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Richmond, Va.

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Record No. 4953

In the Supreme Court of Appeals of Virginia at Richmond

ARBERN REALTY COMPANY, INC.

v.

MARGARET AREY SWICEGOOD, ET AL.

FROM THE CORPORATION COURT OF DANVILLE

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 4953

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 9th day of October, 1958.

ARBERN REALTY COMPANY, INC., Plaintiff in Error,

against

MARGARET AREY SWICEGOOD, ET AL., Defendants in Error.

From the Corporation Court of Danville

Upon the petition of Arbern Realty Company, Inc., a writ of error is awarded it to a judgment rendered by the Corporation Court of Danville on the 17th day of March, 1958, in a certain proceeding then therein depending wherein Margaret Arey Swicegood and another were plaintiffs and the petitioner was defendant; upon the petitioner, or some one for it, entering into bond with sufficient security before the clerk of the said Corporation Court in the penalty of three hundred dollars, with condition as the law directs.

RECORD

* * * * *

Filed in the Clerk's Office the 5th day of September, 1957.

Teste:

MARGARET EDMUNDS, D. C.

PETITION FOR DECLARATORY JUDGMENT.

To the Honorable A. M. Aiken, Judge of the Corporation Court of Danville, Virginia:

Your petitioners, Margaret Arey Swicegood and Loraine Arey Clarke, by counsel, respectfully represent, as follows:

1. That they are the owners of the property located on and near Main Street, in Danville, Virginia, which was formerly occupied by the Virginia Theatre, said property consisting of a lot 80 feet by 107.5 feet in the rear of Main Street, and connected to Main Street by an entranceway fronting 15 feet on the southern side of Main Street and running back therefrom between parallel lines 80 feet, and which said property was devised to them by their mother, Rose Fink Arey, by the terms and provisions of her last will and testament, dated July 3, 1936, which was duly probated in the Clerk's Office of this Court on October 22, 1937, and recorded therein in Will Book "F," at page 333, to which said will reference is here expressly made; and

2. That said defendant, the Arbern Realty Company, Inc., is the owner of the property on and near Main
page 2 } Street, in Danville, Virginia, which adjoins the property of your petitioners on the north and which adjoins said entranceway on the east and west sides and above said entranceway, said property having been acquired by said defendant by two deeds, one dated March 14, 1955, from C. Stuart Wheatley and John W. Carter, Special Commissioners, of record in the aforesaid Clerk's Office in Deed Book 295, page 410, and the other dated March 30, 1951, from The First National Bank of Danville, Danville, Virginia, and W. J. Dance, Executors and Trustees under the will of W. W. Williamson, deceased, of record in the aforesaid Clerk's Office in Deed Book 249, page 363, to which said deeds reference is here expressly made; and

3. That the said property of your said ptitioners and the said property of said defendant were together originally owned by S. H. Holland, now deceased, he having been the common predecessor in title of said plaintiffs and of said defendant; and

4. That the property of your petitioners was originally secured from the late S. H. Holland by the Danville Academy of Music by deed dated August 2, 1886, which is of record in the aforesaid Clerk's Office in Deed Book X- page 74, a certified copy thereof being attached hereto marked "Plaintiffs' Exhibit 'A'", and asked to be read as a part hereof; and

5. That in said deed the said Danville Academy of Music was conveved 15 feet fronting on the southern side of Main Street and running back between parallel lines 80 feet, such 15 feet "to be used by the said party of the second part as an entranceway only in said 'Academy of Music Building,'" it having been agreed between said parties to said deed that the said grantor, S. H. Holland, reserve the right of building over said 15-foot entranceway, so that said original owner retained title to all property adjoining said entranceway on each side with the right to build over said entrance-

page 3 way; and

6. That by contract dated June 16, 1920, recorded in Deed Book 110, page 493, the late E. C. Arey (predecessor in title of your petitioners) and the late W. W. Williamson and G. G. Temple (predecessors in title of said defendant) made an agreement concerning said 15-foot entranceway which said contract included among other things an agreement on the part of W. W. Williamson and G. C. Temple "that said entrance from Main Street through the building of the said Williamson and Temple to the Majestic Theatre shall remain as at present constituted, as to length, breath and height, and that said opening recently cut in said party wall and said steps as hereinbefore described shall remain as they now are cut and placed for the use of the said Arey, the lessees and patrons of said theatre, which said entrance, steps, landing and the respective length, width, height and elevation thereof are as appear upon a plat attached hereto, and to be recorded herewith, made by A. G. Pritchett, June 19, 1920, to which reference is made for full and complete specifications of said entrance, stairway, etc.," a certified copy of said contract being attached hereto marked "Plaintiff's Exhibit 'B'", and asked to be read as a part hereof: and

7. That ever since August 2, 1886, the owners of said property of your petitioners have exercised full and complete dominion over said entranceway, having done so as against the

claims of any and all persons, under a claim of right, which said use has been open, hostile and notorious; and

8. That the land constituting said entranceway of 15 feet by 80 feet has been assessed for taxation as against your petitioners and their predecessors in title for more than 20 years, your petitioners and the predecessors having always paid the City of Danville such real estate taxes as has been or are now being assessed against said property; and

page 4 } 9. That in the use of said entranceway your said petitioners have undertaken to fully comply with the terms and provisions of said contract of June 16, 1920, recorded as aforesaid in Deed Book 110, page 493, having let the same remain as it was constituted in 1920 as to its length, breadth and height, but your petitioners and their predecessors in title have made full and free use of said entranceway not only for ingress and egress to and from their said property lying to the rear but of said entranceway itself, having built doors across said entranceway for the purpose of protecting said property in the rear of said entranceway; and

10. That there is presently built across said entranceway a front and doors of a permanent nature located some few feet from the southern side of Main Street, which said front and doors have been in use for many, many years; and

11. That said property of your petitioners is now vacant but a local printing concern has offered to rent said property, including said entranceway, on a long term basis, provided it could have free and unhampered use and enjoyment of said entranceway lying between the southern side of Main Street and said property in the rear; and

12. That said defendant has objected to the making of a lease between your petitioners and said local printing company and has taken the position that your petitioners do not have the right to permit its new and contemplated lessees to use said entranceway for ingress and egress to and from said building of your petitioners located in the rear; and

13. That an actual controversy exists between your petitioners and said defendant involving the interpretation of said deed of August 2, 1886, and said contract of

page 5 } June 16, 1920, and whatever rights your petitioners may have in and to said entranceway by way of adverse possession.

WHEREFORE, your petitioners pray that this Court may interpret said deed and contract and determine what rights, if any, the parties hereto may have with reference to said entranceway and to enter an Order clarifying all such

rights of said parties and especially to enter an Order granting your said petitioners the full, free and unhampered use of said entranceway so that they may properly use and enjoy all of their said property without interference or harrassment of any kind from said defendant.

MARGARET AREY SWICEGOOD
LORAINE AREY CLARKE
By Counsel.

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* * * * *

DECREE.

This proceeding for declaratory judgment came on this day to be heard on petition of Margaret Arey Swicegood and Loraine Arey Clarke, with exhibits filed therewith, the answer of Arbern Realty Company, Inc., evidence taken *ore tenus* by agreement of parties by counsel, and exhibits filed therewith, and was argued by counsel.

It appearing from said petition and said answer, and the evidence taken, that an actual controversy exists between petitioners and defendant as to their respective rights and interests in and to a parcel of land fronting 15 feet on the easterly side of Main Street in the City of Danville, and extending back therefrom between parallel lines 80 feet, to the theater building and lot (80x107.5′) of petitioners in the rear, that the purpose of this proceeding is to seek the Court's interpretation of pertinent deeds and contracts so as to determine the rights of the parties with respect to said parcel; and the Court having determined said rights as stated in its opinion letter dated March 8, 1958, page 15 } which shall be filed as a part hereof, it is ADJUDGED, ORDERED and DECREED that petitioners' predecessors in title to said theatre building took a fee simple title to said 15x80′ parcel of land fronting on said Main Street, subject to the right reserved and exercised by the predecessors in title of defendant, present owner of storehouses fronting on said Main Street and adjoining said parcel on each side thereof, to build over said parcel not less than 15 feet above ground level; that said fee simple title to said parcel was devised to petitioners; that neither petitioners nor their predecessors in title have waived their

said rights in said parcel, nor are they estopped to assert said rights; that the said Margaret Arey Swicegood and the said Loraine Arey Clarke now stand seised and possessed of a fee simple title to said 15x80′ parcel of land, with full and unrestricted right of enjoyment and power of disposition thereof, alone, or in connection with their said property in the rear, said parcel of land being fully shown on map filed as Plaintiffs' Exhibit G, subject only to rights of the defendant to build over said parcel as hereinafter provided, to which action of the Court the defendant by counsel excepts.

It is further ADJUDGED, ORDERED and DECREED that the defendant has a perpetual right to construct and maintain its building over said 15x80′ parcel of land which shall be finished with a pitch of not less than 15 feet, to which action of the Court petitioners by counsel except.

It appearing that a part of the wall between said parcel of land (15x80′) and defendants storehouse No. 539 on the east is built on said parcel, that a part of the wall between said parcel and defendant's storehouse No. 545 on the west is built on said parcel of petitioners, leaving a width of 14.25 feet between said walls, across said parcel, as shown on Plaintiffs' Exhibit G, and that said walls were

page 16 } constructed by a predecessor in title of defendant, it is further ADJUDGED, ORDERED and DECREED that said two walls are the property of defendant, but petitioners shall have the right to tie in to said wall for the purpose of using their property, provided, however, that if said walls are destroyed or demolished said defendant in rebuilding said walls shall conform said walls to the lines of its lots as shown on said Plaintiffs' Exhibit G.

A question having been raised as to the rights of the petitioners to use their theatre building adjoining and lying to the rear of said 15x80′ parcel of land for purposes other than a theatre, it is further ADJUDGED, ORDERED and DECREED that said petitioners, Margaret Arey Swicegood and Loraine Arey Clarke, are now seised and possessed of a fee simple title to said theatre building and lot (80x107.5′), with full right of enjoyment and disposition for any lawful use, to which action of the Court defendant by counsel excepts.

Defendant by counsel is allowed to file herewith written grounds of exceptions taken to this decree, which are made a part hereof.

(on back)

Enter 3/17/'58.

A. M. A.

* * * * *

page 17 }

* * * * *

Filed in Clerk's Office, Corporation Court, Danville, Virginia March 25th 1958.

Attest:

MARGARET EDMUNDS, Deputy Clerk.

EXCEPTIONS.

WHEREAS, the Court has entered a decree in the above captioned matter with leave granted to the defendant to stipulate its exceptions in a separate document, to be made a part of said decree,

NOW, THEREFORE, the defendant excepts to the action of the Court in said final decree as follows:

1. The Court held that the plaintiffs owned the fee simple interest in the real estate embraced in the theatre entranceway and the land beneath the same, to which the defendant excepts on the following grounds:

(a) That the record title to said entranceway and the surrounding circumstances did not justify a construction of the deed from S. H. Holland to the Danville Academy of Music, recorded in Deed Book "X" at page 74 in this Court, or any other instrument of record, as conveying to the plaintiffs or their predecessors in title a fee simple interest in the entranceway or the land beneath it, or any interest beyond that of an easement over and through the property of the defendant for the sole purpose of an entranceway only to the building used as a theatre; and,

(b) That even if said deed from S. H. Holland to the Danville Academy of Music or any other instrument in the chain of title could be construed as having conveyed to
page 18 } the plaintiffs or their predecessors in title a fee simple in the theatre entranceway or in the land

beneath it, that such fee simple title is burdened with a restriction or equitable servitude which restricts the use of the land to an entranceway only to the plaintiffs' property; and,

(c) That while it is understood that counsel for the plaintiffs have abandoned their claim of adverse possession of said property, if the Court's decree was predicated on adverse possession there is insufficient evidence to support the requisite elements of adverse use and possssion.

2. That the Court, in permitting the plaintiffs to introduce evidence tending to show changes in condition, permitted the plaintiffs to go beyond their pleading in presenting evidence which should not have been permitted or, in any event, that the Court should have permitted the defendant a reasonable opportunity to present evidence in rebuttal.

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* * * * *

Filed in Clerk's Office, Corporation Court, Danville, Virginia May 2nd 1958.

Attest:

MARGARET EDMUNDS, Deputy Clerk.

NOTICE OF APPEAL AND ASSIGNMENT OF ERROR.

Notice is hereby given that Arbern Realty Co., Inc. intends to appeal the above captioned case and will apply for a writ of error or appeal to the Supreme Court of Appeals of Virginia, assigning as errors of the trial court the following:

ASSIGNMENTS OF ERROR.

1. It is contended that the trial court erred in finding that the plaintiffs owned the fee simple interest in the real estate embraced in the theatre entranceway and the land beneath the same, which entranceway is the subject matter of this suit, upon the following grounds:

(a) That the record title to said entranceway and the surrounding circumstances do not justify a construction of the deed from S. H. Holland to the Danville Academy of

Music, recorded in Deed Book "X" at page 74 in the Clerk's Office of the Corporation Court of Danville, Virginia, or any other instrument of record as conveying to the plaintiffs or their predecessors in title a fee simple interest in the entranceway or the land beneath it or any interest beyond that of an easement over and through the property of the defendant for the sole purpose of an entranceway only to the building used as a theatre; and,

(b) That even if said deed from S. H. Holland to the Danville Academy of Music, recorded in Deed Book "X" at page 74 in said Clerk's Office, or any other in-
page 20 } strument in the chain of title could be construed as having conveyed to the plaintiffs or their predecessors in title a fee simple in the theatre entranceway or in the land beneath it, that such fee simple title is burdened with a restriction or equitable servitude contained in said deed from Holland to the Danville Academy of Music and reimposed and from time to time countenanced in other instruments of record by the predecessors of the plaintiffs, which restriction or equitable servitude restricts the use of the land to an entranceway only to the plaintiffs' property; and,

(c) That while it is understood that counsel for the plaintiffs have abandoned plaintiffs' claim to a fee simple title in said entranceway and the land beneath the same by adverse possession of such property, if it was the trial court's intention to predicate its findings on adverse possession, then there is insufficient evidence to support the requisite elements of adverse use and possession.

2. It is contended that the trial court erred in permitting the plaintiffs to introduce evidence tending to show changes in condition, in that such evidence sought to prove facts which were not set out in the pleading of the plaintiffs and that, in any event, the trial court should have permitted the defendant a reasonable opportunity to present evidence in rebuttal to that of the plaintiffs which went beyond their pleading.

ARBERN REALTY CO., INC.
By Counsel.

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CROSS ASSIGNMENT OF ERROR.

Defendant having filed Notice of Appeal and Assignment of Error in this case, plaintiffs hereby assign the following cross error:

ASSIGNMENT OF CROSS ERROR.

The Court erred in rejecting as evidence in this case two letters of Marx Realty and Improvement Co., Inc. to Margaret A. Swicegood, one dated June 29, 1951, the other dated August 22, 1957, said letters being offered by plaintiffs and identified as Plaintiffs' Exhibit H and Plaintiffs' Exhibit I, respectively, and refused and initaled by the Trial Judge on February 21, 1958.

MARGARET AREY SWICEGOOD
LORAINE AREY CLARKE
By Counsel.

Counsel

MEADE, TALBOTT AND TATE
By EDWIN B. MEADE
516 Masonic Building
Danville, Virginia.

Filed in Clerk's Office, Corporation Court, Danville, Virginia May 3rd 1958.

Attest:

MARGARET EDMUNDS, Deputy Clerk.

* * * * *

page 4 }

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Stipulation:

"It is stipulated and agreed between the parties by counsel that evidence in this proceeding shall be taken *ore tenus* before the Court and that petitioners' photographs shall be filed and endorsed by the Court as Exhibit C, Exhibit D, Exhibit E, and Exhibit F.

"It is further stipulated and agreed that S. H. Holland, S. I. Roberts, John B. Wood, A. B. Carrington, Mary B. Schloss, E. C. Arey, Rose Fink Arey, Carrie Douthat Harrison, W. W. Williamson and George G. Temple are now dead; that an Academy of Music was built on the lot described in "Fourth" clause of deed of August 2, 1886, filed as "Exhibit A" in accordance with specifications set forth in Exhibit deed, was later destroyed by fire about 1906, and that thereafter an opera house was rebuilt on said lot, and that this same rebuilt building stands today as is shown in "Exhibit C" and "Exhibit D."

Mr. John Carter conditionally agreed to the above stipulation on the ground should the progress of the case in his opinion justify introduction of evidence to contradict or nullify the stipulation his right was reserved.

Map by H. S. Peirce, dated Nov. 10, 1954, showing "Survey of property for Mrs. G. G. Temple Est. and others" was admitted to record as Plaintiff's Exhibit "G."

* * * * *

page 5 } JOHN MARTIN,

called as a witness on behalf of the plaintiffs and having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Meade:

Q. You are Mr. John Martin?

A. Yes, sir.

Q. I believe you are employed by the City of Danville?

A. Yes, I am.

Q. In what capacity?

A. City Building Inspector.

Q. Mr. Martin, you are familiar with the property on Main Street between the old Opera House alley and the property occupied by Rhodes Furniture Company and running back towards the edge of the parking lot operated by the Municipal Parking Company over here?

A. Yes, sir.

Q. I hand you a picture of the building in the rear, which is known as the Opera House building, and ask you is that the building; are you familiar with that building?

A. Yes, sir.

John Martin.

Q. I hand you another picture which shows a different view. Is that the same property?

A. Yes, sir.

Q. I hand you another picture which has the front view taken across the street on the north side of Main Street, taken of the brick building, and you will see Virginia Inn across the front of it. Are you familiar with that?

A. Yes, sir.

Q. Has the upstairs or all of the area shown—

* * * * *

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* * * * *

Q. Has the property of the Arbern Realty Company on Main Street as shown in this picture been condemned?

A. Yes, it has.

Q. What part of it has been condemned?

A. The upstairs portion was condemned by the State Fire Marshall for sleeping quarters.

Q. What was it used for before it was condemned?

A. I understand it was used as a hotel or a place for quartering people at night.

Q. Was any condition placed on this condemnation or for improvement or in any way relieving the condemnation?

A. Yes, sir, the Fire Marshall stated in his report—

Mr. John Carter: Objection as hearsay.

Judge Aiken: It is hearsay, of course.

Q. On what condition was this property condemned?

A. Under the condition that it could not be used for sleeping in the upstairs.

Q. Can it be used if anything is done to correct the situation?

A. Yes, it can.

Q. Has that been communicated to the company who owns it?

A. Yes, sir.

page 7 } By Mr. Meade:

Q. With reference to the building in the rear owned by Mrs. Swicegood and Mrs. Clarke, has that been condemned?

A. Yes, it has.

* * * * *

Q. On what condition can that particular property be used as a theatre again?

A. With extensive improvements.

Q. Would those improvements be substantial and expensive?

A. Yes, sir.

Q. What was the date of that condemnation of this property?

A. About 1953. I don't remember the exact date.

Q. Do you have the exact date on which the old Opera building owned by Mrs. Swicegood and Mrs. Clarke was condemned?

A. The State Corporation Commission gave them consent to use the place as a theatre until July 10, 1956, at which time the lease of the Carver Theatres, Incorporated, expired.

No questions by counsel for the defendant.

R. G. BOUSMAN,
called as a witness on behalf of the plaintiffs and having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Meade:

Q. You are Mr. R. G. Bousman?

A. Yes, sir.

Q. And you are employed by the City of Dan-
page 8 } ville?

A. Yes, sir.

Q. In what capacity?

A. City Real Estate Assessor.

Q. How long have you been filling that position?

A. Beginning 1950 in that office there. I was with the real estate work beginning 1946 with the Commissioner of Revenue.

Q. At our request you traced back this property that originally was conveyed out of S. H. Holland to the Academy of Music in 1886 and which property has come on down along the chain of title to different owners, to the

present date. Have you traced back that property as to assessment for tax purposes?

A. Yes, sir.

Q. How far back did you make your investigation?

A. I began with the 1910 assessment and checked each ten (10) year period showing the description and assessment of each year.

Q. Did you check prior to that date as well as subsequent to that date?

A. I didn't make any check on the assessment prior to 1910. I just used a ten year period to see the changes made in the description and assessment.

Q. From 1910 to the present?

A. Yes, sir.

Q. In whose name was it assessed in 1910? Who was the owner?

* * * * *

Q. In whose name was the property assessed in 1910?

A. Mary B. Schloss.

page 9 } Q. How was that set up on the Land Book in 1910 reference to Mrs. Schloss?

A. These are descriptions taken from the Land Books for each of the years. In 1910 the description was "25 feet Academy of Music, Main and 80 by 107 1/2 feet in rear." Are you interested in the assessment value?

Mr. Meade: No, sir. Not unless these gentlemen want it. If you have got it you might give it to us there.

A. The assessment on the land was $1,250.00. The building $10,000.00. Total $11,250.00.

Q. Was there anything on that particular 1910 Land Book to show a further description of the 25 feet Main Street?

A. No, sir.

Q. Just shows 25 feet Main Street?

A. Yes, sir.

Q. Does it show the depth of the 25 feet?

A. No, sir.

Q. As I understand it you checked it at the end of another ten year period?

A. Yes, sir.

Q. That would be 1920. In whose name did this property stand in 1920?

R. G. Bousman.

A. I wasn't requested to follow too closely the ownership. I think it would be the Arey family at that time and it has been in the Arey family since that time.

Q. If the record shows that the property was conveyed to E. C. Arey from Mary B. Schloss on January 29, 1916, would it be in Mr. E. C. Arey's name in 1920 unless he conveyed it away?

A. Yes.

Q. What does it show in 1920?

page 10 } A. In 1920 it was described as 30 feet Academy of Music, Main and 80 by 103 1/2 feet rear. The assessment was land, $3,000.00, building, $10,000.00, total $13,000.00. Now, on that 1920 Land Book there was a pencil note made for the purpose of correcting the description for the following years and this note read: "22 1/2 feet" and then in parentheses "15 ft. entrance 2 1/2 ft. upper alley, 5 ft. alley next to P. R. Hatcher." It seemed to clear the description up a little bit and they changed it that way so it came up in 1921 with this new description.

Q. Were you in the Commissioner of Revenue's office when Mr. P. G. Ragland was there as Commissioner of Revenue?

A. No, sir, I wasn't.

Q. On the 1920 assessment is all the land grouped together or is it broken down and each part or parcel given a separate assessment?

A. It just shows one figure with the general value of the whole property.

Q. I believe you looked in 1930. What did you find?

A. I found it described as 22 1/2 ft. and in parentheses "15 ft. entrance to theatre, 5 1/2 ft. alley with Mrs. J. E. Holland and 2 1/2 ft. alley with Temple and Williamson." The land was valued at $7,750.00, building $13,500.00, total $21,250.00.

Q. On that assessment was the land grouped as a whole?

A. One figure for the land. Described and valued as one piece of property.

Q. In making your memorandum do you show in whose name it was outstanding in 1930?

A. I didn't follow it as to ownership.

Q. If I understand your procedure you took another ten year period and that brought you 1940?

page 11 } A. 1940 was described as 22 1/2 feet and in parentheses "15 ft. entrance to theatre 5 1/2 ft. alley."

Q. What were the values?

R. G. Bousman.

A. $9,000.00 for the land, $12,000.00 for the building, total $21,000.00.

Q. Was the land assessed as a whole in 1940?

A. Yes, sir.

Q. What does your memorandum as to the Land Book show as to 1950?

A. 1950 described 22 1/2 feet, in parentheses "15 ft. entrance to theatre" and 7 1/2 ft. in parentheses "two alleys," Main. Land $15,750.00, building $15,000.00, total $30,750.00.

Q. Was the land assessed in 1950 as a whole?

A. As a total figure.

Q. Now, I believe you have brought us from 1910 to 1950 and in 1920 you have a penciled memorandum on the Land Book showing how that 22.5 feet was broken down?

A. Yes, sir.

Q. Now, counting the year 1920 and up through 1950 is there anything on the Land Book or anything in your records during the time you have been connected with the assessments to show or to indicate that anybody other than Mr. E. C. Arey and his successors in title had paid any part of the assessment on that 15 foot entrance way on Main Street?

A. I wouldn't be able to say how the assessors prior to my being in this office would have treated this entrance as to value relating to other owners.

Q. Was there anything on the Land Books you looked at from 1910 up until 1950 to indicate, anything there to indicate, anybody else was paying tax against the 15 foot entrance way?

page 12 } A. The entrance was described with the theatre property and wasn't described with the store front property?

Q. In 1950 were you in charge of real estate assessments?

A. Yes, sir.

Q. After 1950 up to the present date tell the Court what has been done by your office and by you in regard to the assessment of this property in question here, including the alleyways and including the entrance way of 15 feet on Main Street?

A. To value this property we have treated the entrance as an assessment against the owners of the theatre to the extent of the use that they make of the 15 feet fronting on Main Street. We have treated the 15 feet as of value comparable to another 15 feet in the same area. However, we have ap-

plied two-thirds of the value of the 15 feet to the theatre entrance assessment—

* * * * *

page 13 }

* * * * *

A. On this 15 foot area of land we have used two-thirds of its value as an assessment against the owners of the theatre property. We have used one-third of its value against the owners of the properties fronting Main Street or the people who owned the building over the theatre entrance.

Q. When did you start this particular method of assessing taxes against this property? What year did you start?

A. It began in 1952. We were in the process of making the survey and we didn't complete it until the 1952 assessment.

Q. And from that time you had carried through on that plan?

A. Yes, sir.

Q. Why did you assess any of those taxes against the owners of Main Street adjoining property; that is, the owners of the Virginia Inn?

A. We felt the owners of the store property had a use over this area of land there and I think it is two stories at least, it may be three, but we felt that they had use of the land and it would be right to have the assessment against them for using the upper floors over one store

page 14 } entrance.

Q. When you arrived at that decision in 1952 and made up your Land Books accordingly, was any kind of notice given to the respective owners how you were doing it?

A. No, sir.

Q. You didn't write them or advise them, just put it on the land Books two-thirds against the Arey Estate and one-third against the owners of the adjoining property?

A. We didn't word it that way. Our office records described how we arrived at a total assessment of the value.

Q. So your Land Book showed the same it did in 1950?

A. As far as the assessment of the land, it does.

Q. In other words, the land where the Opera House is

built and the 15 foot entrance way was assessed as a whole against the Arey Estate and now Mrs. Swicegood and Mrs. Clarke?

A. Yes. It was described and assessed at one figure. However, the office records show how it was arrived at.

CROSS EXAMINATION.

By Mr. John Carter:

Q. Mr. Meade just asked you whether the description on the tax books was the same in 1950 and up to date. Is that entirely accurate?

A. The description in 1950 is not the same as it is now. The description in 1952 is the same.

Q. What was the 1957 description?

A. The 1957 description would be 15 feet entrance to theatre, 5 feet two alley rights and lot in rear,
page 15 } Main.

Q. What is the description of the Arbern property on your tax books for 1957?

A. I didn't bring that up here.

Q. Maybe I can refresh your memory. You think if you saw what is shown on your tax records you would recognize it? Isn't this the description of the Arbern property in 1957: "65 feet and two alley rights (5 feet) and building right over and under 15 foot corridor?"

A. If that is on the Land Book I will agree with it.

Q. Does that sound like it is on the Land Book? Could you check the Land Book and verify that description?

A. I could check it. I couldn't say from memory that is exactly right.

Q. I unfortunately can't testify in this case and I would prefer you to check it and with the Court's permission and come back.

A. All right.

RE-DIRECT EXAMINATION.

By Mr. Meade:

Q. If that is the true assessment of the property of the Company as stated by Mr. Carter, is it a fact that is in accordance with the plan which was adopted in 1952 and which you have fully described?

A. Yes, it would be.

(At this point Mr. Charles Carter presented the Land Book to Mr. Bousman.)

RE-CROSS EXAMINATION.

By Mr. John Carter.

Q. Would you read to the Court the description shown on the tax books for the City of Danville for 1957 for the property in the name of Arbern Realty Company?

page 16 } A. This is the description of the Arbern Realty Company, Incorporated property: "65 feet and two alley rights (5 feet) and building right over and under 15 foot corridor, Main."

Q. Were these alley rights taxed to the predecessors of Arbern Realty Company shown in the tax description of the property of the petitioners of Arbern Realty Company before this tax survey in 1952?

A. I haven't checked the back records on this property. Haven't been requested by anyone.

Q. Haven't checked to see whether or not these alleys were taxd to Arbern Realty Company's predecessors?

A. No.

LEON S. TAYLOR,

called as a witness on behalf of the plaintiffs and having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Meade:

Q. You are Mr. Leon Taylor?

A. I am.

Q. What is your age?

A. 67.

Q. How long have you lived in Danville?

A. Going on 43 years.

Q. Were you at any time connected with what was known as the Majestic Theatre and later the Virginia Theatre on Main Street in the City of Danville?

A. I was.

Q. From what period of time?

A. From 1915 to 1930.

page 17 } Q. In what capacity were you connected with that?

Leon S. Taylor.

A. Part of the time I was Music Director and from 1924 to 1930 I was Music Director and Theatrical Manager representing the Southern Amusement Company.

Q. When you first went to work at that theatre what was it called?

A. It was called the Majestic Theatre.

Q. Who was the owner?

A. Mrs. Schloss for one year and then the late Mr. E. C. Arey for the following period I was connected with it.

Q. So you were there for one year under Mrs. Schloss and for 14 years under the ownership of Mr. E. C. Arey?

A. That's right.

Q. Now, Mr. Taylor, during that whole period of time did, first, Mrs. Schloss and then Mr. Arey exercise full control and supervision and ownership of this entrance way of 15 feet leading from Main Street back to the theatre?

A. They did.

Q. Did anybody else, any adjoining property owners, to your knowledge during that time ever assert any claim or right in and to that entrance way?

A. Not to my knowledge.

Q. At the time you were there, where was the ticket office located?

A. It was inside the first door for about 4 feet, I should say, in the center of the lobby.

Q. At that time where were the doors which cut off the entrance way to protect everything in the rear there, where were they located with reference to the street line?

A. Well, I should say it was about 8 feet in. page 18 } Actually like it is now.

Q. Was it exactly like it is now?

A. No, it hadn't been remodeled as far as the doors were concerned, etc.

Q. Was any use made by your employer or by you as manager of the theatre for six years of that entrance way there for 15 feet to the street, running back to the property?

A. We made full use of it during that period.

Q. Did you sell any merchandise in there?

A. At that time the theatre was selling only ticket admissions.

Q. Did not sell any accessories?

A. No, that was put in later. I would like to add during my managership of the theatre we had use of the alley below for bringing in road shows and bringing in baggage and

also had 2 1/2 feet on the upper side for the colored balcony.

Q. At the time you were there did you have use of the basement there running back the 15 feet?

A. If there was any basement there we had use of it.

Q. Do you recall going there at any time and state whether you saw anything such as candies and popcorn sold there?

A. In later years I was called in to play some shows under different management and they did have candy and other things for sale, popcorn, etc.

CROSS EXAMINATION.

By Mr. John Carter:

Q. Mr. Taylor, you said from 1915 to 1930 you were either music director or manager and music director of the theatre?

A. Yes, sir.

page 19 } Q. And during one year of that time you worked for Mrs. Mary Schloss and during the subsequent 14 years you were employed by what kind of amusement company?

A. I didn't say I was employed by Mrs. Schloss but by the Southern Amusement Company for the entire period.

Q. For the entire period?

A. That's right.

Q. And Southern Amusement Company first leased the building from Mrs. Schloss and later Mr. Arey?

A. That's right.

Q. So you were representative of the lessee and not the owner of the land?

A. Yes, employed by the Southern Amusement Company.

Q. You were employed by the Southern Amusement Company and the Southern Amusement Company had leased this property and you used the property in such manner you thought the lease would permit you. Is that true?

A. Yes.

Q. You remember back in 1920 when there was a remodeling of the entrance way of the old Majestic theatre and at that time a staircase was put from the entrance way or the rear portion of the entrance way up through the party wall between the two properties to the balcony of the Majestic Theatre? Do you recall that?

A. I think there was. There is a stairway up there, I know.

Q. You remember when that was installed?

A. No.

Leon S. Taylor.

Q. Did you have anything to do with the negotiations between Mr. Temple and Mr. Arey and Mr. Williamson about putting that up there?

A. No, I was only employed by the Southern
page 20 } Amusement Company and that was handled by the legal department.

Q. So whatever type use the Southern Amusement Company made of the property was done with the expressed and granted permission of Mr. Temple and Mr. Williamson and you didn't know about that?

A. Didn't know about that.

Q. You wouldn't know of any agreements between Mr. Temple or Mr. Williamson about that?

A. No, I wouldn't be given any opportunity to see the lease.

Q. And you only used that entrance way into the theatre?

A. Certainly did.

Q. And all your patrons came through there?

A. Unrestricted.

Q. And that was the only use you ever made of it. And you don't know whether there was any basement under this entrance way or not?

A. I am not familiar with the basement under this entrance way other than I am familiar with the boiler room.

Q. You say in subsequent years you had come to the theatre from time to time and saw them selling candy and popcorn in the lobby?

A. Yes.

Q. Was that the same normal type sales of candy and popcorn that became popular in later years with the advent of the moving picture?

A. Yes.

Q. Was there anything different in the sale of those things to customers than the way it is handled in any ordinary movie house in Danville today?

A. Not as far as I know.

page 21 } Q. And did the ticket taker have a little stand which he trundled out and sold to them?

A. The ticket taker did not sell the candy.

Q. I mean in subsequent years.

A. In subsequent years as I observed it a certain person was delegated by the manager to sell that.

Q. And did that man take up the tickets?

A. I couldn't say.

Q. Would you say at the time you first became familiar with this property that the doors on the front and the entrance way of this property were constituted approximately as they are today?

A. Approximately.

Q. The doors at the front portion of the entrance way a number of feet back from the front there?

A. Yes, that's right.

Q. And also back to the wall which divided the theatre building from the Temple property?

A. There was also an inside fire door as well.

Q. I believe at the time the box office or where the tickets were sold were inside the entrance way or about half way down between these doors?

A. I wouldn't say half way. It was inside the first door.

Q. On the rear side of the first door?

A. Yes.

Q. And in later years it was changed and put on the outside of the first door?

A. That's right.

page 22 } R. G. CLARKE,

called as a witness on behalf of the plaintiffs and having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Meade:

Q. I believe you are Mr. R. G. Clarke?

A. Yes, sir.

Q. Do you live in the City of Danville?

A. Yes, sir.

Q. What is your age?

A. 54.

Q. What is your business?

A. Clarke Electric Company.

Q. How long have you been engaged in that business?

A. Since 1920.

Q. I believe you are presently located at the corner of Main and Holbrook Avenue in the City?

A. Yes, sir.

Q. Was your store ever located in the block between what is known or was formerly known as the Opera House alley and the alley next to the old P. O. Jones property?

A. Yes, sir, I think the number was 945 Main Street.

R. G. Clarke.

Q. And the 15 foot entrance way leading from the entrance way into the theatre in the rear; where was your store?
A. Next to it and up the hill.
Q. Next to it and up the hill?
A. Yes, sir.
Q. When did you first go into that?
A. It was formerly occupied by A. Ellwanger and Company and we took over Mr. Ellwanger's business in 1920.

* * * * *

page 32 } RE-CROSS EXAMINATION.

By Mr. Carter:
Q. Never put them on notice your right was any broader than that?
A. It was under lease so we had no right.
Q. No hostile claim you all had any further right to it?
A. It was leased to them.
Q. But no hostile claim was ever brought to the attention of the Arbern Company beyond the attempt you had the right to use it as a theatre?

Objection by Mr. Meade on the grounds this is argument with the witness.
Objection sustained by Judge Aiken.

A. It was leased to them so we had no right.

RE-RE-DIRECT EXAMINATION.

By Mr. Meade:
Q. Did you know Mr. W. W. Williamson?
A. Yes, sir.
Q. And were you and Mr. Williamson and Mr. Temple in the same church?
A. Yes, sir.
Q. You knew them quite well?
A. Yes, sir.
Q. At the time of their respective deaths were they large real estate holders?
A. Yes, sir.
Q. Were they considered in the community here as astute businessmen?
A. Yes, sir.

CHARLES L. ABERCROMBIE,
called as a witness on behalf of the plaintiffs and having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Meade:

Q. You are Mr. Charles L. Abercrombie?

page 33 } A. Yes, sir.

Q. You live here in Danville?

A. Yes, sir.

Q. How long have you been living in Danville?

A. About 25 years.

Q. During that time what has been your principal business?

A. Picture show business.

Q. Did you operate one or more picture shows in the City of Danville?

A. Yes, sir.

Q. Over what period of time?

A. I think it was from 1934 through 1949. In 1950.

Q. Do you operate a moving picture business in Danville today?

A. Yes, sir.

Q. Do you operate one elsewhere?

A. Yes, sir.

Q. Where?

A. Durham, North Carolina.

Q. I want to ask you in your own words to give us as far as possible from your own personal observation the trend so far as the moving picture business is concerned and so far as the show, road show business, and coming on down to what has developed to the present time—

* * * * *

page 34 }

* * * * *

A. I think I understand you. You mean how the picture show started and first the house was first used as a vaudeville or road show house?

Mr. Meade: That's right.

Charles L. Abercrombie.

A. I know at one time the house was used more as a road show house. I don't think it had pictures and after the road shows proved impractical I understand the house was used as a vaudeville house and possibly silent pictures and from that on down, I think it came on down to what we would call small 'tab shows' and about that time talking pictures must have started and I don't know if it was open continually. It has been open since I came here in 1934 and in 1934 it was operating on talking pictures and small stage show units.

Q. What has been the history of that type of business so far back as you know throughout the country, not only in Danville?

A. That type of operation?

Mr. Meade: Yes, I'm talking about generally.

A. Well, all pictures—

* * * * *

page 35 }

* * * * *

A. All picture show business has deceased since 1947, so far as the exhibitor is concerned.

Q. Why?

A. Well, there are certainly a lot of differences of opinion. I think it is poor pictures and television. That is the exhibitor end of it. The producers have made more money than they have ever made before but the gross income on the exhibitor has deceased every year since 1947.

Q. Constantly downward?

A. Yes, sir.

Q. Has that been your experience?

A. No, sir.

Q. Was that your experience in Danville?

A. I think it went down every year in Danville, yes, sir.

Q. Was that the reason you left Danville?

A. Had a lot to do with it, yes, sir.

Q. Getting back to your road shows, do you remember the time they had road shows constantly going around the country?

A. Yes, sir.

Charles L. Abercrombie.

Q. Do we have the same demand for these tab shows and vaudeville?

A. No, sir.

Q. Are you familiar with this property here in question; the old Opera House that belonged to Mr. E. C. Arey so long?

A. I think so.

Q. Did you ever operate a moving picture house in that building?

A. I did not.

Q. From the time you came to Danville and the
page 36 } time they stopped operating up there are you
familiar with the general operation?

A. Yes, sir.

Q. Is that building as presently constituted adaptable to a first class movie house?

A. I wouldn't think so. Not in my opinion.

Q. In your opinion, knowing the physical characteristics of the building, its location, could you as an operator of a moving picture house operate a moving picture business there in that building profitably?

A. I don't think so.

Q. Would you be interested in renting it under any circumstances at any reasonably rent?

A. No, sir.

Q. Can you say why?

A. Well, the reason I wouldn't want it, the building is an old building and I remember it had columns in there, which I wouldn't want, supporting the balcony, and I always thought the house was too short, particularly since they added to the size of the picture you project. The house was wide and very short, was one of the things I never liked about the house. That would be my idea. I don't know any other thing except it is old, old building and I wouldn't want it myself.

Q. Has the outdoor movie on the outskirts of cities and towns made an inroad on the business of theatres inside of cities and towns?

A. They have, yes, sir, particularly in the type policy that house would operate under. The drive-in has hurt the second and third run houses more than it has hit the first run houses.

Q. Has that always been a second run house so
page 37 } far as you know?

A. So far as I know. So far as I have been in

Charles L. Abercrombie.

Danville. It has been a second run house.

Q. Does it require more capital to operate a first run house than a second run house? Do you pay more for your pictures?

A. As a rule, yes, sir. I would say you could operate a second run house of the same size, it would be cheaper to operate a second run house, if conditions were the same.

CROSS EXAMINATION.

By Mr. John Carter:

Q. Mr. Abercrombie, you say ever since you have been in Danville since about 1934 this has been a second run house?

A. I think that's right.

Q. And by second run you mean they do not show any pictures that were coming to town for the first time?

A. Yes.

Q. But show older pictures that have been shown by some class A house in the city previously?

A. That's right.

Q. Was this building when you came to Danville suitable for a first run house?

A. I wouldn't think so.

Q. Why?

A. For the same reasons I mentioned there, the depth of the house compared to the width of the house and the columns supporting the balcony.

Q. How about the state of repair when you came to Danville?

page 38 } A. Well, I don't think I ever looked at the house. I knew it was an old building but so far as the theatre proper I wouldn't know if the seats were good.

Q. The fixtures?

A. No, sir, I wouldn't know about the fixtures.

Q. And wouldn't know about the repair but knew the building was old?

A. Yes.

Q. And knew it was not suitable for a first run house?

A. Yes.

Q. And as far as first run houses go the building and pictures have to be in that order?

A. Yes, it requires a little more for first run than for second run houses.

C. Stamps Flippen.

Q. You say you wouldn't be interested in renting it today. Would you be interested in renting any movie house in Danville?

A. I might.

Q. You certainly wouldn't want to rent a building that had been condemned?

A. No, sir.

Q. So, your objection to this particular location is that it is in a state of disrepair?

A. Yes, and the fact that the actual construction, I think, was wrong for a moving picture house. Maybe when you were putting on stage shows, it was probably built for that purpose. People don't mind getting close to the stage but don't like to get close to a picture. That was the reason for the shallowness of the house.

Q. There are still a number of moving picture houses in and around Danville?

A. Yes.

Q. How many moving picture houses do we have other than the drive-in type?

page 39 } A. Schoolfield, Capitol, Rialto, Ritz, Lea, North.

Q. Six?

A. Six. I think that's right.

Q. And three drive-ins?

A. Three drive-ins. Nine.

RE-DIRECT EXAMINATION.

By Mr. Meade:

Q. If that building today was brand new, just built, built just like it is but brand new, would you be interested in renting it for a movie house?

A. I don't believe I would, Mr. Meade.

C. STAMPS FLIPPEN,

being called as a witness for the plaintiffs and being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Meade:

Q. You are Mr. C. Stamps Flippen?

A. Yes.

Q. I believe you are connected with Towns Printing Company?

C. Stamps Flippen.

A. Right.
Q. What is your position?
A. President and Treasurer.
Q. Your present location, I believe is at the corner of Union and Patton Streets in the City of Danville?
A. Right.
Q. Does your lease come to an end within a short period of time?
A. It does.
page 40 } Q. Was it necessary for you to look for another location for your business?
A. Yes.
Q. What type of business is Townes Printing Company, generally speaking?
A. Printing and office supplies.
Q. In your search for a new location did you consider the Arey property, which is the old Opera House with an entrance running to Main Street of 15 feet? Did you consider that?
A. Yes.
Q. Were you interested in leasing that property?
A. We were.
Q. Did you go to any expense looking towards a lease of the property?
A. Yes.
Q. In leasing that property were you interested in it without the entrance way from the Opera House property into Main Street; were you interested in leasing it without that entrance way?
A. No.
Q. Did you determine that there was a controversy as to the ownership of that entrance way?
A. Yes. We had it looked into, legally.
Q. And you found there was some controversy about the ownership?
A. Yes.
Q. Then, what did you do?
A. Well, we delayed for a while, they said they were going to have a trial and it was such a delay we just decided not to, to look somewhere else.
Q. Was it imperative you find another location?
page 41 } A. That's true.
Q. Did you afterwards locate another place?
A. Yes.

C. Stamps Flippen.

Q. So, at present you are no longer interested in the Arey property?
A. That's true.

CROSS EXAMINATION.

By Mr. John Carter:
Q. What use were you going to make of this entrance way?
A. As a sales room.
Q. As a sales room?
A. That's right.
Q. In other words, you intended to open up a store front in that 15 foot entrance way as a retail outlet for the sale of your merchandise?
A. That together with the street floor that would have been erected in the rear, with the plant on the ground floor.
Q. In other words, you would have had a store front fronting on Main Street?
A. That's right.
Q. With real plate glass show windows and an entrance and the usual sales counters and merchandise inside the doorway extending all the way back into the theatre building?
A. That's right.
Q. The theatre building you would have used mostly for your printing business?
A. We were also going to have a sales store extending back. The printing department would have been on the ground floor.
Q. You mean one floor below the street level?
A. Yes.
page 42 } Q. And you would have extended your sales area back on the street level floor of the theatre building?
A. That's true.
Q. Now, is a substantial portion of the Townes Printing Company business the sales of office stationery and art supplies and merchandise of that type?
A. About fifty per cent.
Q. About fifty per cent is for retail sales business?
A. That's true.
Q. And you would not have been interested unless you could use that 15 foot front entrance way as a retail outlet for the sale of your merchandise?

C. Stamps Flippen.

A. We wouldn't have been interested unless we could have done that.

Q. How suitable did you find this building for housing your printing presses?

A. Well, part of the ground level would have had to have been excavated, part of it was the right depth, I've forgotten now, maybe half.

Q. Did you look into the expense of converting this building into a printing shop?

A. We did.

Q. Did you find that profitable?

A. We found it $50,000.00.

Q. Was what it would have cost you to convert it? Was that what made you cool off in leasing this property, the expense you would have had to go to set up your printing shop?

A. Yes and no. It would have depended on what we could have done. We may have had to do it.

Q. But since you have found you a location
page 43 } where your capital outlay would have been less than that old theatre building?

A. Yes, a little less.

Q. And one from the standpoint of retail outlet is more suitable?

A. That's true.

Q. So you aren't interested in investing this $50,000.00 in there unless you could find nothing more suitable in a location which would amount to a smaller expenditure of capital outlay for you?

A. Well, we were of course open to any location that was desirable at that time and would have taken the one that cost the least.

Q. And you found one more desirable?

A. We have, yes.

Q. What did you find about the structural conditions of the building? Had it been maintained over the years in a state of good repair or what sort of shape was it in?

A. I can't answer that. I don't know.

RE-DIRECT EXAMINATION.

By Mr. Meade:

Q. Did you look for another location until you were stymied as to the Arey property on account of this entrance way?

C. Stamps Flippen.

A. Yes.
Q. And where did you finally locate?
A. Well, Mr. Meade, I wouldn't like to say at this time.
Q. Are you required to put a building on that new location?
A. Partly.
Q. And you say the expense will be just under the $50,000.00?
A. That's right.
page 44 } Q. I may have misunderstood you a few minutes ago when I asked you if you looked for another location until you found out you couldn't promptly get this entrance way from the old theatre property to Main Street. Did you start looking for another location before you advised with your counsel?
A. Say that again.
Q. As I understood you to say you were sufficiently interested in the Arey property to have your attorney look into the title and advise you as to the situation with reference to the ownership of the entrance way. Is that right?
A. Yes.
Q. Now, at the time he gave you an opinion on that were you still interested in renting the Arey property, just before he gave you the opinion?
A. If the controversy could have been cleared up.
Q. If you were still interested in renting the Arey property if the controversy could have been cleared up then you still didn't look for another location until you found it would take too much time about the controversy?
A. Mr. Meade, we were at that time looking for any desirable location, but at the same time we were keeping the Arey property in mind.

RE-CROSS EXAMINATION.

By Mr. Carter:
Q. Do I understand, Mr. Flippen, you had not excluded from your mind your search for another location at any time after you found the Arey property was available? You kept on looking after that?
A. That's true.
page 45 } Q. Because of the expense of setting up your shop. If you could find something in an equally good location and you could set up for less money you were still interested?
A. Yes.

Judge Aiken: Could we shorten this if we had a clear understanding of just what you want the Court to answer for you?

Mr. Meade: We are about through except for Mrs. Swicegood. Did want to call Mr. Barber and ask him two or three questions.

Mr. Carter: If Your Honor please, I agree with the Court. I would like to know just what type question it is.

Judge Aiken: What do you want the Court to answer?

Mr. Meade: We want the Court to answer in the affirmative that we have, first, the right to use that old Opera House building for any legitimate, legal business we want to.

Judge Aiken: That you have the unqualified and unrestricted right to do anything you want to with that space?

Mr. Meade: Yes, sir, except we are burdened with the space over top of it.

Judge Aiken: By that restricted space there you own that 15 feet and Mr. Carter, you contend it can be used only as a passageway to the rear?

Mr. Carter: Yes, sir, we might as well put the cards on the table. If I'm correct in my assumption of
page 46 } what Mr. Meade is trying to get to, I'm going to have to ask the Court's permission to take some evidence myself. I think Mr. Meade is contending these people own fee simple to the entrance way with easement in the Arbern Company to build over it and with the restriction that the entrance way be used as an entrance way only is not valid—I want at this time to state to the Court that I want an opportunity to take evidence. I would like, if Your Honor please, leave to take evidence, possibly depositions in New York concerning this particular matter, as to whether or not the Court should hold the fee simple is in Mr. Meade's and Mr. Garrett's clients and that the restriction, this servitude—

Mr. Meade: If Your Honor please, let me answer that. Mr. Carter has agreed to this hearing before the Court. The property is standing there. We have had one opportunity to lease it.

Judge Aiken: The Court hasn't delayed you.

Mr. Meade: (Reading from Petition for Declaratory Judgment) "Wherefore, your petitioners pray that this Court may interpret said deed and contract and determine what rights, if any, the parties hereto may have with reference to said entranceway and to enter an Order clarifying all such rights of said parties and especially to enter an Order granting your said petitioners the full, free and unhampered use of said entranceway so that they may properly

use and enjoy all of their said property without interference or harrassment of any kind from said defendant."

Judge Aiken: I see perfectly what Mrs. Clarke and Mrs. Swicegood are contending. I would like to find out something more what the other side is contending. Mr. Carter, do your people contend that has to be used as a place of amusement, a theatre, or some kind of amuse-
page 47 } ment?

Mr. Carter: If Your Honor please, I have drawn my Answer as broad as possible. I'm frank to say in all fairness and reasonableness I do not think the building itself has to be used as a theatre business.

Judge Aiken: Suppose Mr. Stamps Flippen had gone in there with his printing business. Do you think there was a restriction as to the public passing through it?

Mr. Carter: I wouldn't seriously contend they wouldn't have the right to go through that passageway. I claim as far as the entrance way itself is concerned they have no right to change that.

Judge Aiken: Would they have the right to use it as a pathway?

Mr. Carter: Yes, sir—

Judge Aiken: Your contention is that they have no right to use it for any merchandise or display purposes?

Mr. Carter: Yes, sir.

Mr. Meade: He is asking now to take depositions. His clients are in New York.

Judge Aiken: You thought the whole hearing would be here?

Mr. Meade: Yes, sir, and Mr. Carter has followed and traced the title all the way down in his opening statement and is fully aware of what has been going on here and he is trying to put us all the way out and not all the way in.

Mr. Carter: This claims they hold it by adverse possession. My understanding from Mr. Meade is they own the land in fee simple and that puts us in the position that is for equitable servitude on it. As I see the testimony he is putting on is designed to show that this equitable servitude or restriction or whatever he contends was in the original deed—and I think under the pleadings we have the right to put on evidence that it is in conflict with that—
page 48 } Mr. Meade: We claim that entrance way in fee simple, but not by adverse possession, but under the deeds. We are not claiming title by adverse possession.

Mr. Carter: That is what the Petition says, that they claim by adverse possession. I don't want to raise technical questions but simply want an opportunity to take evidence.

A. W. Barber.

Mr. Meade: If we ask the Court to construe the deed and the contracts which follow later I can't understand why Mr. Carter—

Judge Aiken: Lets go on and get through and then argue some more.

A. W. BARBER,

being called as a witness for the plaintiffs and first being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Meade:

Q. What are your initials, Mr. Barber?

A. A. W.

Q. What is your present occupation?

A. Manager of the Rialto theatre.

Q. How long have you lived in the City of Danville?

A. Going on 15 years this last time.

Q. Have you been in the moving picture business ever since you have been here?

A. Yes.

Q. Were you in the moving picture or show business before you came here?

A. Yes, sir.

Q. How long have you been in the theatre business or moving picture during your lifetime.

A. Vaudeville and moving picture about 35 years.

Q. At the beginning of your pursuit of this occupation what type shows did you have?

page 49 } A. Well, at one time it was vaudeville or tab shows.

Q. In your time did you ever have what we call opera?

A. Yes, we had opera.

Q. What has been the history of opera?

A. Well, it was this high type stuff that patrons patronized it, the high type people.

Q. Do you have as much opera going around from town to town and small cities as you had back about 35 or 40 years ago?

A. No.

Q. Is that produced through the ordinary theatre or through music and civic associations.

A. Usually music and civic associations.

Q. Do they use theatres for that?

A. W. Barber.

A. No, there is one or two places in the south for it, but mostly in the schools or city auditoriums.

Q. Are any city auditoriums utilized for that purpose?

A. No, I don't know of any except towns in which they have college auditoriums.

Q. Do we have a city auditorium in Danville?

A. Yes.

Q. Did you ever attend a civic music program in our city auditorium?

A. Once or twice they had it. I did not attend it.

Q. Where now do they have these associations?

A. I think in our new high school. G. W.

Q. Now, after you say this opera business, did that business recede gradually from the theatres?

A. Yes. it did.

page 50 } Q. What took place after that?

A. Well, then we had the one nighters, big road shows out of New York.

Q. Do we have that any longer?

A. Maybe one in Durham. I think—might have one occasionally and one in Atlanta.

Q. What happened to the show business?

A. The theatres gave over to permanent screens.

Q. What put that out of business?

A. Well, we had small tab shows, people who came in and stayed about a week.

Q. When did that go out?

A. About 10 or 15 years ago.

* * * * *

A. Then they came in and put in 10 or 20 cent houses as they did at the time when it was kind of a depression. Then there was the Capital and North and the Lea house.

Q. Then did you have silent pictures and now sound moves?

A. Yes.

Q. Did you ever manage the Majestic Theatre?

A. Yes, sir. I opened September 19, 1927 the new theatre in the Rialto and later Mr. Hester, who was in general charge, put me in charge of the Majestic.

Q. Did you look after the Majestic as manager?

A. Yes, sir, it was closed part of the time.

page 51 } Q. It was closed part of the time?

A. Yes, sir, maybe run just the weekends.

A. W. Barber.

Q. Did you continue through the term of your lease?
A. Yes, sir.
Q. Then did you renew the lease?
A. That I couldn't say.
Q. And you were there one or two years?
A. Yes, off and on.
Q. You remember who was the owner of the building?
A. Yes, sir, it was the old Southern Enterprises.
Q. I mean of the building itself.
A. I do not know.
Q. Would you be interested in leasing that building today as it stands?
A. Not in the condition it is in, no, sir.
Q. At the time you were manager of this Majestic theatre did you sell candy and popcorn and chewing gum and that sort of thing?
A. We had storage space in the lobby, not as it is now, had it stored there and worked the theatre with it by the box office.

CROSS EXAMINATION.

By Mr. John Carter:
Q. You say you would not be interested in leasing this building for a theatre?
A. No, sir.
Q. What sort of shape is it in?
A. Well, I have observed it and since closing it two or three people have asked me to go in and look at the seats and they are in bad condition.
page 52 } Q. The equipment is old?
A. Yes, sir, and most of the seats have been moved out that were new. They were on the first floor. The others have not.
Q. And no replacements to the equipment have been made in a number of years. You say it is old equipment?
A. That I do not know. It was opposition came to us about it.
Q. A competitive concern had it on lease but you haven't looked at it in recent years?
A. Yes, since the lease run out.
Q. And you found the equipment to be in right bad shape?
A. Yes.
Q. And the building to be in right bad shape?
A. Yes.

Margaret Arey Swicegood.

Q. What about the decorations and painting, etc.?
A. Well, the lobby or entrance way was done over right often, both the floor coverings and walls and the curtains and things like that.
Q. How about the inside?
A. The inside I couldn't say. I haven't noticed any rebuilding or repairs inside.
Q. Well, in the old days they used to sell popcorn and candy by sending a boy down the aisles?
A. Yes, that was during the tab shows.
Q. Sort of like at a baseball game?
A. Yes.

page 53 } MRS. MARGARET AREY SWICEGOOD,
being called as a witness in her own right and first being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Meade:
Q. You are Mrs. Margaret Arey Swicegood?
A. Yes.
Q. Mrs. Swicegood, I believe you and Mrs. Clarke own the property about which we have been talking this morning, the theatre property on Main Street in the City of Danville?
A. We do.
Q. After your father's death did you assist your mother or represent your mother in looking after this property or did she do it herself?
A. No, my mother did it with the help of Mr. Clarke.
Q. And after your mother's death did you take over the managership of the property and look after it for you and your sister?
A. My sister and I did it together, with the help of Mr. Clarke.
Q. How long can you remember back where you knew that your father owned this property and was leasing it from year to year and it was being operated as a theatre or moving picture house?
A. Well, I can remember going around the upper entrance way and through the alleyway and up to the peanut gallery to see the road shows when I was a very young girl in high school.
Q. How long would you say you know what transpired

Margaret Arey Swicegood.

there as to ownership, as to the entrance way and theatre proper?

A. To the best I can remember while my father lived and owned it he had it leased and while my mother lived and owned it she had it leased and while we owned it we had it leased and so we had nothing to do with it but the repairs.

page 54 } Q. Have you and your sister as owners always exercised complete control and ownership over that 15 feet going from the building to Main Street?

A. Yes.

Q. Has anybody at any time ever asserted any rights as against you and your sister in that 15 foot strip of land?

A. None whatever.

Q. Have the tenants in the storehouses on either side of that entrance way assumed or undertaken to assume any rights in that entrance way?

A. Not at all.

Q. You remember Mr. W. W. Williamson, do you not?

A. Yes, I do.

Q. Remember Mr. George G. Temple?

A. Yes.

Q. Until their deaths did you know they owned these storehouses on each side of this entrance way?

A. Yes, I did.

Q. Did either one of them ever confer with you or your sister in regard to claiming any rights in this entrance way?

A. I don't think as long as my sister and I have had it until the day they died they ever discussed it with us.

Q. Did they ever interfere in any way with your ownership?

A. Not in the least.

Q. When was the last lease executed by you and a tenant and when did it expire?

A. I think I'm correct in saying July 1956. It has been vacant two years.

Q. Who was the tenant at that time?

page 55 } A. The Craver Enterprises out of Charlotte, North Carolina.

Q. What term lease did they have at the time of the expiration?

A. When my sister and I came into possession of it we negotiated a 10 year lease with them. They had a previous

lease with my mother which they renewed with us for a period of 10 years.

Q. Did they occupy and use the premises for a moving picture house or theatre up to the time of the termination of their lease?

A. Not entirely. Might have been a matter of two months. I don't think it was more than that that they were closing the theatre although their lease had not expired because they were losing money and couldn't operate even though they continued to pay the rent.

Q. Did they close up the operation of the theatre?

A. They did.

Q. Did they pay the rent?

A. Yes.

Q. Up to the expiration?

A. Yes.

Q. Did you make any effort to renew your lease?

A. We did prior to that and they said they were not interested, they had better houses they were having to close because of that. They had one in Greensboro.

Q. After you received notice they intended to close have you made further efforts to try to lease it?

A. We made efforts but we had very few nibbles.

Q. Were you unable to lease it?

A. We were unable to.

page 56 } Q. Do you know who are the real owners of the Arbern Realty Company, Incorporated?

A. No, sir, I have no idea. Our contact with them was under the name of the Marx Realty Company.

Q. Are you under the impression the Marx Realty and Improvement Company owns the Arbern Realty Company?

* * * * *

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* * * * *

CROSS EXAMINATION.

By Mr. John Carter:

Q. Mrs. Swicegood, Mr. Meade asked you the question from the time of the death of your late mother and from the time the lease expired with the Craver Company, had you not had complete control, possession and occupation of

these premises from that time. What sort of control did you have over the premises?

A. We had enough control and possession to lease it and were empowered to receive the income from it.

Q. But beyond that you exercised no control?

A. It was not necessary.

Q. Was it used for any purpose other than as an entrance way to that theatre?

A. During the time of the lease with the Craver
page 60 } organization it was not used for anything other than an entrance way to the theatre.

Q. What was the term of the lease with the Craver company?

A. The last lease negotiated was 10 years.

Q. I think that expired in July 1956?

A. That is correct.

Q. Mr. Meade asked you if anybody has ever asserted any hostile rights to the use of that entrance way. Let me ask you if you have ever asserted any hostile or right other than ingress and egress into the theatre?

A. Mr. Carter, the term hostile is confusing to me. If you can explain it any other way I will see if I can answer it.

Q. Well, the right to use it for only a specific purpose. Have you ever indicated you were claiming against anyone who might use it; have you ever claimed any right other than to have patrons go through that entrance way?

A. It never occurred to me as long as we had it under lease and we were receiving income from it. It was only since the income was abandoned that it is necessary that we make other arrangements.

Q. Up to the time the theatre company moved out you had no use but as an entrance way?

A. Until they moved out. Since that time it has been used for other purposes.

Q. Since that time you have allowed hucksters to sell things out in that right of way?

A. Yes, three or four times and we received a small amount out of it but any small amount was a help.

page 61 } Q. Did you inform the Arbern people you did that?

A. No, I didn't.

Q. I believe you stated you never in your recollection had any conversation whatever with Mr. Temple or Mr. Williamson about the property?

A. I did not.

Q. You never told them you claimed the right to use this for anything other than ingress and egress to the theater?

A. No occasion that we do that. As neighbors we got along beautifully. Mr. Temple or Mr. Williamson never questioned me and I never questioned them.

Q. And they never questioned your right to use it as a theater entrance?

A. No.

Q. Mrs. Swicegood, what do you claim that you own there?

A. I would like to claim that I own what I pay taxes on.

Q. What do you pay taxes on?

A. We pay taxes on the alleyways, the entrance way which has been under discussion all day and the theater proper.

Q. Does that include the walls around the entrance?

A. I don't know how the taxes as set up, Mr. Carter.

Q. I want to know what you claim as owner?

A. I claim whatever was deeded to my father and subsequently deeded to me, I own. Just what that comprises. I'm not familiar enough to divide walls. I just don't know. According to the map I claim I own what I inherited.

RE-DIRECT EXAMINATION.

By Mr. Meade:

Q. Was the location of the doors in the entrance way moved back or forward or changed in any way during your management of the property?

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A. I believe they were. I believe the Craver organization moved those doors while they were leasing it and the lobby.

Q. What about the marquee? Was that changed in any way?

A. I believe the marquee was put there by the same organition and since the lease expired we have been required by the City to move it.

RE-CROSS EXAMINATION.

By Mr. Carter:

Q. The marquee was above the sidewalk?

A. Above the sidewalk.

Q. Did not overhang the general property lines itself?

A. I do not know that, Mr. Carter.

(At 1:00 P. M. Court recessed until 2:30 P. M. of the same day.)

AFTERNOON SESSION.

(Met pursuant to the morning session, with the same parties present.)

Mr. Meade: If Your Honor please, at this point we would like to introduce certified copies of the deeds in the chain of title to the property owned by the petitioners from the deed of S. H. Holland to the Danville Academy of Music, dated August 2, 1886, down to the present date.

Judge Aiken: Was the Academy of Music Incorporated?

Mr. Meade: Yes, sir. The gentlemen representing the defendant I think have seen these and all are
page 63 } signed by the Clerk and if there are no objections to introduce them as EXHIBITS H, I, J, K, L, M, N, O and P. So that the Court can be apprized of the contents of those deeds I would like not to read all those deeds but I would like to read pertinent parts from each deed.

(At this point Mr. Meade read at random from deeds previously filed as Exhibits and then read tothe Court deed dated 1907 to W. W. Williamson and George G. Temple from Carrie Douthat Harrison and her husband recorded in the Clerk's Office of the Corporation Court in Deed Book 72, page 436 and requested the Court's permission "to have a copy of that made and file that as EXHIBIT Q.")

(Mr. Meade concluded by reading deed dated July 16, 1890 between S. H. Holland and Carrie Douthat from Deed Book 31, page 176 and requested the Court's permission to file "as EXHIBIT R a simple certified copy of this deed.)

Mr. Carter: If Your Honor please, at this stage I would like to move the Court to disregard the evidence concerning any change of condition which might in some way affect the reservation if I understand these gentlemen correctly that they own the fee simple of this property and by virtue of this grant of S. H. Holland this is a reservation and they are trying to show change of condition had made the reservation unreasonable—We would like to have opportunity to produce evidence in the alternative in this matter in the change of this estate up there—I would also ask the Court that coun-

sel stipulate just exactly what they claim in this property, what they claim in the walls, etc.—

Judge Aiken: So far as the Court is concerned they are at liberty to tell you.

(At this point Mr. Garrett reviewed for the Court events subsequent to and preceding the filing of the Petition for Declaratory Judgment on September 5th, 1957 and concluded with "We do not think there is any reasonable ground for delaying this case any further.")

page 64 } (At this point there followed an informal session among the attorneys and Judge Aiken retired to chambers to read the Petition.)

Mr. Carter: If Your Honor please, for the purpose of the record we would like to note an exception to the Court's ruling that we will not be permitted an opportunity to introduce further evidence in this matter.

Judge Aiken: That's *note* quite the Court's ruling. The Court's ruling is that you may admit any evidence you want.

Mr. Carter: We would like to object first to the admission of evidence on change of condition in the neighborhood on the ground that it is not alleged in the pleading.

Judge Aiken: I didn't know there had been any evidence like that.

Mr. Carter: Well, the evidence that has been adduced concerning the theatre business and the condition of this business and matters of that kind.

Judge Aiken: Yes, the Court would overrule your objection to that evidence.

Mr. Carter: And except to the Court's ruling on that. We also move the Court in the alternative to permit us to take counter evidence concerning these matters.

Judge Aiken: That's not the ruling. The Court said it would not suspend the trial in order for you to put on evidence. If you have evidence we will hear it.

Mr. Carter: Well, the Court has said it will not hear any evidence after today on these matters.

Judge Aiken: If you are prepared to put it on the Court will hear it, even if we have to put it on tonight.

Mr. Carter: But as I understand it the Court will not hear any evidence after today from the defendant.

page 65 } Judge Aiken: If you are prepared to put it on today we will. I understood you had not summoned any witnesses?

Mr. Carter: No, sir.

Judge Aiken: Well, the Court is not going to suspend the trial because you didn't.

Mr. Carter: We would like to state to the Court we could get witnesses here within a reasonable length of time but that the matters which have been presented concerning change of conditions as far as the building and use are concerned are matters which we cannot readily get witnesses into court on at 4:00 in the afternoon.

Judge Aiken: I think we ought to point out that this case was set for trial about two weeks ago for today.

Mr. Carter: I agree with the Court that the case was set for trial about two weeks ago for today until the issue of change of condition to the real estate was raised and we did not feel that there was any necessity for us to produce any evidence other than that shown by the Court records in this cause.

Judge Aiken: Well, if you want the Court to say anything about judicial notice, the Court will take judicial notice that this building was located in a business section of Danville as far back as the first deed and is still a business section as of today.

Mr. Carter: Will the Court further take judicial notice there has been no appreciable change in the type of business conducted in that area?

Judge Aiken: I don't think we could do that. It may be true but I don't know what sort of business they were doing there back in the '80s or '90s.

Mr. Carter: Will the Court take judicial notice that the defendant owns three store fronts on Main Street in front of the property of the petitioners?

Judge Aiken: I cannot take judicial notice of
page 66 } that but I'm sure these gentlemen will stipulate
or let you testify that is a fact right now.

Mr. Carter: Will you stipulate, Mr. Meade, the defendant owns three store fronts?

Mr. Meade: If you state to the Court that the defendants are owners of storehouses known as numbers 547 and 545 and 539 as shown on the map filed as an Exhibit I will accept that as a fact.

Mr. Carter: Will you also stipulate one of those store buildings is now vacated and not rented?

Mr. Meadge: I do not know about the occupancy of the buildings.

Judge Aiken: You may testify to that.

Mr. Carter: Well, the store building on the upper side

of the one in question is vacant and has been for sometime.

Judge Aiken: Will you gentlemen permit Mr. Carter to give that as evidnce as if he had been sworn?

Mr. Meade: Yes, sir.

Mr. Carter: Of course we would like to except to the ruling of the Court that you have not given us time enough—

Judge Aiken: I don't think it should be that way. This case was set for trial on February 21st approximately two weeks ago and upon your statement you have summoned no witnesses here and want the trial suspendd. The Court will not suspend the trial. The Court will hear any evidence you have now or within the next several hours.

Mr. Carter: If Your Honor please, we would like to state the exception in this manner: in view of the fact that it is our belief the evidence went beyond the election of the pleading, that we could not reasonably have expected to meet the testimony and evidence presented of changing conditions involving this property and we, therefore, except to the Court's failing to grant our motion for a reasonable extension of time to hear evidence in rebuttal.

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Judge Aiken: All right.

Mr. Carter: If Your Honor please before we get into what Mr. Meade may have to say here, I think that here is one record here that has not been read to the Court. This is the lease that we spoke of in chambers, a copy of which will be introduced. This lease is recorded in the Clerk's Office of this Court in Deed Book 113, page 287, the lease between E. C. Arey and the North and South Carolina Enterprises, Incorporated, bearing date on the 10th day of June 1921.

Judge Aiken: Would you like to file that as an Exhibit?

Mr. Carter: Yes, sir, we would like to file that as EXHIBIT DEFENDANT NO. 1. If Your Honor please, that is all we have at this time.

Mr. Meade: As I understand, subject to your exceptions you rest?

Mr. Carter: Yes, subject to my exceptions.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

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RULE 5:12—BRIEFS

§1. Form and Contents of Appellant's Brief. The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall be to the official Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

§2. Form and Contents of Appellee's Brief. The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate references to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this Court, giving his address.

§3. Reply Brief. The reply brief (if any) of the appellant shall contain all the authorities relied on by him not referred to in his opening brief. In other respects it shall conform to the requirements for appellee's brief.

§4. Time of Filing. As soon as the estimated cost of printing the record is paid by the appellant, the clerk shall forthwith proceed to have printed a sufficient number of copies of record or the designated parts. Upon receipt of the printed copies or of the substituted copies allowed in lieu of printed copies under Rule 5:2, the clerk shall forthwith mark the filing date on each copy and transmit three copies of the printed record to each counsel of record, or notify each counsel of record of the filing date of the substituted copies.

(a) If the petition for appeal is adopted as the opening brief, the brief of the appellee shall be filed in the clerk's office within thirty-five days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. If the petition for appeal is not so adopted, the opening brief of the appellant shall be filed in the clerk's office within thirty-five days after the date printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office, and the brief of the appellee shall be filed in the clerk's office within thirty-five days after the opening brief of the appellant is filed in the clerk's office.

(b) Within fourteen days after the brief of the appellee is filed in the clerk's office, the appellant may file a reply brief in the clerk's office. The case will be called at a session of the Court commencing after the expiration of the fourteen days unless counsel agree that it be called at a session of the Court commencing at an earlier time; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

(c) With the consent of the Chief Justice or the Court, counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

§7. Effect of Noncompliance. If neither party has filed a brief in compliance with the requirements of this rule, the Court will not hear oral argument. If one party has but the other has not filed such a brief, the party in default will not be heard orally.

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