square put near the edge of the pond in the water maybe two feet under, and they were filled with sand. This was done in a number of [57] places throughout the whole pond. Filled with sand so the fish would have a better breeding place.

Q Will you state whether or not the club has ever attempted to obtain stock for the pond from external sources? A Yes. In 1945 when the heavy rains in Virginia washed out so many ponds and our pond was partially washed out but saved by this cofferdam, our Board bought a quantity of fish that came from the Back Bay, large bass, and put them into our pond, thinking that we may have lost some fish when the dam partially broke.

Q You first obtained these fish when? A What?

Q You first obtained these fish when? A I don't understand.

Q I am afraid I didn't understand your answer. You got some fish from another source? A We did.

Q Who did you get them from? A I do not know.

Q That was in Back Bay? A Yes, Back Bay.

Q Now, have you ever gotten fish from any source? [58] A Oh, yes. Time and again from the fish hatchery, the Virginia Fish Hatchery. I myself have gone down on a number of occasions and we

have gotten ten thousand bass fingerlings and six thousand bream fingerlings and put in the pond year after year.

(Referring to registrar book) But in addition to that this book shows that previous members of the club had done the same thing.

Q Do you continue to get these fingerlings from the Fish Hatchery Commission? Do you get them there to this day? A No. Up to a certain time. Now, when that was, I would say about fifteen or eighteen years ago, the rule was made that fish of that kind, the fingerlings, young fish, would not be given to clubs but only to private waters and to the farmers starting a small pond on their place known as watering places for the cattle.

Q By whom was this rule promulgated? A We thought by the Legislature.

Q They would not give Custis any more after that time? A No private clubs. Custis Club was one of them.

Q Do you know of your own knowledge whether [59] or not they continued to stock public streams after that time—the Fisheries Commission? A No. We have understood they have stocked public streams every year since that time.

Q Has the Game and Fisheries Commission rendered any other assistance to your club over the years? A Yes. At their suggestion they sent down one-hundred-foot-long gill nets to attach to the hurdles in the middle of the pond and then stretch it to the shore opposite. We'll say on the right hand side. Then they did exactly the same thing on the left side and left them overnight in order to find out what fish would show up caught in the gill nets overnight to establish to a large extent two things: one was what kind of fish was in the pond and the quantity of fish that would be caught overnight.

Q Who was responsible for having the Game and Inland Fisheries Commission make this study? A Well, I just have to go see the committee of the club.

Q Does the club presently have a caretaker? A Yes, it does.

Q Who is the caretaker? A Hudson Lipscomb.

Q Have there been caretakers prior to Hudson [60] Lipscomb?

A There have been caretakers every single year since the club was organized, and a house built for him to live in.

Q Has the caretaker always lived on the premises? A Always lived on the premises.

Q What were the duties of the caretaker? A The duties of the caretaker are largely to be there to oversee that the strangers who should not fish on the private pond did not avail themselves to that opportunity, did not fish there. They are to keep up the boats and make the other repairs around the place.

Q During your association with the club have you ever observed persons other than members of the club or their guests fishing in the waters of the pond? A Yes, we have.

Q Would you tell the Court some instances that you recall and what action, if any, was taken. A Most of the time that kind of trouble is simply people who would fish from the dam with cane poles. Come by without permission and possibly seeing a place to fish would take the cane poles off the side of their truck or car and start to fish. Either our caretaker or one of our members [61] would go there and explain to them that this was a private pond, and they almost invariably, or invariably, I reckon, withdrew, and went on without question.

Now, there was one other time we found some man who had come by with his son and had a boat in a truck. He put the boat out on the pond, and the boat hadn't been out but a few minutes when one of our officers went out there in our boat to speak to this man and told him that he should not have done that, that this was a private pond. And he was a gentleman. He very courteously and immediately withdrew and we had no further trouble whatever from him. That was the only time that we have known except this present time.

Q When you are referring to the present time, are you talking about the difficulties which you have encountered with the defendants in this case? A I am.

Q Within the past couple of years? A I am. That is the only time.

Q And other than the controversy which is here in litigation with these defendants, the only boat that you have ever seen on the pond was— A Once and only.

Q That is the only one you know of? A There may have been others, but that was [62] the only one I know of or heard any of the members speak of.

Q Are there any roads which touch upon the pond other than that which is shown on Exhibit J leading to the location of the club? A Any roads?

Q Any roads. If I may have Exhibit J. A I know of one and only. And that is the defendants' road.

Q Other than the road leading to the club, you know of one other road and that is one constructed by the defendants? A That's right.

Q When was that road put in? A Oh, four or five years ago, more or less.

Q Prior to that time had there ever been any other road leading there? A Definitely there had not been.

Q Will you state whether or not the pond has been posted over the years? A Oh, yes, the pond has been posted over the years. Both the land around the pond, our fifty acres, and stobs have been put upon in the pond with a posted sign on them.

Q Describe generally where in the pond those posted signs were placed. [63] A Well, just generally in both the north fork and the south fork.

Q What was the nature of this posting? What did it say? A Well, there were two kinds of postings. One was simply a posting of this kind, that we had signs put out, we did, private signs on posts stating "No fishing above these signs between March 15 and June 15."

Q For whose benefit was that? A It was simply for the benefit of allowing the fish in the pond to breed in an undisturbed manner.

Q But who were those signs intended for? A For our members.

Q That is one kind of sign. What was the other? A The other kind of sign was the ordinary sign with the word "Posted" on it to keep strangers out.

Q What do you mean by strangers? A Well, outsiders who were not members of the club.

Q Where, generally, would those signs be posted? A Well, they were posted in a dozen different spots around the pond.

[64] Q To your knowledge and from your investigation of the history of the club, do you know of any persons other than the defendants in this case who have ever asserted any right of ownership in the bed of this pond? A We know of no one who has every asserted any ownership, no.

Q When did the defendants in this case, to your knowledge, first make any claim to any ownership of the pond or any right to fish upon it waters? A Well, I don't have the date, but I would say three or four or five years ago. Maybe four or five years ago roughly. About.

[76] * * *

Q Now, you spoke of your members having [77] removed over the years various logs from the pond. You said your membership has taken logs out of the pond. A Oh, yes, yes.

Q Have any other objects been removed from the pond? A No, no, no.

Q I am not talking about fish. A Well, logs and brush because of this fact: Some of our members were purists in the nature of fly casting, and they wanted to fly cast around the edges of the pond, and they had exposed edges available if you took the trash out or the things that had fallen in the pond like brush or weeds or trees.

Q In what areas of the pond did you remove the logs from? A Just mainly all the way through the whole pond.

Q Have you ever used fish traps in a pond? A The club never has. There is a definite rule that is against using any fish traps.

Q So there have never been any in there? A Yes, there have been. Of course, they have been in there.

Q Will you state the occasion to the Court. [78] A Well, about October 1, two years ago, I happened to be trolling down from the upper part of the pond, and my line caught into something out in the middle of the pond not far from where the Johnson place is. We

went back and found that it was a very large steel fish trap, large enough for two or more men to get into the trap. We still have it on our grounds.

I went down, got the caretaker, Hudson Lipscomb, and he and I and my son, three of us, managed to get that heavy difficult thing up onto some boats. It had in it approximately one hundred fish. Some of the largest silver perch we have ever seen. Full of fish. Now, who put it in there we could not tell.

Q What were the approximate dimensions of this trap? A Well, if Hudson were here he could tell us. I would say roughly—I would say roughly ten feet across by almost square. Then it had wings to it which would, in turn, draw the fish down toward the trap.

[85] * * *

The Court: The Court would like to know if he could advise the Court what lands did the pond claim to own when he became a member and what lands they claim to own now after these thirty odd years. If he can answer those two questions.

By Mr. Cogar:

Q Can you answer the Judge's questions, Mr. Thornton? When you became a member of the club what part of this pond did you and the members of the club then claim that you owned? A The entire waters—the land that was covered by the water of the pond.

Q Covered to what level? A To the same level it has always been. We have had no change in that except the temporary change for the ninety days in the spring.

Q Are you claiming it at the point where it [86] was raised? A Yes. Where it was raised?

Q Where it was raised. A Of course, yes.

Q Do you know if that is the point shown on the exhibit of Mr. Fleet showing a water elevation of 9.25 feet? A I understand that, sir, yes.

Q Those answers relate to the claims asserted by your club at the time you became a member? A That's right.

Q Are these contentions the same today? A Absolutely the same.

Q Have there been any variations? A There have been no variations.

Q Over the years? A Over the years.

[87] * * *

Testimony of George Hill Meredith

Direct Examination

By Mr. Ellis:

* * *

Q What is your occupation, Mr. Meredith? A State game warden.

Q How long have you been so employed? A Twenty-four years.

Q Where do you reside, Mr. Meredith? A King William County.

Q How long have you resided in King William County? A All of my life.

[88] Q What is your age? A Fifty-five years.

Q Mr. Meredith, are you familiar with what is known generally in the King William community as Custis Pond? A I am.

* * *

Q In connection with your duties as game warden, have you had occasion to visit the pond? A Yes.

Q Do you have any idea, Mr. Meredith, on how many occasions you have visited the pond while you have been game warden? A I don't know. It is impossible: In a routine check I have been there a number of times. Then I have been there on complaints from the club, from the keeper of the club.

Q Have you had occasion to question anyone who has been fishing in this pond during the years that you have been game [89] warden? A Yes.

Q Do you have any idea as to how many occasions you have

done so? A I have questioned people fishing and I have arrested people for fishing from the banks of the pond.

Q On how many occasions, if you can approximate, have you made such arrests? A Well, I couldn't tell the exact number, but in 1966 I made several arrests on complaints from the club about people fishing in the pond.

Q What were they charged with, if anything? A Two were charged with—one was fishing without a license. And it was two charges against one. He was fishing without a license and was charged with trespassing. Another one I charged with trespassing.

Q On what lands were they charged with trespassing? Over what land or waters? A They were charged with trespassing on the waters of Custis Club.

Q Do you know what the outcome of those arrests was? A They were proven guilty.

[90] * * *

Q Now, over the period of time that you have been game warden, have there been any other arrests? A I have made some arrests of who fished in the pond from the road without permission.

Q Have you had occasion to check members of the pond who were fishing in the pond? A I have been to the club and have been on the pond and checked members fishing in the pond.

Q Have you had any understanding with the club itself with respect to your duties concerning the pond? A I have always been told that it was—members of the club told me that no one had the right to fish there but members.

[91] * * *

A (Continued) Anyone that did not have permission to fish in the pond, when I approached them if they did not have permission they were charged with trespassing.

Q Now, are you familiar with the reputation as to who owns that pond in this community? A Having known about Custis practically all of my life and in talking, I have always been told and understood that it was the property of the Custis Fishing Club.

Q Now, are you familiar with the reputation as to the boundaries or the property lines of the club waters? A Well, it is my understanding the club owns the pond in its entirety. The water to its highest point.

* * *

Cross Examination

* * *

[97] Q Now, Mr. Meredith, did anyone suggest to you that you should charge these people with trespassing? A The manager of the club and members—members who were in charge of the club at that time, told me that no one had a right to fish in the waters of the Custis pond without permission. And I was simply going on that information, sir.

[99] * * *

Testimony of Thomas T. H. Hill

Direct Examination

* * *

By Mr. Ellis:

Q What is your occupation, Mr. Hill? A Deputy clerk of the Circuit Court of King William County.

Q How long have you been deputy clerk of the [100] Circuit Court of King William County, sir? A Well, I have been working in the clerk's office since June 11, 1930. I was too young to become deputy clerk when I came here. I have been deputy since 1935, I believe. Or before.

Q What is your present age, sir? A I am fifty-nine.

Q Where do you reside? A King William County.

Q Have you resided in King William County all of your life? A All of my life.

Q Are you familiar with what is known in the King William County community as the Custis Pond? A Yes, I am.

Q Are you familiar with the reputation in that community as to who owns that pond? A I have always understood that the Custis

Hunting and Fishing Club owned the mill pond and that to go into it you had to get permission from a member or be invited by a member.

Redirect Examination

By Mr. Ellis:

Q I believe you stated, Mr. Hill, that it was your understanding that a person had to have permission to fish in Custis Pond, is that correct? A That's correct.

Q Permission from whom? A From one of the members.

Q Now, would this apply, would this understanding apply, to any part of the pond? A I always understood that the Custis Pond, the Mill Pond, the whole Mill Pond, was owned by the club, and in order to go fishing or anything you would have to get permission from a member or somebody in authority at the club.

[105] * * *

Testimony of Hudson B. Lipscomb, Jr.

Direct Examination

By Mr. Cogar:

* * *

Q How old are you, Mr. Lipscomb? A Sixty-three.

Q Which means that you were born in 1908? A Right.

Q Where were you born? A In King William County at a place called Perrins on the Mattaponi Road right down here by about, I reckon, ten or eleven miles.

Q A place named what? [106] A Perrins.

Q Can you spell it? A No, I can't spell it.

Q You are presently employed by the Custis Fishing and Hunting Club? A Yes.

Q In what capacity? A As a caretaker.

Q Do you have another job besides that? A Yes. I am employed by the Chesapeake Corporation.

Q What was your first association with the club? A Well, my first association was when I used to come over to the club with my mother when she used to bring her corn over to the club to have it ground.

Q When was this? A Well, that would have been better than fifty years ago.

Q When you were just a youngster? A That's right.

Q She brought her corn over to the mill to have it ground? A That's right.

[107] Q Was the property improved at that time? Were there any buildings standing besides the mill? A Yes. The house, the tenant house, and the clubhouse was there.

Q Incidentally, where was your mother born, Mr. Lipscomb? A At Custis Club.

Q Where the clubhouse is presently situated? A No. Just right across from it. Right at the end of my garden. From where it sits right across on an angle from the clubhouse.

Q Approximately how many feet from the Custis clubhouse? A I'd say about thirty feet.

Q That house is no longer standing? A No.

Q When you came to the mill with your mother to grind her corn, what did you do while it was being ground? A Well, I always stayed around with her, but I always wanted to go fishing in the pond but she wouldn't let me go fishing in there. She would say you go fishing in the creek because that pond belongs to the club.

Q Did you ever go fishing in the pond? A Later on. In later years.

[108] Q When was that? A Well, when I was a boy about, I reckon, twelve or thirteen.

Q Where did you fish? A Well, used to fish in the creek first, and then used to catch these little stiffbacks and used to put them on a hook and go down around the pond and turn them loose in the pond so we could catch bass.

Q Did you ever have any difficulty fishing there? A Oh, yes, oh, yes. Ran out every time. Used to catch us and run us out.

Q Who would run you out? A Well, the caretaker by the name of Jim Gardner. He was the one that used to run me out all the time.

Q This was when you were a youngster? A Yes, sir.

Q Was there every anyone fishing with you? A Yes. Me and a boy by the name of Ernest Cobb.

Q You have said that your mother told you that you could not fish in there because it belonged to the club. Have you ever had any understanding different from that? A No. Always belonged to the club.

[109] Q What part of the pond are you speaking of? A Well, the part of the pond of the fishing then was right around the dam, on the dam part, and right up beside the pond on the north prong.

Q What part of the pond did you understand belonged to the club? A All of it.

Q Do you remember when the clubhouse was built? A No.

Q Is the clubhouse that stands there now the clubhouse that was there when you visited the club as a youngster with your mother? A Yes.

Q Is it the same tenement house? Is the tenement house the same as the one that was there? A No. That one burned down.

Q When did it burn down? A I don't know. I'd say somewhere around about forty years ago or something. Maybe better.

Q How soon was it rebuilt? A It was rebuilt right recently.

Q From your association over the years with the club from your childhood to the present, are you able to [110] say whether or not there has been a caretaker there? A It has been a caretaker there ever since I can remember.

* * *

Q Could you tell the Court in the period of approximately from 1910 to 1920 or 1925, those who lived [111] around the pond or on

the pond and had residences around the pond? A Well, the first one that owned the Huntington property that ran all way around the pond was a fellow by the name of—called him Mr. Billy Bray, but I think it was James, J. B. Bray. But he was the first one who owned that property. Then he sold—

Q Could you tell where that property is? Is that on the north side of the pond? A That is on the—it takes in the whole north prong and the north side of the pond all the way around, and on the north—on the west side of Bull Swamp prong down to this line.

Q The line shown on Exhibit G? A That's right.

Q That pond, I think as a matter of record, for the most part is owned by the Chesapeake Corporation? A The Chesapeake Corporation owns all that now.

Q Did this boy have a residence on any part of that property? A No, sir.

Q Did you ever observe Mr. Bray fishing upon the waters of the pond? [112] A Yes, we did. Some of us asked him to give us the right to go on there and fish. He owned the land down to the pond. He said I can give you the right to go on my property but I can't give you the right to fish in the pond because that doesn't belong to me.

Q Moving around the pond, what other owners do you have? A Well, there is a piece just before you get to the line that was owned by the Pilchers. They didn't live there but they lived right away from it.

Then on around was a piece of land owned by the Wootens. By Mr. Jim Wooten.

Q For the record, I believe that is W-o-o-t-e-n? A Yes. Then the next piece—

Q Let's take them one at a time. The first one you mentioned was Pilchers? A Yes.

Q And the Pilchers lived there during the time you have been associated with the club? A Yes.

Q Have you ever known them to assert any right to any ownership or any rights at all in the water or the land beneath the waters of Custis Club? [113] A No, I haven't.

Q Have you had occasion to see various members of the Pilcher family over the years? A Yes, sir.

Q Both while you were a caretaker and when you were not employed by the club? A That's right.

Q Now, what about the Wootens? Who are the Wootens? A Well, it was three of them. One was Jim Wooten, and the other one was Sam, and the other one was a cousin. I think they used to call him John Lord.

Q Were any of these men married? A No, sir, not as I know of.

Q Three bachelors— A Three bachelors.

Q —living there so far as you know? Who did the housekeeping? A Well, I don't know, but they had a saying to the thing that said that Jim wouldn't, Sam couldn't, and John had it all to do. So maybe he done the housekeeping.

Q You knew all three of them? A Yes, sir.

Q When is your first recollection of having [114] known them? A Well, in 1918 we used to haul watermelons to the shipyard in West Point, and he used to haul watermelons down there, too.

Q Have you ever been on their property? A Many times.

Q You have been in their home and had conversations with them? A Yes, sir.

Q Over how many years, generally, did you know them? A Well, I knew them all my life.

Q Until their deaths? A Until their deaths.

Q During that time did you ever understand any of them to make any claim to any ownership of the waters or the lands beneath the waters of Custis Pond? A None whatsoever, as I have heard.

Q Their property is situated where, now? Is the property that was owned by the Wootens the same property that is now owned by the defendants in this case, the Johnsons? A That is right.

Q Coming on around the southern end of the pond toward the east, were there other residences along there? [115] A Yes, but I

don't know who owned the property before the Palmers and Reed & Johnson Lumber Company bought it. But they bought the piece of property called Royers. Then later on I think Mr. T. L. Johnson got it all. He bought the others out and got the whole place.

Q He is living and is presently a resident of this county? A Yes, sir.

Q It is your understanding that he presently owns the property adjoining the defendants' property to the east? A That's right.

Q Have you ever known— A To the west. The Johnson property, the defendants', is on the west of Mr. T. L. Johnson's.

Q Mr. T. L. Johnson's property is east of the defendants'? A East of it, yes.

Q Have you ever seen them fishing upon the waters of the pond or did they ever assert in your presence any claim to the ownership of the pond? A No, not at all.

Q Have you had occasion to see this Mr. Johnson or members of his family over the years? [116] A T. L.?

Q Yes, sir. A Yes, sir. Went to school with the boys and all.

Q Now, if you will look up before you, you will see a map which is a duplicate of Exhibit G in this record, and between these two prongs, one going off to the lower left hand corner and one coming down toward the center of the bottom of the paper, there is between the red line and the word "Custis" a bit of land that is surrounded on three sides by the waters of Custis Pond. Do you know who owns that property, generally, in that area? A Well, it used to belong to Mr. W. S. Timberlake and to his wife, I think it was who it belonged to. I think when she died she left it to her daughter.

Q Do you know her daughter's name? A I don't know her daughter's name.

Q Has there ever been any improvement or structure on that property, to your knowledge? A It has been improvements on there because it has been all bulldozed off, according to my idea.

Q Has that been recently? A Yes, sir.

Q But has there ever been a house— [117] A No, sir.

Q —or anything like that on it? A No, sir.

Q You knew Mr. Timberlake? A Yes, sir.

Q You knew members of his family? A Yes, sir.

Q For how many years? A All my life.

Q Have you ever known them to assert, or claim, any rights to ownership in the bed of the pond in the land beneath the pond, or any rights in the waters of the pond? A None at all.

Q Going on around to the east, over the years have there been any other property owners that you can recall? A Yes. Well, I don't know who owned it before Mr. Cobb bought it, but he bought it back right many years ago, and he still owns, at least his heirs still own, that property that adjoins the club and Royers.

Q Royers? A Royers' place. That is T. L. Johnson's property.

Q So this is the property between the club and T. L. Johnson's which you have testified to? [118] A That's right.

Q Which closes the ring? A That's right.

Q Is Mr. Cobb living now? A No.

Q Is there anybody living on that property now? A Nobody lives on the property.

Q Was he the last person to live on it? A Yes, sir, Mr. Cobb was the last one to live there.

Q Do you remember when he died? A No, I can't say the date, but it has been about I'd say twelve or fourteen years, something like that.

Q How long had you been knowing him before he died? A All my life.

Q Did you even know him or any members of his family to assert any rights of ownership in the land beneath the waters or any rights to the waters of the pond? A No.

Q Did you ever see him or any member of his family fishing upon the waters of the pond? A None except the boy I told you that fished [119] with me and got run out of the pond.

Q Was that Cobb you were talking about? A That was Cobb.

Q You do not know the circumstances under which Mr. Cobb died? A Yes, sir. He drowned, or had a heart attack, whichever it was, but they found him in the waters of Custis Pond.

Q Do you know if anyone was with him at the time of his death? A No one. Nobody was with him, I don't think.

Q All right, sir. We have traced your boyhood years and your visits to the club. Do I understand you to say that you have lived in the vicinity of this club all of your life? A All my life.

Q You have never lived away from here? A No further than West Point. I lived in West Point about six years, but I came back and forth up home.

Q How far is your homeplace from this pond? A About a mile-and-a-half. About a mile-and-a-half to the dam, but if you go through the woods to it, it ain't over about three-quarters of a mile.

Q Are you aware of any breaks in the dam of [120] the pond? A Yes, sir.

Q When was the first break that you recall? A Well, I don't know what year it was but I was merely a small boy about I'd say maybe six or seven years old, and that was the first break I can remember.

* * *

Q Was your father employed by the pond for repair of this break? A Yes, sir.

* * *

[124] Q When did you first commence to serve as caretaker for the club? A Well, the first time I was there was '46, and I stayed there for part of '46 and '47 and I think a couple months in '48. That was the first time. Now, this time I have been there from—I looked after the club from December 1965 until July 1966, and then in 1966, July 1966, I moved over to the club and I have been there ever since.

Q What was your reason for leaving the employ of the club in 1966? A I didn't leave it in '66.

Q Oh, excuse me. On the occasion of your first employment. A Well, the reason I left it the first time was that I had children going to school. I had to drive and take them to meet the school bus about three miles every morning, and that was too expensive for me so I had to move back home where the school bus came right by the door.

Q That was back in 1946? A '46 and '47.

Q Then in 1965, in December 1965, you came back and you have been there every since? A That's right.

Q Do you live on the premises of the club? [125] A That's right.

Q In the caretaker's house? A That's right.

Q What were your duties in 1946 and what have been your duties from December 1965 to the present? A Well, it is to take care of the club, to look after it, police it, and keep people out of it. And to do any normal repair work. And cut the grass.

Q Are you able to say whether or not over the years you have seen posted signs in the waters of Custis Pond? A Yes, sir. I can't tell you exactly the year, but it was a number of years back but it was posted signs, one right in the middle of Ice House Cove where it goes off on the pond, and another one right in the hook of where the lily pad stands between Pilchers prong and Bull Swamp prong. Right in that big wide space right there.

Q That is the far western end? A That's right. It was two of them. One was up there and one was in Ice House Cove.

Q Do you know who had put those there? A No, I don't know who put them there.

Q Will you describe the circumstances under which you have had to ask people not to fish in the pond and what their reactions have been? [126] A Well, when I have seen some of these fellows standing on the side of the banks, most of them will always get out of the way, and I will tell them, I say I know you fellows are fishing in the pond. I say how about telling me your name? They won't tell me their names but they will get on out of the way. But I did—

Q Now, if I may interrupt you. This has generally been the case.

Have you ever had anybody who took exception to your request not to fish in the pond? A No.

Q Have you had anybody who got upset when you asked them not to? A Nobody got upset when I asked them. The fellows that was fishing from the bank, they always left.

Q Now, coming up to the time where we get into this controversy, have you ever had an occasion in the last two or three years to ask anybody in the area of the Johnson property not to fish in the pond? A Yes, sir.

Q Would you relate those circumstances to the Judge. A Well, they didn't ever say they was going to quit fishing and they didn't say that they was going to keep on. They just—one time, the first time I caught them, I [127] just told them and I left them, and they did.

Q About when was this? A I think that was in '67? That was the first time I had ever seen them down there.

Q Who was that that you said it to? A I think it was one of the Johnson boys and three—three more others was in the pond.

Q Were they on the bank? A No. They were in the boat.

Q Prior to the time you saw them on the pond in a boat in 1967, had you seen anybody other than members or non-members on the pond in a boat? A Yes. Members or non-members?

Q Yes. A Yes, I have seen non-members in there since then.

Q I mean before then. A Oh, before that, no.

Q Now, when you saw them in the boat in 1967, tell me what you said and what they said. A I told them, I said don't you boys know this is a private pond? And they said no. And I said, well, it is a private pond, you know you ain't got no right to fish in here.

[128] * * *

The Court: Would you lay the foundation as to which Johnson boys they are? I think there are two sets of them around the pond.

By Mr. Cogar: (Continued)

Q Which Johnson boys were you referring to? A The Johnsons that own the Wooten property.

Q The defendants in this case? A Yes.

Q What did you say to them? A I told them did they know it was a private pond, that they didn't have no right to fish in there? They told me that they didn't know that it was private. And that is all I said to them.

[129] Q You were in your boat and they were in a boat? A Yes, I was in my boat.

Q Then what happened? What did you do and what did they do? A I left then and I went on back to the club.

Q Did you have any occasion to have any encounter with them after that? A I seen the same one that same day, because I went up to their home, up to their farm.

Q Why did you go up there? A Well, I wanted to see Mr. Johnson, the elder fellow, to tell him, because he was letting the people fish in a private pond. And I met him.

Q Will you tell the Court what you said to Mr. Johnson, the father of the defendants, and what occurred at that time? A I told him, I said I caught some fellows down there fishing in the pond, and I said one of them is, I think, your son. And I said that is a private pond. He said, well, I don't think so.

So he got a little upset. So he said right off the bat, he said, well, who are you? So I told him I was a caretaker at the club.

[130] * * *

Q Have you finished what you told the father of the defendants? [131] A No.

Q All right. Tell the Court what else you told him. A What else I told him and what he told me?

Q What you told him. A Well, I told him that the boys were fishing on the pond and that it was a private pond. And his reaction was to tell me that it was—that for me to go and tell them rich sons of a bitch down there that if they would go along with him that we would go along with them, that if they didn't he would fence his part of the pond off.

Q At the time of this encounter with the elder Johnson, had a road been constructed or pushed down to the pond on the Johnson property? A Yes, sir, yes, sir.

Q When was that done? A In '67, I think.

Q Prior to the time that the Johnsons opened a road on their property down to the edge of the pond, what other road led to the pond that you can remember in your lifetime? A Well, it was no other road except the old logging roads, and they was all growed up and closed. And this other road was the one that the main highway came down to the [132] dam. They were the only two open roads to the pond.

[133] * * *

Q Do the waters and the lands of Custis Pond remain at the same height throughout the year? [134] A No. I lower the water on the 15th of December in the pond twenty-six inches, and on March 15, I put it back on the pond unless it is requested by the members to put it on earlier.

Q Tell His Honor mechanically how you go about lowering the water. A Well, I raise the gates, the gates to the spillway. I will raise these gates and let the water go down in the bottom of the gates. The main gate is twenty-six inches deep, and when she gets to the bottom of that, the water is twenty-six inches lower in the pond.

Q You leave it in that position? A From December 15 until March 15. Then I will lower the gates and the pond fills back up.

Q What effect does that have on the terrain around the pond? A Well, you do that to fertilize the banks.

Q The purpose of it has been explained, Mr. Lipscomb. To the eye, what impression do you have after it is down around the pond? A Oh, well, you see logs and all that shore that hasn't been seen. You see all these logs and things that stick all out in the water. It looks like a skeleton pond.

Q You restore it each time to what level? [135] A Twenty-six inches. Back to normal.

Q Mr. Lipscomb, from the time of your earliest recollections when you went there as a child to the present, having lived all of your

life in the vicinity of Custis Pond, have you ever known prior to your encounter with the Johnsons, the defendants in this case—

* * *

Q Will you tell His Honor what instances, other than 1967, in your lifetime that you have ever known any person to assert any right to ownership in the lands beneath the pond or rights in the waters of the pond? A None. Ain't nobody had no right to it. None as I know of.

Q Who owns the pond so far as you know? A Custis Hunting and Fishing Club.

[145] * * *

Testimony of Thomas W. Purcell, Jr.

Direct Examination

By Mr. Cogar:

* * *

Q Mr. Purcell, what is your occupation? [146] A Psychologist with Tucker Hospital.

Q What degree do you hold? A Master's degree.

Q What is your age? A Fifty-three.

Q You are a member of the Custis Fishing and Hunting Club? A Yes, sir, yes, sir.

Q How long have you been a member? A Since right after World War II. About '46 or '47.

Q To the present? A To the present, yes.

Q What was your first association with the club, or the pond, or the grounds surrounding it? A It goes back as far as I can remember. My father was a member of the club and used to take us down there. It is one of my earliest recollections. How old I was at that time I can't say, but it goes back. I can't remember much about how old I was.

Q Could you give an approximation? A Well, when I was born, really, I guess.

Q But your recollection would go back to approximately when? [147] A My recollection would go back to when I was five, something like that.

Q Your father, was he a member of the club A Yes.

Q Were any other members of your family? A Well, my grandfather was a member. My brother is a member. And my mother was the only woman member of the club. After my father died they gave my mother membership until we got out of service—until I got out of service, and then transferred the membership to me.

Q I understood you to say that you commenced to go there as a youth. From then until the present you have gone with what degree of frequency? A Well, it varies, but I have been fairly close to the club every year from time to time. Now, sometimes I get down there less frequently than I would like, but I have been going steadily since then.

Q Have your visits been confined to the fishing season? A No. I have been down there at all times, all during the year.

Q Who is the present caretaker? A Mr. Lipscomb.

Q To the best of your knowledge, has there [148] been a caretaker there so long as you have been going to the club? A Yes, sir.

* * *

Q Have you ever had occasion to observe any non-members fishing in the pond? A Yes, sir.

Q Can you give the Court any example of these, and what action, if any, was taken when that occurred? A Oh, I guess some fifteen or twenty years ago, I remember once myself I was paddling up the pond and saw somebody fishing from the bank. Had a road there. They appeared to be fishing from the bank, and I went over and told them that they couldn't fish in the pond. He said, but that land belongs to somebody in my family. Or something like that. I said, yes, but the pond is private, and that I wanted him to stop—be off the pond before I got back. And I came back, and when I got back he was gone.

Q Have you had occasion, yourself personally, [149] on any other occasion to ask anybody to leave the pond who was not a member or guest of a member? A No, I have not.

Q Have others in your presence asked non-members not to fish in the pond? A Yes. I remember once many years ago my father running somebody off the pond. They were just fishing from the bank. They weren't fishing from the dam.

Q In your nearly fifty years of association with the club, will you tell the Court what persons other than membership of the club have asserted any right to the ownership of the land beneath the pond? A As far as I know, until recently I had never heard of anybody asserting a right to it.

Q By recently, are you— A Well, recently, since we have gotten this problem with the Johnsons.

Q This litigation? A Yes, this litigation.

[154] * * *

Testimony of Henry W. Oppenhimer

Direct Examination

By Mr. Ellis:

* * *

Q Your occupation, sir. A I am an attorney. Semi-retired.

Q What is your age, Mr. Oppenhimer? A Seventy-five.

Q Mr. Oppenhimer, are you a member of the Custis Fishing and Hunting Club? A I am.

Q How long have you been a member of that club? A Since 1954.

Q Since 1954, have you used the pond to fish in? A I have used it constantly to fish in.

Q Prior to 1954, did you have occasion to [155] visit the club? A Prior to what?

Q 1954. A I did. I came to the pond before then occasionally with Dr. Hunter McGuire before I became a member.

Q Did you come as a guest? A I came as a guest.

* * *

Q What has been your understanding with respect to the boundary line of the pond itself insofar as that portion which is owned by Custis Club? A Well, my opinion, I mean, was based on the Lee deed, primarily.

Q I am not asking for your opinion. A In my opinion we owned, as in the language [156] in that deed, to the furthest limits of the pond. I did not know of any adverse claim.

Q Has that been your understanding since you have been a member? A That has been my understanding throughout my membership.

Q Now, on your visits have you had occasion to see any persons other than members of the club without permission using the pond? A I think on two occasions prior to the time I wrote a letter that I will mention later. On one occasion, I can't give the year or the date, but my brother-in-law, I think it was, Dr. Carrington Williams, with whom I was fishing, it may have been somebody else, we saw somebody fishing from the bank on the side of the pond opposite the large lily pad field. That is, across from, not on, the lily pad side. We went over.

Q Would that be the side or the part that is in the middle between the two forks? A It is leading toward Bull Swamp. Come up the pond, take a right, and you will go into Bull Swamp. We saw a man fishing from the bank. We wandered over that way. We guided the boat over in that direction with the idea of asking him if he had permission to fish, and he pulled up as we came [157] and disappeared.

Q You had no occasion to speak to him? A We didn't come in range of speaking to him. He withdrew and departed as soon as we appeared.

Q When was the next time you saw anyone? A The next time was sometime after that, and it was prior to 1968, when we saw a group of I suppose six teenage boys and maybe younger ones. Some were further up the pond fishing and some were wading out into the pond. As we approached and came up to them they started getting out of the pond and running. And we yelled at them more because of their confusion, and out they went. They went up the hill. That was across on the other side of the pond—not the other side, on the lily pad side but on the other side of the gut leading up to Bull Swamp. They cleared out. They didn't stay there.

Q You mentioned another occasion which prompted a letter by you. A I think the exact date was September 2, 1968. I came to the pond, and I don't know who was with me but someone was with me. It was either my brother-in-law or possibly Mr. Wingo. I am not certain who it was. But when we came up there, Mr. Lipscomb said that—

Q Don't state what Mr. Lipscomb said. A Well, I mean, we came up. He became aware [158] of the fact that somebody had been using the pond, and when they were challenged to the use of the pond they said they had permission to use it from a man in Newport News. And we then went up to pond and saw them fishing from boats. The next day I wrote a letter. That was September 3, 1968. I addressed a letter to Mr. Charles A. Rose, the president of the Custis Club, advising him that people were fishing on the pond under a claim of permission from a man in Newport News.

[159] * * *

Q Other than these three incidents, have you seen anything else? A They are the three incidents I have seen. I have not known of any prior to this trouble. That prompted the writing of the letter which brought this thing to a head. I think it started the ball rolling.

Q Now, do you know of any persons other than those involved in this litigation who have asserted any claim to ownership in the pond other than the Custis Club? A None that I know of than these present claimants, or persons whom they acquired ownership with.

[163] * * *

Testimony of John T. Wingo

Direct Examination

By Mr. Ellis:

* * *

Q Your occupation. A Lawyer.

Q Your age. A Eighty-three.

Q How long have you been practicing law, sir? A Since July 1909.

Q Are you a member of the Custis Fishing and Hunting Club? A I am.

Q How long have you been a member of that club? A Since early in 1952.

[164] * * *

Q Now, on your visits to the pond, have you ever observed anyone other than a member of the club or a non-member with permission fishing in the club waters? A Possibly once. I remember seeing a large boy, or young man, maybe two of them, but only one was fishing, from a tree located up near the beginning of what we call Bull Swamp, the head of the pond. I think we spoke to him. I am not certain who was with me. I am under the impression it was Dr. Carrington Williams. I think we spoke to him and made some observations about it being a private pond, but I don't know that we ordered them away or anything.

Q What did he do, if anything? A We made protests that he had no right in there. We told him it was a private pond.

Q Did he leave? A I think he did. I am not certain about that.

[165] Q What has been your understanding with respect to ownership of the waters and the land under the waters of the pond? A That is has been an exclusive ownership of the Custis Club. That was all the information that I had when I joined. All the activities, such as repairing the dam. Shortly after I became a member we had trouble with the spillway of the dam, which was then on, I think—there was a break across the spillway on I reckon you would say the northern side.

Q Do you recall what year approximately that was? A I think this was in 1953.

Q And did the club itself repair the spillway? A Yes, it did.

Q Do you recall the approximate cost of that repair? A It so happens that I looked over my old file just recently. I didn't make an exact note of it but I think it was nine thousand one hundred some dollars.

Q Did the club bear that expense? A Entirely. We had some negotiations with General Anderson, who was then director of the

Highway Department for the State of Virginia. We had some conferences, but could not get any substantial contribution. They took the view [166] that they were only responsible, under some act of the Code of Virginia—

Q Did the road at that time cross the dam? A It crossed the dam, yes. It crossed the dam, and they claimed they were only liable for the surface of the road, under these statutes, and offered I think $400.00, and we were so outdone, and I did expect it to be followed up somewhere, but to my best recollection we never received a dollar even of the $400.00.

Q Other than persons involved in the present litigation, do you know of anyone who has asserted any claim of ownership to the waters of the pond or the land under it? A I do not.

[167] * * *

Testimony of John B. Purcell

Direct Examination

By Mr. Ellis:

* * *

Q Your occupation? A Bank officer.

Q And your age? A Fifty-eight.

Q Mr. Purcell, are you a member of the Custis Fishing and Hunting Club? A Yes, sir.

Q How long have you been a member? A I became a member, took up my father's membership, in 1940.

Q Is Mr. Thomas Purcell who testified in this case your brother? A Right.

Q When, if you can state with any certainty, was your first visit to Custis Pond? [168] A I really couldn't state. I know it was not later than 1920. It could have been earlier. My father became a member in 1916.

Q What is your first memory, at what age do you first remember going to Custis Pond? A About seven years old.

* * *

[169] Q Now, during your visits to the club have you ever had occasion to see a non-member fishing in the club waters? That is, a non-member without permission from a member of the club. A No. Let me say this. I will say that I have seen them fishing from the bank or the dam, and the caretaker would run them away. But we would go back and report them fishing from the dam.

Q Other than this you have never observed anything? A No, nothing other than I have seen them fishing from the dam, and then I went back and reported it to the caretaker and he ran them off.

Q What is your understanding as to the ownership of the pond and the land under the pond? A I have never heard it discussed until this recent case that we did not own complete fishing rights to the pond.

Q What about the limits of the land under the waters? What has been your understanding of that? A I don't believe I understand the question.

Q Have you had an understanding with respect to the ownership of the pond itself? A I have always understood that we owned the [170] pond itself.

Q Do you know of any persons other than the persons involved in the present litigation who have asserted any claim— A No, I don't know.

Q —to the pond, sir? A I do not.

* * *

Mr. Cogar: The plaintiff rests, Your Honor.

[177] * * *

The Court: Gentlemen at the bar, I do know that all of you have done a lot of work in this matter and the Court has also done a lot of work in it. I believe, in my opinion, that there are only four cases that would pertain to the issue in this case, and I will be glad to give you gentlemen the benefit of my research if you so desire. I am sure that all of you have found these four cases, but, even so, if you want to look at them this afternoon or tomorrow morning before court they will be here for you to review.

Providence Forge v. Miller Manufacturing [178] Company, 177 Va. 129. I would say in a sense that probably is a forerunner of the others I will give you.

Mr. Spratley: I believe that is cited in Leake, Your Honor.

The Court: Yes. Leake v. Richardson, 199 Va. 967. This is in a little inverse order here. Boerner v. McCallister, 197 Va. 169. Improved Realty v. Sowers, 195 Va. 317. And, lastly, Wickouski v. Swift, 203 Va. 467.

Gentlemen, I do believe that these four cases cover all of the law relating to mill ponds in Virginia, and as I have found them I pass those on to you. If you haven't already looked them up, if you would look at them I would appreciate it.

Mr. Cogar: A little earlier, Your Honor, Mr. Spratley referred to the Bull Run Development case.

The Court: Gentlemen, that case deals with general adverse possession, which is not in point.

Mr. Cogar: On the issue of adverse possession, there is mentioned in this case, which involves a suit to establish a boundary between properties, which is the statutory proceeding that [179] we are following here, the principle that if the claimant or the plaintiff can show a period of uninterrupted peaceful possession that is prima-facie evidence of ownership, and it seems that it is sufficient to sustain our position unless they can show differently.

The Court: Gentlemen at the bar, I think adverse possession as to the pond, which is a very fine point, is what we are concerned with in the case before us, and I am giving you these five cases. I sincerely believe that all of the points are covered in these cases, and you may fit your argument on your facts within these cases.

[184] * * *

Testimony of Maurice V. Johnson, Jr.

Direct Examination

By Mr. Spratley:

Q Will you state your name and address, sir. A Maurice V. Johnson, Jr.

Q What is your occupation? A Plumbing and heating contractor.

Q Are you one of the defendants in this case? A Yes, sir.

Q Who are the other defendants? A My wife, Joyce F. Johnson, and my brother, Wade C. Johnson.

Q Do you own any land in King William County? A Yes, sir, I do.

Q How many parcels of land do you own? A Two.

Q When did you acquire this land? A Around 1965. Latter part of '65.

Q What are the sizes of these tracks of land? A One is 124 acres. The other is 64½.

Q Where is the 124-acre tract located? A Adjoining the Custis Mill Pond and off Route—I don't know the route number, to tell you the truth. [185] I think it is RFD 1.

* * *

Q What are the contours of your land? A When you say the contours, you mean what?

Q The high ground, low ground. A My deed calls for 124-acre tract with approximately 4 or 5 acres under water, the rest being high ground with the exception of two ponds I have built on the land since that time myself, and there are approximately 14 acres of it I built ponds and got underwater now.

[189] * * *

Q What, if any, fishing have you done in regard to this property? A I am not much of a fisherman myself. I don't fish much. I have fished a little bit in the lakes that [190] I have built, maybe twice in the three years.

[191] * * *

Q Mr. Johnson, directing your attention to Plat Book 5, Page 115, I would like you to look at that page and then tell me if you have ever seen the plat before? A Yes, sir, I have.

[192] Where did you first see that plat? A My neighbor, Mr. Wayne Johnson, has a plat like that. It looks more the original than this, or, at least, something as good as that.

Q Is your property shown on that plat?

Mr. Cogar: If Your Honor please, at this time I would like to interject an objection to any testimony relating to this plat which has been mentioned previously and to which yesterday I indicated that we objected to its introduction.

The Court: All right. Will you state your reasons for the objection.

Mr. Cogar: Yes, sir, I will, Your Honor. The Court of Appeals in two cases, Christian v. Bulbeck, 120 Va. 74, and again in Robinson v. Peterson, 200 Va. 186, has held that a plat, a recorded plat, [not] referred to in a deed or otherwise identified, just a plat of record, is not admissible in evidence in a boundary dispute case, and, if I may, I will read just the headnote from these two cases.

Reading first from Christian v. Bulbeck, which says:

A plat not referred to in or made a [193] part of the chain of title of either plaintiff or defendants on the trial of a partition under Acts 1912, page 133, is not admissible as evidence of the extent or location of the metes and bounds covered by the true title, or of that covered by the color of title of the defendants.

The Court: Well, gentlemen at the bar, have you all not been referring to this map all the way through this trial? Both sides?

Mr. Spratley: Your Honor, Mr. Fleet referred to this plat. I think this is where he got the general projection of that line on the plaintiff's exhibit.

Mr. Cogar: If Your Honor please, Mr. Fleet did refer to it. At the time he referred to it, he stated that for the purposes of projecting this line he had looked at the grant of the Commonwealth. The Seaton Line on the grant of the Commonwealth. He had looked at the line appearing on the Lee deed to the Custis Club, and he had seen this line on this plat. But this plat is not referred to in any deed in the courthouse of King William County.

The Court: As well as I remember, I didn't [194] Mr. Fleet refer to this map also? He said he found on the 50-acre tract some poles, or

something, an old post? And didn't he point out where they stopped and he took off from that point on?

Mr. Spratley: Your Honor, he also said that this line, this northern line on this tract, was very close to his red line, and that he had considered both of them.

The Court: That's correct. And I believe some question was asked about courses and distance. He said they were very close.

Mr. Cogar: That's correct, Your Honor. If it were referred to for that purpose and that purpose alone, but if it is now to be offered as evidence to indicate the ownership of this defendant, we say that under the ruling of these two cases it could not be clearer that unless the plat be identified in a deed then it is not admissible for that purpose. Or else, I could put any plat in.

The Court: I understand, Mr. Cogar, the point that you make. In other words, the plat that is not authenticated in a chain of title would have no relation to that chain of title because anybody could record a plat.

[195] Mr. Cogar: That is correct.

The Court: But the point here is that this map has been referred to by you gentlemen, first of all, by reference and in connection with the first exhibit that was shown to the Court of a red line called the Seaton Line, and it was compared with this map, which is recorded in Plat Book 5, Page 115.

Mr. Spratley: Yes, sir.

The Court: All right. The Court will allow it for those purposes.

Mr. Cogar: As to the location of the line?

The Court: That's correct, sir.

By Mr. Spratley: (Continued)

Q Mr. Johnson, would you look at this plat. A Yes, sir.

Q Is the 124 acres that you own on that plat? A Yes, sir.

Q Where is it located on that plat? A In the left hand side here.

Q Would that be the westerly side? A Yes, sir.

Mr. Cogar: If Your Honor please, I object to this testimony. As I understand, this defendant [196] by sworn answers to interrogatories has stated, and he has stated in court by deeds introduced, that he relies upon those deeds and the deed of Pilcher for his chain of title. Those deeds speak for themselves, and I do not think it is appropriate for him to say that his land which he owns is shown on that plat which is not identified in any of the evidence. The deeds speak for themselves.

[199] * * *

The Court: I believe the clerk will verify if we call him to the stand that the records here were destroyed in 1885. On January 24, 1885, the records were destroyed.

[205] * * *

The Court: Gentlemen at the bar, based upon two premises—its being an ancient document and its embracing the land of the defendants —the Court will allow it to be introduced as Defendants' Exhibit Number 11.

Mr. Cogar: Let the record show the plaintiff objects and excepts to the ruling of the Court on the ground that there is no evidence that it is an ancient document and there is no evidence that it does embrace the land of the defendant.

[210] * * *

The Court: Gentlemen, we will proceed on to the next question for this witness.

Mr. Cogar: If Your Honor please, I [211] hesitate to interrupt, but I understand the Court's ruling, and I have excepted to it, there will be no plat other than a copy of this introduced. Am I correct in my understanding of that?

The Court: As I understand it, Mr. Spratley will through some way or another. Whether it can be done or not through the clerk's office, I do not know. I understand his machine is too small for it. I do not know whether some arrangements can be made to reproduce the plat otherwise. Mr. Spratley, it will have to be reproduced. You know, gentlemen, that we cannot take the record out of the clerk's office, so it will have to be reproduced in some fashion.

Mr. Spratley: I am willing to go so far as to talk to Wayne Johnson about that plat and show it to counsel to make sure it conforms with this one if that would help matters. I cannot assure the Court that I can do this but I will certainly try.

[212] * * *

Cross Examination

By Mr. Cogar:

Q I believe, Mr. Johnson, in your testimony—I am not purporting to quote you exactly—you said that under your deed you got title to 4 or 5 acres underwater. A That was my understanding upon buying it, yes, from the original owners.

Q Will you tell us what deed you are referring to? A From the deed from David Howard. And, actually, mine came through a chain through Becker and so forth.

Q Would you tell this Court what deed it is that you refer to that conveys to you 4 or 5 acres of water under the pond? A There is nothing mentioned to my knowledge [213] in the deed about under the water. It says to a point and a line to be determined by survey, which I am trying to get a survey.

[217] * * *

Q Mr. Johnson, you received a letter from the president of Custis Club back in 1968, advising you of their ownership of this club, did you not? A If you say I did. If you have a copy of the letter, I guess I did. I don't remember a date—I mean, the date. I have had a letter from them I am sure, yes.

Q I am sorry. I said 1968. I will hand you a letter under date of April 8, 1969, and ask you if you will read it. It is addressed to you and is purportedly signed by Charles A. Rose, president of Custis Fishing and Hunting Club. I will ask you if you will look at that and advise the Court [218] whether you received this letter. A (Observing letter) Yes, I received this letter.

Q Will you read that letter, the body of the letter, to His Honor. A Dear Mr. Johnson:

It has come to our attention that earth has recently been moved

from your property into Custis Pond which is owned by the Custis Fishing and Hunting Club.

As any use of the pond constitutes a trespass upon our property, we request that you refrain from any encroachment in the future. Very truly yours, Charles A. Rose, President, Custis Fishing and Hunting Club.

Mr. Cogar: Having been read in the record, I see no necessity to include it.

[230] * * *

Q This is Defendants' Exhibit Number 6, which I am handing you, Mr. Johnson, which, as I understand it, is the deed which you stated in your answers to interrogatories that you relied upon. Is that correct? A That is the best deed, the oldest one I could find, yes.

Q Now, will you read the first paragraph of the language of the grant? What is the date of that deed? A 13th day of October 1882.

An area of 124 acres, part and parcel of the tract wherein the said parties of the first part now reside called and known at Huntsville near Custis Old Mill, the boundaries of which said area of 124 acres to be as follows:

Commencing at the corner on the main road leading from West Point to King William Courthouse, between the said tract, Huntsville and the land lately owned by Charles Bray, following the said line down to Custis Mill Pond, thence down the line of said Mill Pond to a point to be determined by survey, from whence by a line [231] parallel with the aforesaid line between Huntsville and the Bray tract to the said main road, will make the said complement of 124 acres.

[245] * * *

Testimony of Mildred P. Hite

Direct Examination

By Mr. Spratley:

* * *

Q Mrs. Hite, where do you live? A I live in the West Point community in the lower part of King William County.

Q Do you live anywhere near the Custis Mill Pond? [246] A Yes, I do.

Q How long have you lived in this area? A Nearly 63 years.

Q Do you know Maurice V. Johnson? A Yes, sir.

Q Where do you live in relation to him? A On the next farm.

Q Did your family own property in that area for a number of years? A Yes, sir.

Q Are you familiar with the property ownership? A Yes, sir.

Q When did your family first acquire land in the Custis Pond Area? A My grandfather owned the property and it was inherited at the time. I can't tell you the date that he acquired it. I don't know.

Q What was his name? A Samuel D. Pilcher.

[251] * * *

Q Mrs. Hite, have you ever fished in the Custis Mill Pond? A Yes, sir.

Q Did you get their permission to fish there? A Never considered that it was necessary. We had property that bordered the pond.

Q Of your own knowledge has any member of the your family fished in there? A Yes, sir.

[254] * * *

Testimony of Wade C. Johnson

Direct Examination

By Mr. Spratley:

* * *

Q Are you a defendant in this case? A Yes, sir.

Q Are you part-owner of the 124-acre tract and the 64-acre tract? A Yes, sir.

[257] * * *

Q Mr. Johnson, do you do any fishing? A Yes, sir.

Q Do you do any fishing? A Yes.

Q What, if any, fishing have you done in Custis Mill Pond? A I have been there on different occasions [258] through the years.

Q When was the first time you went there? A I guess soon after my brother, Mr. Johnson, and Becker and Branch and Mr. Wornom bought the property.

Q Did you obtain permission from anybody to fish there? A I went there with Mr. Branch once. And one of the gentlemen that was here in court yesterday, that was a member of Custis Fishing Club, invited me one time to go.

Q Have you fished on any other occasions? A I have been back quite a few times since.

Q From whom did you get permission? A Well, Mr. Branch at that time. I didn't go up there much before I had anything to do with it.

Q Why did you go with Mr. Branch? A Well, he was going. I enjoyed fishing.

Q Did he have any interest in the pond at that time? A He was a part-owner in the property.

Q Since you became an owner have you been fishing in that pond? A Yes, sir.

Q Did you get permission from anyone? A No, sir.

[259] Q Have you ever taken any of your friends out fishing with you? A Yes, sir.

Q Have you given any of your friends permission to fish in the pond when you were not there? A Yes, sir.

Q How frequently have you done that? A Maybe ten or fifteen people.

* * *

Cross Examination

By Mr. Ellis:

[261] * * *

Q Did the caretaker of Custis Pond ever ask you to leave or ask you what you were doing on the property? A Not during that period. He has since. I have something to do with it. Mr. Lipscomb.

Q Did he ask you to leave on any occasion? A He and I presume it was his wife came out one day while two friends of mine and myself were out in the boat, and he came up and asked us who we were, where we were from. I let my two friend do the talking. I knew him but he didn't recognize me. At the time I had a mustache, which I [262] didn't have before. He told me—or, he was more or less speaking to them, or all of us, and told us that we had to leave, that they had an injunction to make us stay out of the pond, that Mr. Johnson didn't have the authority. So I asked him then, you mean you have an injunction to keep us from fishing?

[264] * * *

Testimony of James A. Cowardin

Direct Examination

By Mr. Spratley:

* * *

Q Did you have any relatives or did your wife have relatives living in the vicinity of that pond? A My brother-in-law's father-in-law owned the property at that time.

Q What was his name? A Mr. Howard.

Q Have you ever fished in Custis Mill Pond? A Yes, sir.

Q When was this, sir? A It was February and March of '65.

Q From whom did you get permission? [265] A From Mr. Howard.

Q Did you ever receive any permission from the Hunt Club? A No, sir.

Q Have you fished there more than once? A Yes, sir. Several times.

* * *

Cross Examination

By Mr. Cogar:

[267] * * *

Q What kind of boat were you in when you [268] fished on the pond? A We drug an aluminum boat down through the woods to the lake.

Q Who is "we"? A My brother-in-law and I.

Q What is his name? A Roy Farmer.

Q Where does he live? A He lives in Hampton.

Q Is he going to testify in this case? A I have no idea.

Q Did you five times drag a boat down there? A No, we didn't drag it five times. Once was enough.

Q You drug it from a road, didn't you? A From as far as we could drive in the road. They had a sawmill about midways of the farm there. We drove to the sawmill. From the sawmill we drug it through a logging road. And once was enough for me.

* * *

EXCERPTS FROM REPORTER'S TRANSCRIPT OF TESTIMONY OF AUGUST 7, 1972

[3] * * *

The Court: It is now 11:30. The Court has heretofore been requested to have a further hearing in the matter of Custis Mill Pond.

[80] * * *

The Court: Gentlemen, as heretofore ruled, as all of you gentlemen know, the Court denied the permit to legal premise of adverse possession of description as heretofore stated. The Court adopted at that time the line as shown in the grant by the deed from George Washington Park Custis and so forth and the Court ordered that that line be carried out.

It is heretofore reported back to the Court that it could not be done without surveys. Both parties have made surveys. So, therefore, the Court feels like I have followed the evidence as brought forward here.

I don't believe there is any error. There may be but I don't believe there is any error up to this point.

[81] And in accepting the evidence today, the Court was very much impressed with both of these witnesses brought forward here today, Mr. Savage and Mr. Shaw. However, I believe the evidence will strongly show that Mr. Savage did not follow the direction of the

Court to carry out the Seaton line, and in fact, in his testimony I believe he said that he gave no significance to the deed of Washington and no significance to the plat.

The Court at the very outset this morning has suggested an independent survey based on the old case brought forward here. Later, however, after having heard evidence here today the Court feels like it would be of no good report to send out another expert to follow the Seaton line in the deed of Washington, because I believe they would follow exactly what Mr. Shaw did.

He was asked to do that whereas Mr. Savage was not asked to do that. Therefore, the Court would adopt Exhibit No. R and ask that it be incorporated into the Order of the Court.

Gentlemen, both sides have possibly prevailed in this case in the last hearing and [82] in the hearing today. Since the plat is the later evidence that has been brought forward which the Court would accept, the Court would ask that Mr. Ellis and Mr. Cogar to prepare the Order based under their survey and submit it to Mr. Spratley for his signature.

The Court thanks all counsel at the bar again for their consideration in this case, officers of the Court and the reporter and all the parties hereto. Court now stands adjourned.

CLERK
SUPREME COURT OF VIRGINIA
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