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Record No. 5028

In the Supreme Court of Appeals of Virginia at Richmond

B. W. POND, ET AL.

v.

NEWBILL J. FISHER, ET AL

FROM THE CIRCUIT COURT OF THE CITY OF NORFOLK

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. 5028

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 6th day of May, 1959.

B. W. POND, ET AL., Appellants,

against

NEWBILL J. FISHER, ET AL., Appellees.

From the Circuit Court of the City of Norfolk

Upon the petition of B. W. Pond and Lula L. Pond an appeal is awarded them from a decree entered by the Circuit Court of the City of Norfolk on the 30th day of December, 1958, in a certain chancery cause then therein depending wherein Newbill J. Fisher and others were plaintiffs and the petitioners were defendants; upon the petitioners, or some one for them, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of three hundred dollars, with condition as the law directs.

RECORD

* * * * *

BILL OF COMPLAINT.

To the Honorable Clyde F. Jacob, Judge of the Court aforesaid.

Your complainants respectfully represent unto the Court as follows:

1. That on the 27th day of August, 1958 they were seised and possessed in fee simple, free of encumbrances of any sort by perfect title, of a certain tract of land with the buildings and improvements thereon, lying and being in the City of Norfolk, Virginia, being bounded by Mason's Creek on the west, Commodore Park on the north and Granby Shores on the east and the south, a more particular description of said tract being as follows:

All that certain lot, parcel or piece of land in the City of Norfolk, State of Virginia, with the buildings and improvements thereon, situated on the east side of Mason's Creek and being more particularly described as follows:

Beginning at the southeastern corner of a strip of land designated as a 12-foot right of way on a certain plat entitled "Map of a Portion of Commodore Park," which is duly of record in the Clerk's Office of the Corporation Court of the City of Norfolk, Virginia, in Map Book 10, at page 47, which point is located S. 17° 09′ 10″ W. two hundred ninety-four and fifty-two hundredths (294.52) feet from Landale Road as measured along the southeastern side of said right
page 2 } of way, which is shown on the aforesaid plat; and from said point of beginning running S. 16° 15′ 30″ West three hundred (300) feet to a pin situated in a marsh near a manhole; thence turning and running S. 89° 15′ 30″ West five hundred forty-two and thirty-one one-hundredths (542.31) feet to a point in Mason's Creek; thence turning and running N. 15° 9′ 30″ East four hundred forty-five and forty-six one-hundredths (445.46) feet to a point; thence turning and running S. 75° 10′ 30″ East nine and thirty-four one-hundredths (9.34) feet to a pin; thence continuing along the same course five hundred eighteen (518) feet to a pin which pin marks the point of beginning.

2. That on the 28th day of May, 1958, they entered into a written contract with B. W. Pond and Lula L. Pond, the defendants herein, to sell to the said defendants the said tract of land with the buildings thereon, situated as aforesaid for the sum of Eighteen Thousand and no/100 ($18,000.00) Dollars. The said contract is herewith attached marked Exhibit "A" and made a part of this bill.

3. That by the said contract it was agreed by and between the said defendants and your complainants that a purchase price of Eighteen Thousand and no/100 ($18,000.00) Dollars would be paid for the said property as follows, to-wit:

A cash deposit of One Thousand and no/100 Dollars ($1,000.00) together with a cashier's check of Four Thousand and no/100 Dollars ($4,000.00) to be put in escrow at the time of signing said contract; said check to be made payable to George Gray and M. C. Simpson. The said $1,000.00 was to remain in escrow with Mr. M. C. Simpson, the real estate agent in this transaction and the $4,000.00 cashier's check was to remain in escrow with Mr. George Gray, Attorney for the said defendants in this action. The Thirteen Thousand and no/100 Dollars ($13,000.00) remaining unpaid was to be paid in cash as of the date of settlement.

4. That it was further agreed by and between the
page 3 } said parties that the date of settlement would be on
or before August 27, 1958 and that possession of the premises by the defendants herein would take place on that date.

5. That on the 27th day of August, 1958, your complainants were ready, willing and able to deliver fee simple title to said property by a good and sufficient general warranty deed, together with complete possession of said property; the said deed was duly signed, sealed and acknowledged by your complainants. The said defendants refused to accept said deed or to pay the balance due on the purchase price.

6. That on the 18th day of September, 1958, your complainants tendered to said defendants and offered to deliver to them a good and sufficient deed, which conveyed title to the said property in fee simple with general warranty; that the said deed was duly, signed, sealed and acknowledged by your complainants and the said defendants then and there refused to accept the said deed or to pay the sum of Thirteen Thousand and no/100 Dollars ($13,000.00) due on said purchase price.

7. Your complainants herewith tender good and sufficient deed with general warranty to the said property in fee simple, duly signed, sealed and acknowledged by your complainants

and hereby offer to fully perform all provisions of said contract with the said defendants.

WHEREFORE, your complainants pray that the said B. W. Pond and Lula L. Pond may be compelled on their part to comply with the provisions of the said contract; that the said B. W. Pond and Lula L. Pond may be compelled to accept the deed tendered to them and pay the balance due of Thirteen Thousand and no/100 Dollars ($13,000.00) with
page 4 } lawful interest due thereon from the 27th day of August, 1958.

NEWBILL J. FISHER, JANE W. FISHER, RUBIE N. FISHER, THOMAS M. FISHER
By EDWARD R. WILLCOX, JR.
of counsel.

Filed in the Clerk's Office the 19th day of September, 1958.

Teste:

W. R. HANCKEL, Clerk
VIRGINIA MANNING, D. C.

* * * * *

page 5 } EXHIBIT "A."

Revised Dec. 1953

STANDARD FORM
NORFOLK-PORTSMOUTH REAL ESTATE BOARD, INC.
Official Sales Contract

This Agreement of Sale made in triplicate this 28 day of May, 1958, between B. W. and Lula L. Pond hereinafter known as the Buyer and Newbill J. Fisher and Thomas Fisher, and Ruby Fisher Brothers and Sister hereinafter known as the Seller and M. C. Simpson and Company a member of the Norfolk-Portsmouth Real Estate Board, Inc. hereinafter known as the Agent.

WITNESSETH: That for and in consideration of the sum of One thousand dollars 00/100 Dollars ($1,000.00) by Check in hand paid receipt of which is hereby acknowledged, the Buyer agrees to buy and the Seller agrees to sell for the

sum of Eighteen thousand dollars 00/100 Dollars ($18,000.00) all that certain piece, parcel or lot of land described as follows, to-wit: being the property of Newbill J and Lottie Fisher, being situated at the Southwestern most part of Granby Shores fronting on Mason Creek and being direct North of Commodore Park, and direct South of property presently known and numbered as 201 thru 209 West Bayview Boulevard, in the City of Norfolk, Virginia. All land, buildings and improvements thereon. Consisting of one and 4/10 (1 4/10) acres of land, more or less.

The purchase price to be paid as follows:

(18,000.00) The cash deposit of (1,000.00) is to apply on the purchase price of property, the balance of (17,000.00) is to be paid as follows, (4,000.00) to be put in escrow in the form of a cashier's check at the time of signing this contract the check is to be made payable to George Gray and M. C. Simpson, and to be held in escrow by Mr. Gray, (13,000.00) additional cash to be paid on date of settlement.

Possession to be on date of settlement.

It is understood and agreed by the Buyer and Seller that all money deposited with this contract to apply on the purchase price of the property, shall remain in escrow with the Agent until day of settlement.

The Seller agrees to deliver the above property with a General Warranty Deed with the usual covenants of title signed and executed by all parties interested in the property, same to be prepared at the expense of the Seller. All deeds of trust to be prepared at the expense of the Buyer, and all deeds to be recorded at the expense of the Buyer.

All taxes, are to be pro-rated as of Date of settlement and settlement to be made on or before August 27, 1958, or as soon thereafter as title can be examined and papers prepared, allowing a reasonable time to correct any defects reported by the title examiner.

It is understood that the title is to be free and clear of all liens and indebtedness of every kind except the liens above mentioned.

It is understood that the property is to be conveyed subject to any restrictions of record now thereon.

The Seller agrees to pay to the Agent cash for his services, a commission on the sale price of the property at the rate prescribed by the Norfolk-Portsmouth Real Estate Board, Inc.

Witness the following signatures and seals made this 27 day of May, 1958.

B. W. POND	(Seal)
LULA L. POND	(Seal)
NEWBILL J. FISHER	(Seal)
JANE W. FISHER	(Seal)
THOMAS M. FISHER	(Seal)
RUBIE M. FISHER	(Seal)

* * * * *

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* * * * *

DECREE.

This cause which has been regularly matured, set for hearing and docketed, came on November 7, 1958, to be heard on the bill of complaint of Newbill J. Fisher, Jane W. Fisher, Rubie N. Fisher and Thomas M. Fisher, complainants, the joint and several answer and cross bill of B. W. Pond and Lula L. Pond, the general replication of the complainants and their answer to the cross bill, the general replication of the defendants to the answer to the cross bill, and the evidence heard *ore tenus,* and was argued by counsel.

At the conclusion of the defendants' evidence, the complainants moved to strike the same upon the ground that taken as true it constituted no defense.

Upon consideration whereof, the Court is of the opinion that the allegations of the complainants have been fully sustained by the evidence on their behalf, and that the evidence on behalf of the defendants is insufficient to constitute a defense to the complainants' bill, and is not sufficient to sustain the allegations of the cross bill, and said evidence is stricken.

The Court is further of the opinion that the complainants are entitled to a specific performance of their contract.

Accordingly, the Court doth ADJUDGE, ORDER and DECREE as follows:

page 13 } 1. The defendants shall, within thirty days, pay to the complainants $17,000.00, with legal interest thereon from November 7, 1958 until paid, and their costs of this suit.

2. Upon payment thereof the defendants shall furnish and affix to the deed dated November 5, 1958, and described as the

complainants' Exhibit No. 5, in their suit, United States Revenue Stamps in the amount of $19.80, and the Clerk of this Court shall deliver to the defendants, or their attorney, the deed above described, conveying to the defendants, with general warranty, the title to the following property:

All that certain lot, parcel or piece of land in the City of Norfolk, State of Virginia, with the buildings and improvements thereon, situated on the east side of Mason's Creek and being more particularly described as follows:

Beginning at an iron pin situated at the western end of Bayview Boulevard (formerly Landale Road) which point is designated Old Iron Pin on the Plat designated "Map of a Portion of Commodore Park," which plat is duly of record in the Clerk's Office of the Corporation Court of the City of Norfolk, Virginia, in Map Book 10, at page 47, and from said point of beginning running S. 17° 09′ 10″ W. two hundred ninety-four and fifty-two hundredths (294.52) feet to a point; thence, running N. 75° 10′ 30″ W. five hundred fifteen and thirty-four one hundredths feet (515.34) feet to a point in Mason's Creek; thence turning and running S. 15° 9′ 30″ W. four hundred forty-five and forty-six one hundredths (445.46) feet to a point in Mason's Creek; thence, turning and running N. 89° 15′ 30″ E. five hundred forty-two and thirty-one one hundredths feet (542.31) to a pin near a manhole; thence, turning and running N. 16° 15′ 30″ E. three hundred (300) feet to a pin; thence, N. 17° 09′ 10″ E. two hundred ninety-four and fifty-two one-hundredths (294.52) feet to the center line of a roadway designated original 18-foot right of way as shown on the plat entitled "Map of a Portion of Commodore Park," duly of record as aforesaid (this 18-foot right of way is now incorporated and makes up the southern most portion of Bayview Boulevard, formerly Landale Road); thence, turning and running in a northwesterly direction 12 feet to the point of beginning;

The 12-foot strip of property set out in the above description, which lies between the main portion of the Fisher property and Bayview Boulevard (formerly Landale
page 14 } Road) is subject to the perpetual easement of being used as a right of way, which easement was granted by T. H. Fisher and Lottie T. Fisher, his wife, to W. J. Land, by their deed of November 1, 1909, which deed is duly of record in the Clerk's Office of the Circuit Court of Norfolk County, Virginia, in Deed Book 346, at page 269.

3. Should the defendants fail to pay the said sum of $17,000.00, with interest as aforesaid, and the costs of this suit,

within thirty days from the date hereof, said property shall be sold at the risk and expense of said defendants, upon terms and conditions to be fixed by the Court at that time.

4. At the instance of the defendants, who desire to present to the Supreme Court of Appeals of Virginia a petition for an appeal from this decree, the execution of this decree shall be suspended for ninety days from the execution and filing by the defendants of a suspending bond or a *supersedeas* bond, in the penalty of $5,000.00, with surety to be approved by the Clerk of this Court, such bond to be conditioned according to law.

Enter Dec. 30, '58.

C. H. J.

It is stipulated by counsel that the $4,000 check made by Lula L. Pond and made payable jointly to George Gray and M. C. Simpson be deposited with the Clerk of this court.

C. H. J.

* * * * *

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Filed 2-16-1959.

VIRGINIA MANNING, D. C.

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

Defendants, B. W. Pond and Lula L. Pond, herewith file their notice of appeal from the final decree entered in this cause on December 30, 1958.

ASSIGNMENTS OF ERROR.

1. The Court erred in entering the final decree granting the complainants specific performance of the contract dated May 28, 1958.

2. The Court erred in overruling the motion of the defendants to set aside the final decree and grant a new trial on the ground of after-discovered evidence, which motion was supported by the affidavits of B. W. Pond, Lula L. Pond,

George Gray, attorney at law, and Herman A. Sacks, attorney at law.

3. The Court erred in sustaining the motion of the complainants to strike the evidence of the defendants.

4. The Court erred in sustaining the objection of counsel for the complainants to the testimony of George H. Gray, attorney at law, that the survey indicated that the real property could not be reached from a public road, to-wit:

page 30 } "Q. Who was raising that question about the boundary lines? Either one of the parties?

"A. No one was raising any question about the boundary lines at that time. The only question was to have a survey made to determine where the boundary line was. But then after a survey was made and it came back and the survey indicated that this property could not be reached from the road or public road—

"Mr. T. H. Willcox: If Your Honor please, I object to that. He examined the title, in advance.

"The Court: Objection sustained."

5. The Court erred in sustaining the motion of counsel for the complainants to strike out the testimony of George H. Gray, attorney at law, as follows:

"A. I examined the title. I found the deed in the title which is Plaintiff's Exhibit 3. I also found in the title the deed Plaintiff's Exhibit 1, which makes reference to an 18-foot right of way. I found the conveyance from Fisher to Land conveying off a part of the property that the Fishers own, which appeared to leave a 12-foot right of way. But the problem there, sir, was that you could not tell from the title examination where the public road was with reference to this particular piece of property. It appears that they eliminated the 18-foot right of way and it was not clear at all whether or not any part—whether the 12-foot right of way was made. It was not clear exactly as to the width of the road or who owned it.

"Mr. T. H. Willcox: Now, if Your Honor please, I move that that statement in its entirety be stricken out.

"The Court: So ordered. Any any other questions?"

6. The Court erred in sustaining the objection of counsel for the complainants to the testimony of Lula Pond, to-wit:

page 31 } "Q. Don't mention what you said before but give us any other part of the conversation you had with Miss Rubie Fisher.

"A. Well, when Mr. Gray found out about the road—

"Q. Mr. Gray?

"Mr. T. H. Willcox: Gray.

"A. Mr. Gray, when he found out about the road, I thought I would go down there and find out from them if it was twelve or if it was eighteen. And when I did, I talked to Rubie and then I talked to Mr. Thomas and they seemed to insist it is eighteen. But under those conditions, of course, I couldn't sell off any property. And the condition the house is in, it has no running water, no pump. They still use the spring. And it has no bathroom. It just wouldn't serve my purpose at all. I thought about building a home, selling off a couple of lots.

"By Mr. Sacks:

"Q. What did you tell—

"Mr. T. H. Willcox: If Your Honor please, we move that all that be stricken out as irrelevant. It all occurred after the contract was signed.

"The Court: The Court will sustain the motion. She said after Mr. Gray found out, after he examined the title. He didn't do that until after the contract was signed. The contract was signed before he finished, had gotten that information, according to his testimony.

"Mr. Sacks: I want to show what Mrs. Pond was told. She is the one who had to buy it."

7. The Court erred in sustaining the objection of counsel for the complainants to the testimony of George H. Gray, attorney at law, as to the conversation between Mrs. Pond and Rubie N. Fisher, which took place on August 12, 1958, in his presence, to-wit:

page 32 } "Q. Mr. Gray, were you present when Mrs. Pond had a conversation with Miss Rubie Fisher in connection with this?

"A. I was present on only one occasion when Mrs. Pond and Rubie Fisher had a conversation and that was on or about August 12th of this year. I went—

"By the Court:
"Q. Was that subsequent to the signing of the contract?
"A. Yes, sir.

"Mr. T. H. Willcox: I object.
"The Court: Objection sustained.
"Mr. Sacks: We want to show by this evidence that Miss Fisher was apprised of what we found out; she was not surprised; the evidence shows had knowledge of the condition; and her reaction to what was told her.
"The Court: You are speaking of which Mrs. Fisher?
"Mr. Sacks: Miss Rubie Fisher, the lady who testified, one of the plaintiffs.
"The Court: Her reaction?
"Mr. Sacks: Her reaction to the objection. She wasn't surprised that it couldn't be subdivided said, 'They don't have to take it if they don't want it.'
"The Court: Is that a fact that she had told your client that?
"Mr. Sacks: It may show that she knew of it.
"The Court: The objection is sustained.
"The Witness: Want to put it in the record anyway?
"Mr. Sacks: All right.
"The Witness: I think you have a right to offer proof.
"The Court: Put it in the record.

"A. On the 12th of August I went there with Mrs. Pond to look at the property. It was the first time I had ever seen it and Mrs. Rubie Fisher was there. And Mrs. Pond told Mrs. Fisher that she couldn't take that property with
page 33 } that 12-foot right of way because she couldn't subdivide it. And Mrs. Fisher says, 'Well, if you don't want to take it, you don't have to.' "

* * * * *

page 3 } (The reporter was sworn; the witnesses were sworn and excluded on motion by Mr. Sacks; opening statements were made by counsel to the Court, during the course of which it was stipulated by and between counsel that the property described in the deed which was tendered by the parties complainant to the parties respondent has a clear title; and the following occurred:)

* * * * *

page 4 }

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NEWBILL J. FISHER,
a complainant, having been first duly sworn, testified as follows:

* * * * *

page 14 }

* * * * *

Q. Did they tell you why they don't want the property?
A. No, never told me.
Q. Didn't tell you at all?
A. No.
Q. Didn't talk to you?
A. No. I haven't talked to Mrs. Pond but once. That was the day she came down to my house.

Mr. Sacks: That is all.
Mr. E. R. Willcox: Come down, Mr. Fisher.

* * * * *

page 15 } M. C. SIMPSON,
called by the respondents as an adverse witness, and having been first duly sworn, testified as follows:

Examined by Mr. Sacks:
Q. Mr. Simpson, you are a real estate agent in the city of Norfolk. Did you have listed with you this property involved in this suit?
A. Yes, sir.
Q. How long?
A. One day.
Q. One day?
A. Yes, sir.
Q. That was before you sold to this Mrs. Pond?
A. That is correct.
Q. Did you have it before then?
A. No, sir.
Q. You weren't familiar with it at all?
A. No, sir.
Q. Did Mrs. Pond tell you what she wanted to do with the property?

M. C. Simpson.

A. No, sir.
Q. What?
A. No, sir.
Q. Didn't she tell you she wanted to sell off part
page 16 } of it?
A. No, sir.
Q. Did not?
A. No, sir.
Q. Did you tell her about the lane that went with the property?
A. No, sir.
Q. Did not?
A. No, sir.
Q. Well, does the lane go with the property?
A. That, Mr. Sacks, I do not know. It is supposed to.
Q. It is supposed to?
A. Yes, sir.
Q. And is that the 18-foot lane?
A. I wouldn't know.
Q. Well, was any size lane discussed with Mrs. Pond?
A. No, sir.
Q. You mean she bought a pig in a poke, is that it?
A. Well, any way you would like to express it. Mrs. Pond made a desire to buy the property direct from the owners before I ever listed it. She was sitting on their porch when I went to list the property.
Q. Although she talked to the owners about it, you are the man who consummated the deal, is that correct?
A. That is correct, sir.
Q. I want to put you on notice that I expect to
page 17 } contradict you. Didn't Mrs. Pond tell you that she could not use all of that land for her residence but she was going to sell some of it off?
A. No, sir, she did not.
Q. Didn't tell you. You are sure?
A. I am positive.
Q. You know that.

By the Court:
Q. Did you ever go on the land with the lady?
A. No, sir, never showed the property.
Q. All right. You are familiar with the land?
A. Yes, sir.
Q. Any entryway there, any lane that is visible?
A. Oh, yes.

Rubie Fisher.

CROSS EXAMINATION.

By Mr. E. R. Willcox:

Q. Mr. Simpson, what was the first day that you saw this property?

A. About 1:30 Sunday afternoon, between 1:30 and 2:00 o'clock on May 25th I believe. Yes, May 25th, Sunday afternoon (witness consulting calendar).

Q. Was Mrs. Pond there when you arrived?

A. No, sir. We went direct to the property to see it. And after talking with Mr. Tom Fisher and his sister who lived on the property, he told us we would have to go to his page 18 } brother, Mr. Newbill Fisher, and he lived over in South Bay View. So after inspecting the property we left the premises and went to Mr. Newbill Fisher's home. And when we got there, Mr. and Mrs. Pond were sitting on the front porch and had already tried to buy the property direct from Mr. Fisher, I was told.

Q. Describe this right of way. Describe the way you got on this property.

A. Well, there is a lane running between two pieces of property on West Bay View Boulevard leading into the property. And I don't have any idea how wide that lane is nor am I familiar with the length of it at all.

Q. Is it built up on either side?

A. Both sides.

Q. Closely built up?

A. Well, I don't recall offhand how close they are to the buildings. I would think that the building set back on one side approximately 75 feet and on the other maybe 15 feet.

Mr. E. R. Willcox: That is all.

Mr. Sacks: I call Mrs. Rubie Fisher as an adverse witness.

page 19 } RUBIE FISHER,

a complainant, called by the respondent as an adverse witness, and having been first duly sworn, testified as follows:

Examined by Mr. Sacks:

Q. You are Mrs. Rubie Fisher?

A. Miss.

Q. Miss Rubie Fisher?

A. Yes.

Rubie Fisher.

Q. You are one of the complainants in this suit? You are one of the owners of this land, are you not?
A. Yes.
Q. Did you have any conversation with Mrs. Pond before the contract was signed?
A. No, sir.

Mr. E. R. Willcox: I object. This is parol evidence designed to vary the terms of the contract.
The Court: The question itself is not objectionable. The next question would probably be objectionable. You may answer the question that you did have a conversation with him.

A. No, sir, I didn't have any.

Mr. Sacks: I can't hear.

A. I say I didn't have any conversation with him before the contract was signed.

The Court: She did not have.
page 20 } The Witness: I did not.

By Mr. Sacks:
Q. Did you have one after it was signed?
A. No, sir.
Q. Did she tell you what she was buying the property for?
A. No, sir.
Q. Didn't she tell you that she was going to sell some of it off?
A. No, sir.
Q. Didn't you tell her that it couldn't be done?
A. No, sir. I didn't say—she never told me.
Q. What is that? Didn't she say that she would like to sell part of it off and you said it couldn't be done, that you had tried to sell it before?
A. She never told me anything like that.
Q. What did she tell you about it?
A. She didn't tell me anything because I never talked to her.

The Court: I think any conversation afterwards would be immaterial. It wouldn't be admissible as parol evidence.

George H. Gray.

Mr. Sacks: Only except if they knew what she wanted it for.

Mr. T. H. Willcox: She says she never talked
page 21 } before.

Mr. Sacks: I am trying to lay the foundation

The Court: After having said that she didn't talk to her before the contract, then everything else would be inadmissible.

By Mr. Sacks:

Q. You say you never talked to her about this?

A. No, sir.

Q. About this land. All right.

The Court: You may step down.

The Court: Whom will you have next?

Mr. Gray: Your Honor, it appears that I am going to have to testify, so I will just have to withdraw from the case as counsel. I didn't expect to. I was not sworn.

GEORGE H. GRAY,

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

Examined by Mr. Sacks:

Q. Will you state your first name?

A. George H. Gray.

Q. What is your occupation?

A. I am an attorney at law.

Q. How long have you been practicing law?

page 22 } Mr. T. H. Willcox: We will admit that he is a qualified lawyer and competent to examine titles.

By Mr. Sacks:

Q. Mr. Gray, were you retained by Mr. and Mrs. Pond, the defendants in this suit, to examine the title of the property involved in this case?

A. Yes, sir. If I may go ahead, I will go ahead with it. Mrs. Pond retained me one or two days after she had made a deposit with Mr. Simpson of a thousand dollars. At that time no contract had been signed between Mrs. Pond and the Fishers, the owners of the property. I was engaged to examine title to the property to determine whether or not the Fishers

had good title to it. So at that time no contract had been signed. So I proceeded to examine the title. And, of course, in my examination of the title I found the plat which is in evidence here marked Plaintiff's Exhibit 2. But since this plat was put to record in around the turn of the century, there has been a road cut through there. The 18-foot right of way shown on this plat is not in existence so far as I could determine. The boundary lines of the property which the Fishers own in my judgment could not be fixed definitely.

Mr. T. H. Willcox: If Your Honor please, we object to that. He can say what the boundary lines are.

The Court: What you found.

Mr. T. H. Willcox: The deeds are the best evidence.

page 23 } A. All right. I found that you could not tell where the property was with reference to the existing roadways.

Mr. T. H. Willcox: I object to that statement and move that it be stricken out. What Mr. Gray could tell is a matter of opinion, not a legal question, and whether or not he could find it is immaterial. The question is whether there is a right of way there and, as Your Honor knows, there is no property without a right of way. There is bound to be a right of way to every piece of property in the world. And the plat shows it and the deeds mention it.

Mr. Sacks: If Your Honor please, the title examiner examined the title, he didn't find it. Then the burden shifts to the plaintiff.

The Court: He can say what he found. He can't say what he concluded from the finding.

A. Well, I am stating what I found as best I could. But in any event, I found that the title to the property that the Fishers did own was a good title. The only question was the location of the boundaries and the roadway. Mrs. Pond wanted to buy this property and so this contract was prepared I think by Mr. Simpson. No objection was made to the contract because it was understood that Mrs. Pond was going to have a survey made to find the exact location of the boundary. And a survey was made. The difficulty was, page 24 } we didn't get the survey back until—

George H. Gray.

By the Court:

Q. —after the contract—

A. —after the contract was signed, of course, and the contract was signed because the property which the Fishers owned they did have good title to. The question was what the boundary lines of the property were. And as Mr.—

Q. Who was raising that question about the boundary lines? Either one of the parties?

A. No one was raising any question about the boundary lines at that time. The only question was to have a survey made to determine where the boundary line was. But then after a survey was made and it came back and the survey indicated that this property could not be reached from the road or public road—

Mr. T. H. Willcox: If Your Honor please, I object to that. He examined the title, in advance.

The Court: Objection sustained.

Mr. Sacks: If Your Honor please, here is a contract—

The Court: He cay say what he found: no right of way leading to the property, of record.

By Mr. Sacks:

Q. Go ahead.

Mr. T. H. Willcox: I don't think he can say that.

The Court: He can say it; otherwise—

page 25 } Mr. Sacks: The burden of proof is on the plaintiff to show he has good title to everything he sold. They haven't done that.

The Court: They do have good title to everything mentioned in the contract.

Mr. Sacks: Well, no. This contract doesn't show what they had, Judge. You can't take this contract and tell what property they are buying.

The Court: Mr. Gray just testified that examination showed they had good title, fee simple title to the property described in the contract and that it was a question of boundary lines; were going to have a survey made. So they were buying it without the boundary lines. They were buying it according to the record title in the deeds recorded in the Clerk's Office.

Mr. Sacks: This contract couldn't be enforced with the description; it doesn't describe anything.

George H. Gray.

The Court: Let's get through with Mr. Gray. He is busy, wants to get away. Go ahead.

By Mr. Sacks:

Q. All right, Mr. Gray. Keep on.

A. All right, sir. Let me see where I should pick up at. Well, the only thing I can testify to next, Your Honor, is the fact that they have conveyed by their deed, property which they don't own according to my title examination. page 26 And I can point that out by the deed that they have put in evidence, Exhibit—

By the Court:

Q. The deed they tendered?

A. Yes, sir. The deed they tendered conveys property which they don't own.

Q. Is the deed description the same as the description in the contract?

A. No, sir. The description in the contract is very vague and general because they didn't know what the boundaries were. I can point out exactly where the discrepancy is. For example, in Plaintiff's Exhibit 3 the northern boundary line on that property is different from the boundary line by which they conveyed the property in the deed.

Q. Point that out for the record.

A. Yes, sir. They make reference to the boundary line in that deed, the northern boundary line, as running south 75 degrees 10 minutes 30 seconds east, sum total of 9.34 feet, plus 518 feet. And their source of title recites the northern boundary line as running—(witness consulting papers)—a portion of the boundary line runs south 54 degrees 45 minutes west, and the other part of it—I don't know whether we can give the course on that or not. It shows in the deed that they have in evidence, Plaintiff's Exhibit 3, if I can pick out that northern boundary line I can cite it to you. The page 27 } deed they put in evidence doesn't show the course but the two are not the same.

Q. Does the deed in evidence convey more or less land than the contract mentioned?

A. It conveys more, in my judgment.

Q. Conveys more?

A. Yes, sir; and also conveys land which belongs to somebody else. Well, here—here is the easiest way for me to point it out, Your Honor. (Indicating) For example, this deed—

George H. Gray.

Mr. E. R. Willcox: Your Honor, maybe I had better explain and possibly they want some correction. I drew the first deed in a hurry and in order to have a better deed I redrew it with a recital and with the right of way in it. Possibly this is going to throw Mr. Gray off. Do you want me to introduce the original deed tendered in evidence?

Mr. Sacks: This is the deed tendered us.

The Court: This deed is not the one on which you were relying.

Mr. Sacks: You introduced that deed in evidence.

Mr. E. R. Willcox: That is not the original deed because it didn't have a recital in it. At that time I didn't know they wanted the 12-foot right of way.

Mr. Sacks: That is the deed they introduced in page 28 } evidence. That is the one they tendered to us.

Mr. E. R. Willcox: Very well. We will stand on this deed, Your Honor. It is a better deed than the other one. I just didn't want to throw Mr. Gray off.

A. All I am going by is the description in the bill of complaint.

Mr. E. R. Willcox: All right. We will stand on that.

A. All right. The description in the bill of complaint, the last line is at a point in the bill of complaint—

Mr. T. H. Willcox: Why don't you read it?

The Witness: All right.

A. (Reading) "Thence turning and running south 75 degrees 10 minutes 30 seconds east." Where you turn from is a point out here somewhere. (Indicating) Then you run 9.34 feet somewhere over here and then you run 518 feet continuous in a straight line. Well, by this very plat it shows that these people don't own this property over here because this boundary line here is south 54 degrees 45 minutes west. Now they have furnished a plat or at least Mrs. Pond delivered to me a plat which supposedly came from Mr. Simpson which—

Mr. T. H. Willcox: One minute. If Your Honor please, leave out the suppositions.

George H. Gray.

A. All right. Well, the plat they refer to in this deed does have the line, the northern boundary line, right
page 29 } straight across. But they don't own it by the very plat they put in evidence here. Isn't this the plat?

Mr. Sacks: That is the plat.

Mr. E. R. Willcox: Oh, that is a copy of the plat. I had just as soon give you the original. I have original copies. That is a copy you made.

The Witness: If they have the original, we will put it in.

Mr. E. R. Willcox: I shall be glad to put this one in evidence. Here it is. This is it. I mean just as it came from the surveyors.

A. (Continuing) In other words, this property right here is supposed to be this property here (indicating), and they have got the northern boundary line here. Wait a minute, have I got it upside—no, I have it right. They have it as a straight line. And this line here shows that it cannot be.

Mr. E. R. Willcox: Now—

Mr. Sacks: Let him finish.

A. Also when this deed—of course, it is a matter of argument but the deed, the bill of complaint and the deed which was tendered does not convey any right of way to a street which is out here. At the time this contract was entered into and the title examination was made, there was no way of knowing from the title where the street was—that is Bay View Boulevard—where that was with reference to this
page 30 } property. Actually, it turns out that it is—Bay View Boulevard runs somewhere along in here. And this property does not have—the property which is conveyed in this deed of trust—this bill of complaint—described in the bill of complaint or conveyed in the deed, gives you no access to any public road.

By the Court:

Q. You pointed out to the Court this latter plat marked as property of N. J. Fisher. Was that of record?

A. This plat is not in the chain of title to the property. Whether or not it is of record I don't know but it is not in the chain of title to the property.

George H. Gray.

Q. You are unable to say whether N. J. Fisher at the time this plat was made owned the property as described in the plat, whether he acquired these parts that you say have been disregarded, the ownership being in other people?

A. Well, the ownership of this property up in here is, in my judgment, in other people. I don't believe this plat is of record. If it was, I am pretty certain I would have found it.

Q. The deed was drawn from this plat?

Mr. E. R. Willcox: Yes, Your Honor. The deed is drawn from this plat and also refers to a plat which I would like in a few minutes to get out of the Clerk's Office, of a
page 31 } part of Commodore Park as shown in Map Book 10, Page 42, which establishes this boundary line as it presently is on this plat. Of course, that was—

Mr. Sacks: Let him get finished.

Mr. E. R. Willcox: Yes, sir.

By Mr. Sacks:

Q. Mr. Gray, while you are here, I notice Granby Shores; is that a street or road?

A. No, sir. That is property.

Q. And the same thing, Commodore Park?

A. Commodore Park is property. Granby Shores over here is property. The only road that we discovered later, the only public road after the title was examined and the survey made, lies out here somewhere, which is Bay View Boulevard.

Q. This is locked in?

A. That is landlocked. The property which they have conveyed in their deed and described in this bill of complaint is landlocked, yes, sir.

Q. No lane there at all?

A. There is a lane there. There is a 12-foot lane here, apparently, but they don't convey it.

Mr. Sacks: It shows it is no part of the property. There is a line through here.

A. (Continuing) The bill of complaint—the description in the bill of complaint and the deed which was
page 32 } tendered doesn't convey it.

The Court: Go ahead.

George H. Gray.

By Mr. Sacks:

Q. Now, Mr. Gray, take this contract here, this description where it says, "being situated at the southwesternmost part of Granby Shores in front of Mason's Creek and being direct north of Commodore Park." Is that so?

A. No, sir. It is directly south of Commodore Park, it is not directly north.

By the Court:

Q. You didn't find any deed of easement on the record they referred to in this deed November 1st?

A. I haven't seen that deed.

Q. That is the evidence in the case?

A. This deed is not the one that was submitted to us.

The Court: They are relying on that in this suit and they describe the lane and the easement to the lane.

Mr. T. H. Wilcox: If Your Honor please, if the easement is there it is a public lane, it goes with the deed whether it is in it or not.

The Witness: It is not a public lane, sir.

Mr. T. H. Wilcox: Every lane in the city of Norfolk that is platted is public by the City Charter, my friend.

The Witness: That, sir, I take exception with.

page 33} This property here has never been dedicated to the public. It is not so far as I know, platted on any property. It might show on plats of other people, people who have no right to plat it, that may be; but so far as any plat put to record for this particular property showing that 12-foot lane, there is none.

Mr. Sacks: Do you have the deed you tendered to us? (Addressing Mr. E. R. Willcox.) This (indicating) is the deed they tendered to us, not what they are putting in court today.

Mr. T. H. Willcox: I am mistaken. This is the one tendered in the bill.

The Witness: I was furnished a copy of the deed which was tendered and that looks like it.

By Mr. Sacks:

Q. This one here?

A. Yes, sir. Let me see. Let me compare it with the copy that I was furnished.

Mr. Sacks: He admits that is the deed he tendered.

Mr. E. R. Willcox: This deed covers the same thing but

George H. Gray.

we put in the right of way.

M. T. H. Willcox: Don't you think we had better get that one marked as an exhibit now?

Mr. Sacks: Yes.

Mr. E. R. Willcox: You offer it.

page 34 } Mr. T. H. Willcox: We will offer it.

Mr. E. R. Willcox: We offer it as Plaintiff's Exhibit 6.

The Witness: I don't know I have ever seen this one before. It isn't a copy of what I have right here.

By Mr. T. H. Willcox:

Q. You admitted the deed was tendered?

A. The deed was tendered but I have one—

Mr. Sacks: Where is the original of this copy?

Mr. T. H. Willcox: Here.

The Witness: That is not the original.

The Court: They are not copies?

Mr. Sacks: Give us the original of this.

Mr. E. R. Willcox: That was the deed that was tendered. I don't know. I must have gotten Mr. Gray the wrong copy.

The Court: Plaintiff's 6.

(The document referred to was marked Complainant's Exhibit 6.)

Mr. T. H. Willcox: If Your Honor please, there has been some question in the testimony by Mr. Gray about this plat marked "Property of N. J. Fisher, April 1953, made by J. M. Baldwin, Civil Engineer." I think that ought to be marked as an exhibit.

Mr. Sacks: Yes.

page 35 } Mr. T. H. Willcox: Keep it in the record.

The Court: 7.

(The plat referred to was marked Complainant's Exhibit 7.)

By Mr. Sacks:

Q. You say there is no ingress to or egress from that property, any public road, is that correct?

A. Not according to the description in the bill of complaint or the deed that was tendered.

George H. Gray.

Q. Did you turn the title down for that reason?

A. Well, at the time I did the title I couldn't turn it down because the survey had to be made to discover those facts, and that was understood.

Q. In other words, no one can tell from that contract what property is being sold?

Mr. T. H. Willcox: I object to that.

The Court: Objection sustained. It calls for opinion.

Mr. Sacks: He is a lawyer.

A. What I did simply is to examine the title to the property that the Fishers owned in this particular area, and found that what they did own they had a good title to. There was one objection which was made to a well or some water right there, which were removed. It was then, after the survey was made of the property and we had gotten the survey back, page 36 } we found that this property that they have in the deed that was tendered and described in the bill of complaint, does not border on any public road, it is landlocked.

Mr. Sacks: That is all. Witness with you.

CROSS EXAMINATION.

By Mr. T. H. Willcox:

Q. Mr. Gray, my understanding is that when you were employed to examine this title, the contract had not been signed?

A. That is correct, sir.

Q. But a deposit had been made and there had been negotiations?

A. Yes, sir.

Q. And after you examined the title, the contract was signed?

A. Yes, sir.

Q. And the record title to the property of the Fishers, what they own, is good but you wanted a survey which was made after the contract was signed?

A. After the contract was signed, yes, sir. Of course, at the time that the contract was signed, the boundary lines were not known and it was not known that this property didn't border on a street.

George H. Gray.

Q. It wasn't known that the property did not border on a street?

page 37 } A. Sir?

Q. You say it was known that the property did not border on a street?

A. As far as I know it was not known that there was—

Q. So far as you know?

A. Yes, sir.

Q. Well, now, Mr. Gray, you are an experienced lawyer and we agree that you are qualified. Is it not a principle of law that there can be no land anywhere without a right of way?

A. The principle of law as I understand it, sir, is that when you convey a piece of property you have got to give a man ingress and egress to a public way, yes, sir.

Q. Well, is it not a legal proposition—you are testifying as a lawyer—that every piece of land has a right of way to a public road, either by a grant contract or necessity?

A. I can answer that yes, sir, but—

Mr. Sacks: I object.

The Court: Objection sustained.

Mr. T. H. Willcox: I withdraw the question.

A. I don't mind answering it. You have to establish it by a chancery suit.

Mr. T. H. Willcox: Counsel has objected, the Court has sustained the objection, I have withdrawn the question.

page 38 } The Witness: All right, sir.

By Mr. T. H. Willcox:

Q. Mr. Gray, did you examine the title to the parcel of land shown on this plat marked Exhibit 7 and designated as a 12-foot access right of way?

A. Well, you have to—

Q. Just answer the question, then make your explanation.

A. No, sir.

Q. That is all.

A. All right, now I will make my explanation, sir.

Q. Go ahead.

A. I examined the title. I found the deed in the title which is Plaintiff's Exhibit 3. I also found in the title the deed Plaintiff's Exhibit 1, which makes reference to an 18-foot right of way. I found the conveyance from Fisher to Land conveying

off a part of the property that the Fishers own, which appeared to leave a 12-foot right of way. But the problem there, sir, was that you could not tell from the title examination where the public road was with reference to this particular piece of property. It appears that they eliminated the 18-foot right of way and it was not clear at all whether or not any part—whether the 12-foot right of way was made. It was not clear exactly as to the width of the road or who owned it.

page 39 } Mr. T. H. Willcox: Now, if Your Honor please, I move that that statement in its entirety be stricken out.

The Court: So ordered. Any other questions?

Mr. Sacks: I don't see why. Here is the examiner of the title, what he found. It shifts to the complainant to show he has good title to the property.

RE-DIRECT EXAMINATION.

By Mr. Sacks:

Q. Is there anything else you want to say, Mr. Gray?

A. No, sir. That is all.

The Court: Stand down, sir.

* * * * *

page 41 } LULA L. POND,

a respondent, having been first duly sworn, testified as follows:

Examined by Mr. Sacks:

Q. Mrs. Pond, please state your name and residence. Tell the lady your name and where you live.

A. Lula L. Pond, 1709 Moran Avenue.

Q. Mrs. Pond, you and your husband signed a contract that has been introduced in this suit for the purchase of this property, is that correct?

A. That is right.

Q. With whom did you have your dealings first about this property?

A. I didn't understand.

Q. With whom did you first discuss the buying of the property?

A. Mr. Simpson's agent, a Mrs. Page.

Lula L. Pond.

Q. Mrs. Page came to see you?
A. (The witness nodded.)
Q. How long was that before Mr. Simpson talked with you?
A. Well, that was—she called me that morning; I talked that afternoon with him.
Q. Had you talked to the Fishers about this property?
A. Not before. Oh, before Mr. Simpson arrived on the porch, we waited for him after knowing that he was due there.
page 42 } Q. And whom did you talk with then?
A. We waited—
Q. Which Fishers?
A. Oh, Mr. Newbill before Mr. Simpson got there. Then after he got there, he said, "Let's let Mr. Simpson handle it."
Q. Did you talk to Mrs. Rubie Fisher?
A. She wasn't there at that time.
Q. Did you tell Mr. Newbill Fisher and Mr. Simpson or Mrs. Page what you were buying the property for?

Mr. T. H. Willcox: I object. It is totally immaterial and irrelevant.
The Court: I overrule your objection. Answer the question.
Mr. T. H. Willcox: On the grounds, sir, that it is an attempt to vary the terms of the contract. We except.

By Mr. Sacks:
Q. Did you inform Mr. Newbill Fisher, or Mr. Simpson, or Mrs. Page, what you were buying the property for, what you were going to do with it?
A. She had called me and told me that she had *some* property that I could divide and make some money off. So I figured that Simpson must have known what it was all about.
Q. Now, just what did you tell her about it, what you wanted to do with the property?
page 43 } A. Oh, build a house on it, sell off some lots.
Q. You told her that?
A. Yes.
Q. All right. Now, was that before you signed the contract?
A. Yes. She knew all about it.
Q. When you say "she," whom do you mean?
A. Mrs. Page. She knew what my intentions were, to begin with; wanted a lot first off.
Q. Then you told her that you wanted to sell part of it off?
A. Yes.

Lula L. Pond.

Q. What is the size of the land that you were buying?
A. She had quoted two and three-quarters over the telephone but it winds up it is about an acre and then I guess four-tenths of marsh and whatever it was, water included, I don't know.
Q. Did you want to buy it all for your own use?
A. No.
Q. You wanted some part of it off?
A. That is right.
Q. What did Mrs. Page or Mr. Newbill tell you, whether you can or cannot sell any part of it off? Did he tell you that you couldn't do it?

Mr. E. R. Willcox: I object to this on the same
page 44 } grounds as before.
Mr. T. H. Willcox: If Your Honor please, have it understood that all this is subject to the objection, so we won't have to repeat it.
The Court: Yes.

By Mr. Sacks:
Q. When you told them that you wanted to sell part of it off, what did they tell you about it? Did they say you couldn't do it or—
A. Mr. Simpson made a remark that he had—he had taken a builder out there and that he—in other words "I took a builder out there and we are going to put three split levels on the place."
Q. Did he tell you that you could not sell any part of it?
A. No.

Mr. T. H. Willcox: Your Honor—
The Court: It is his witness; leading.

A. Never did; never did.

The Court: You can't answer that question.

By Mr. Sacks:
Q. Of course, you retained Mr. Gray to examine the title for you?
A. That is right.
Q. Was anything said to you about a lane?

page 45 } Mr. T. H. Willcox: By whom?

Lula L. Pond.

A. Not one word.

Mr. Sacks: By Mrs. Page.

The Court: You ask her what conversation she had, if any. Never suggest an answer.

Mr. Sacks: I don't think that is leading.

The Court: Yes. It is your witness. "What color is the hat," not "Is it a red hat?"

By Mr. Sacks:

Q. What property were you buying?

A. I was supposed to be buying the Fishers', I guess.

Q. How were you supposed to get in and out of the property?

A. I just went down the road, that is all. Nobody didn't say anything about it.

Q. Well, did you see any lane in there?

A. I thought it was the City's.

Q. Thought what?

A. I thought it would be the City's. I didn't know.

Q. I don't understand you.

A. I thought it was the City's when I went down it.

The Court: She said she went down the road, got to it, she thought it was the City's.

A. I didn't pay—

page 46 } By Mr. Sacks:

Q. You knew it was a road?

A. Knew it was a road; I didn't pay much attention to it. I thought it was the City's or something. Because there were two posts there at the beginning of the property.

Q. Now then, you refused to buy the property, is that correct?

A. That is right.

Q. Why?

A. Well, because I couldn't sell off any lots on account of the City ordinance.

Mr. T. H. Willcox: That, of course, if Your Honor please, we object to because that is a question of law—in addition to the other objections.

By the Court:

Q. You went down and saw the land before you signed the contract?

A. Yes.

Q. You saw what you were buying?

A. Yes.

Q. And you got down there through a lane or a road?

A. That is right.

The Court: That is all.

A. (Continuing) It was two—

The Court: That is all. Answer Mr. Willcox.

page 47 } Mr. E. R. Willcox: Come down.

EUGENIA SANDYS,

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

Examined by Mr. Sacks:

Q. Wil you state your name, please?

A. Mrs. Eugenia Sandys.

Q. Where do you live, Mrs. Sandys?

A. 112 East 17th Street.

Q. Do you know Mrs. Pond, the defendant?

A. I do. I have known her for years.

Q. And did you go with her to see Mrs. Page and Mr. Simpson before she agreed to buy this property involved in this suit?

A. I did.

Q. To whom did she talk while you were there?

A. Mr. Simpson.

Q. Did you hear what she told him about the property?

A. What is that?

Q. What was the conversation—

Mr. T. H. Willcox: If Your Honor please, have it understood, the same objection and exception applies to all this.

The Court: It is understood.

page 48 } By Mr. Sacks:

Q. What was the discussion about the property?

Donald R. Locke.

By the Court:

Q. If they had any discussion, what did they say?

A. They had a little discussion. Mrs. Pond told Mr. Simpson she would like to put a deposit down on it; and she gave Mr. Simpson a one-thousand-dollar check. Mr. Simpson wrote the check, she gave him a check and she signed it. So Mr. Simpson says to her, "Mrs. Pond"—after she gave him the check—says, "What do you think of doing with this property?" She says, "Well, I think I will sell some lots off and build me a home on there." And then Mr. Simpson said, "I had a builder out there looking at this property and thought of" she said, "We figured on putting three split levels on it"—that is houses, of course. And he didn't reply one way or the other. And finally he got the check and we got up. It was a very short conversation. It—only a few minutes.

Mr. Sacks: That is all.

Mr. T. H. Willcox: No questions.

DONALD R. LOCKE,

recalled, testified further as follows:

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page 51 }

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By Mr. Sacks:

Q. Is there a zoning ordinance covering this particular property?

A. It is a subdivision regulation.

Q. Is that in the form of an ordinance?

A. They are applicable to this property, yes.

Q. Can you get that?

A. You say may I get it?

Q. Yes, can you get it?

A. I will have to go over to the office. I would have brought all that but, off the record, I didn't know what this was all about.

Q. I thought Mr. Gray told you we would like you to get that if you can. Can you get that now?

Mr. T. H. Willcox: Any further examination?

Mr. Sacks: That is all. We can't go any further.

MRS. LULA L. POND,
recalled, testified further as follows:

Examined by Mr. Sacks:

Q. Mrs. Pond, you testified that before the contract was signed you gave Mr. Simpson a thousand dollars, page 52 } is that correct?

A. That is right.

Q. Now—

A. Simpson, Mr. Simpson, a thousand dollars.

Q. What?

A. Mr. Simpson a thousand dollars.

Q. Yes. Now, why wasn't the contract signed at that time?

Mr. T. H. Willcox: I object, if Your Honor please; it is totally immaterial.

The Court: What is the point?

Mr. Sacks: I want to show, if Your Honor please, that Mr. Simpson didn't know whether the people were signing the contract at the time. She was satisfied, but his clients hadn't been apprised of what she wanted to buy.

The Court: I think it is immaterial why the contract was not signed. The fact that it is signed or was signed is what—

Mr. Sacks: I want to show just why it wasn't signed at the time she paid a thousand dollars.

The Court: Was there any discussion? Ask her what conversation took place, if any.

By Mr. Sacks:

Q. Now, Mrs. Pond, you paid Mr. Fisher a thou-
page 53 } sand dollars before the contract was signed, for it?

A. No; Mr. Simpson, a thousand dollars.

Q. Mr. Simpson, a thousand dollars. All right. Now, did he have the contract signed by his people then?

A. Didn't have anything.

Q. What did he tell you he was going to do with that thousand dollars? What was he going to bring you?

A. Was going to see if he could get the contract, because it was understanding that part family wanted to sell, the other part didn't want to sell, wasn't quite sure; come back later on for my husband to sign. That is the way it was.

Q. So at the time you gave him the thousand dollars, Mr. Simpson wasn't sure that the people would sign?

A. That is right.

Q. When did you have the conversation with Mr. Simpson about what you wanted to do?

A. Yes.

Lula L. Pond.

Mr. T. H. Willcox: He has been over that one time, asked her what the conversation was. She has testified to it.

By Mr. Sacks:
Q. That was between the time you gave the thousand dollars and the time you signed the contract is when you told him what you wanted to use the property for, is that right?
A. They knew previous to that what I was looking for.
page 54 } Q. They did?
A. Yes.
Q. Why do you say that?
A. Because I had tried to find a lot—

Mr. T. H. Willcox: One minute. Will you read me what she said before she started again.

(The record was read by the reporter as follows:)

"A. They knew previous to that what I was looking for."

Mr. T. H. Willcox: I object to that and move that it be stricken out.
The Court: Objection sustained. She said what someone else knew.
Mr. Sacks: I don't know how she knows it; she might be able to say they told it.
The Court: Objection sustained.

By Mr. Sacks:
Q. Do you remember the date on which you signed the contract? Was it signed on the—

The Court: It speaks for itself.
Mr. Sacks: Well, the top of it says the 28th, the bottom says the 27th of May.
The Court: Is that going to be very material?
Mr. Sacks: No, sir, except that I want to show
page 55 } how long after the contract was signed they actually closed. It doesn't make any difference.

A. We closed—

By Mr. Sacks:
Q. Ma'am?

Lula L. Pond.

A. You want my answer to that one? He said it was all right to answer that?
Q. All right; go ahead.
A. About a week later.
Q. About a week later?
A. Monday or Tuesday; it was the 2nd or 3rd.

Mr. Sacks: Your Honor, I should like to suspend until we get Mr. Locke over here.
The Court: Do you have any other testimony other than his? Your case will be closed; you rest after Locke's testimony?
Mr. Sacks: Yes, sir; Locke and Mr. Boush.

(Thereupon, the Court recessed for lunch.)

page 56 } AFTERNOON SESSION.

(Met pursuant to the morning session with the same parties present as heretofore noted.)

LULA L. POND,
recalled, testified further as follows:

Examined by Mr. Sacks:
Q. Mrs. Pond, I don't know whether I asked you or not before: Did you ever tell any of the—

Mr. T. H. Willcox: Now, if Your Honor please, he is starting off with a leading question.
The Court: That is self-serving.

By Mr. Sacks:
Q. Did you have any conversation with Mrs. Rubie Fisher?
A. Yes.

Mr. T. H. Willcox: I object, if Your Honor please. He has been all over that once. He has asked her to outline every conversation; she has done it. Now during the recess when they have had an opportunity of conferring—I don't mean to suggest anything improper—they come back, go over it again.
Mr. Sacks: She didn't mention it in the first part of the trial.

Donald R. Locke.

The Court: You can't ask her to correct something she has already said.

page 57 } Mr. Sacks: No, this is something else.

By Mr. Sacks:

Q. Don't mention what you said before but give us any other part of the conversation you had with Miss Rubie Fisher.

A. Well, when Mr. Gray found out about the road—

Q. Mr. Gray?

Mr. T. H. Willcox: Gray.

A. Mr. Gray, when he found out about the road, I thought I would go down there and find out from them if it was twelve or if it was eighteen. And when I did, I talked to Rubie and then I talked to Mr. Thomas and they seemed to insist it is eighteen. But under those conditions, of course, I couldn't sell off any property. And the condition the house is in, it has no running water, no pump. They still use the spring. And it has no bathroom. It just wouldn't serve my purpose at all. I thought about building a home, selling off a couple of lots.

By Mr. Sacks:

Q. What did you tell—

Mr. T. H. Willcox: If Your Honor please, we move that all that be stricken out as irrelevant. It all occurred after the contract was signed.

The Court: The Court will sustain the motion. She said after Mr. Gray found out, after he examined the title. He didn't do that until after the contract was signed.

page 58 } The contract was signed before he finished, had gotten that information, according to his testimony.

Mr. Sacks: I want to show what Mrs. Pond was told. She is the one who had to buy it.

The Court: What she had just said is immaterial.

Mr. Sacks: Come down.

DONALD R. LOCKE,

recalled, testified further as follows:

Donald R. Locke.

Examined by Mr. Sacks:

Q. Mr. Locke, do you have that ordinance of the City of Norfolk relative to subdivision?

A. Yes, sir, this is it. December 1947 and adopted July 20, 1948.

Q. Is that ordinance in effect now?

A. It has—yes.

Q. Was it in effect on the 28th day of last May?

A. Yes, sir.

Mr. Sacks: I introduce that ordinance in evidence.

Mr. T. H. Willcox: If Your Honor please, we don't object to the proof. We will accept it as a true ordinance. We claim it is totally irrelevant, immaterial to the issue and we object to its introduction on that ground.

The Court: It would be material if the Court
page 59 } concludes that that conversation was material as to
what could be done with the property, prior to the signing of the contract. If they were induced to sign it because they would have the privilege to place three buildings on it instead of one, that would be material. That is all denied by the plaintiff.

Mr. T. H. Willcox: Yes, sir. If Your Honor please, I understand you admit it, then?

The Court: Yes.

Mr. T. H. Willcox: We want to save the point. May we have it understood that we object to all the testimony along this line and if we cross examine him, it will be without waiving our objection?

The Court: You may.

Mr. T. H. Willcox: Without repeating it each time,.

By Mr. Sacks:

Q. Now, Mr. Locke, you are familiar with this piece of property involved in this suit. Can that be subdivided?

Mr. T. H. Willcox: Wait a minute. I object, if Your Honor please. That is a matter of interpretation of the ordinance.

The Court: The Court has to pass on the ordinance, and his opinion is not admissible.

Mr. Sacks: Give me the ordinance, then.

page 60 } By Mr. Sacks:

Q. Where is it marked?

A. Section III, subsection 1 (g) and (l).

Donald R. Locke.

Q. 1 (g) and (l)? Is (k)?
A. No, (k) isn't.
Q. What section?
A. Section III.

(Marked by the Court Respondent's Exhibit 1.)

By Mr. Sacks:
Q. Now let me ask you this: Is that property there subject to the provisions of this ordinance?
A. It would be, yes, sir.
Q. It covers that property.

Mr. Sacks: If Your Honor please, the ordinance reads as follows: (Reading)

"1. The subdivider shall observe the following general requirements and principles of land subdivision:

"(g) All lots controlled by these regulations shall front on a publicly dedicated street and should not extend through to another street.
"(l) The minimum width of any alley shall be twenty feet, except in commercial districts the minimum width
page 61 } of any alley shall be twenty-four feet. Alleys which dead end against permanent barriers are prohibited unless adequate turning area is provided at the terminus."

Mr. T. H. Willcox: While proving that ordinance, will you prove the date of its adoption?
Mr. Sacks: I think he testified.

By Mr. Sacks:
Q. You testified when it was adopted, didn't you?
A. It was adopted I believe July 20, '48.

By Mr. T. H. Willcox:
Q. '48?
A. Yes, sir.

By Mr. Sacks:
Q. It was in force and the agreement was made. It is in force now.
A. Of course, there is one more section—

Donald R. Locke.

Mr. T. H. Willcox: One minute. Let him ask you.
The Court: Answer the questions.

By Mr. Sacks:
Q. Go ahead. Say what you want to say, then.

The Court: By way of explanation of his last answer.
Mr. Sacks: Yes.
page 62 } The Court: You may explain your answer.

A. In the last paragraph you were referring to the width of alleys. As you know, it has not said what the minimum width of streets is. The minimum width of any street is 50 feet.

By Mr. Sacks:
Q. Now, does that land involved in this suit front on any street?
A. Not to my knowledge, no, sir.
Q. Under this ordinance, would the City permit—

(Mr. T. H. Willcox rose to object.)

The Court: Finish the question. Don't answer it until the Court rules on it.

By Mr. Sacks:
Q. —permit anyone to subdivide it?

The Court: Would the City permit a subdivision of this land? The ordinance speaks for itself.
Mr. T. H. Willcox: I object.
Mr. Sacks: All right.

By the Court:
Q. Would the City make the owners construct an 18-foot alleyway if the owners had a 12-foot alleyway when the ordinance went into effect?
A. We would require a 50-foot street.

• • • • •

page 64 }

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GEORGE H. GRAY,
recalled, testified further as follows:

Examined by Mr. Sacks:
Q. Mr. Gray, were you present when Mrs. Pond had a conversation with Miss Rubie Fisher in connection with this?
A. Yes, sir. On or—

Mr. T. H. Willcox: When was that?
Mr. Sacks: In connection with this—
The Court: He started saying "on or about."

A. I was present on only one occasion when Mrs. Pond and Rubie Fisher had a conversation and that was on or about August 12th of this year. I went—

By the Court:
Q. Was that subsequent to the signing of the contract?
A. Yes, sir.

Mr. T. H. Willcox: I object.
The Court: Objection sustained.
Mr. Sacks: We want to show by this evidence
page 65 } that Miss Fisher was apprised of what we found out; she was not surprised; the evidence shows had knowledge of the condition; and her reaction to what was told her.
The Court: You are speaking of which Miss Fisher?
Mr. Sacks: Miss Rubie Fisher, the lady who testified, one of the plaintiffs.
The Court: Her reaction?
Mr. Sacks: Her reaction to the objection. She wasn't surprised that it couldn't be subdivided; said, "They don't have to take it if they don't want it."
The Court: Is that a fact that she had told your client that?
Mr. Sacks: It may show that she knew of it.
The Court: The objection is sustained.
The Witness: Want to put it in the record anyway?
Mr. Sacks: All right.
The Witness: I think you have a right to offer proof.
The Court: Put it in the record.

A. On the 12th of August I went there with Mrs. Pond to look at the property. It was the first time I had ever seen it and Mrs. Rubie Fisher was there. And Mrs. Pond told Mrs.

George H. Gray.

Fisher that she couldn't take that property with that 12-foot right of way because she couldn't subdivide it. And Mrs. Fisher says, "Well, if you don't want to take it, you don't have to."

page 66 } Mr. T. H. Willcox: I understand that is stricken evidence.

The Court: Yes. That wouldn't have any bearing on her knowledge of the width of the road or how many houses could be built.

The Court: That is all? Both sides rest?

Mr. Sacks: Yes.

Mr. T. H. Willcox: No, sir. We want to introduce this plat. Have you finished, Mr. Sacks?

Mr. Sacks: Yes.

Mr. E. R. Willcox: Your Honor, at this time I should like to introduce into evidence as Complainant's Exhibit 8, map of portion of Commodore Park recorded in Map Book 10, page 47, which maps are kept in the Clerk's Office of the Corporation Court of the City of Norfolk, and call to the Court's attention on the plat there is designated a strip which, as you can see, makes up the roadway up here and is the designated line in center of "O," 18-foot right of way as shown on plat of January 23, 1906, recorded in Deed Book 301 at page 94. And I also point out to the Court that there is also shown a 12-foot right of way running across the top part there into that road.

(The plat referred to was received as Complainant's Exhibit 8.)

page 67 } Mr. Sacks: That is not included in the deed.

Mr. E. R. Willcox: It is included in one deed. The plat is dated September 13, 1940.

The Court: Had you better have a copy made of that?

Mr. E. R. Willcox: Yes, sir. I would like to have an understanding that I may submit a certified copy of the plat.

Mr. Sacks: Where is the land we are buying? This piece here?

Mr. E. R. Willcox: The land you are buying is on the south here. This is the property line of the Fishers' property, the northern property line.

Mr. Sacks: This is twelve feet instead of eighteen.

Mr. E. R. Willcox: A 12-foot right of way.

George H. Gray.

Mr. Sacks: And you have got to use this lane to get to this property, isn't that correct?

Mr. E. R. Wilcox: Let the record speak for itself.

Mr. Sacks: Well, doesn't it? He doesn't want to talk.

Mr. E. R. Willcox: It is in the record.

The Court: Let the exhibit speak for itself. You can't see any other way to get there.

Mr. Sacks: Yes, sir. I introduce this ordinance in evidence, particularly Section III.

page 68 } The Court: Respondent's No. 1.

(The ordinance referred to was received as Respondent's Exhibit No. 1.)

Mr. Gray: Your Honor, Mr. Sacks wants me to testify concerning this plat.

The Court: That is a new matter. You may.

GEORGE H. GRAY,

recalled, testified further as follows:

Examined by Mr. Sacks:

Q. Now, Mr. Gray, you saw this plat?

A. Yes, sir.

Q. Explain to the Court the condition.

A. The present condition is not accurately presented by this plat nor was it represented in May when the contract was signed. For example, there is a road which runs around here (indicating) which is Bay View Boulevard, right here; and it runs on past in this direction; cuts right across here (indicating). The second thing is, that this plat here is not in the chain of title of the Fisher property. It may make reference to it but it is not in the chain of title to the property. The Fisher property, according to that chain of title, is not bounded—the northern boundary line does not have a northern boundary line which runs in a straight line north 74 degrees 16 minutes 50 seconds west. I have already

page 69 } testified about that this morning.

Q. You say this is Bay View Boulevard that cuts across the—

A. Bay View Boulevard comes right across here. (Witness indicating.) In fact, I am not even aware that this roadway running along that 18-foot right of way is in existence now.

George H. Gray.

CROSS EXAMINATION.

By Mr. T. H. Willcox:

Q. Do you testify that it is not?

A. I can't testify that it is not because when I came to this property I came from Granby Street over here, down Bay View Boulevard, and made my turn here (indicating) and parked my car approximately right where I have got my finger, right where the word "Notes" is written. And I was not concerned with that property on the left. This property of the Fishers is back here.

Q. Did you go to the Fisher property?

A. Yes, sir.

Q. How did you get there, Mr. Gray?

A. I reached a point on Bay View Boulevard which is—according to this plat it would be the "W" in "Way" and walked down between a house which is where the word—approximately where the word "Old" is and another house which is where the letter "3" is on this plat.

Q. And that would be approximately where the page 70 } strip of land marked "12-foot right of way" is, would it not?

A. Approximately that, yes, sir.

Q. Did you actually see this plat in your examination of the title?

A. No, sir. This is not in the chain of title to the property.

Q. It is referred to in the deed that was tendered, is it not?

A. No, sir.

Q. Look at the deed.

A. Well, just a moment. Let me see.

Q. Look at the deed.

A. (Witness examining) Yes, sir. Yes, it is referred to in the deed that was tendered.

* * * * *

The Court: The Court is not unmindful of the fact that the complainants here cannot have the decree of page 71 } specific performance as a matter of right, and it is within the discretion of the Court to issue. I find no ambiguity in the contract introduced in evidence and on which this is based. I fail to recall counsel pointing out any evidence of ambiguity in the contract. Mr. Gray has testified that the complainants here had fee simple title to property covered by the contract, property described in the contract.

Now we get down to the question of mistake, or technical fraud, knowledge of the vendor of material things that he knew the vendee expected. We are dealing then with a factual matter. There is no mutual mistake. There was no testimony that both parties knew. The last witness you put on—and I thought was going to testify to show some mutual mistake, but the evidence failed there. Of course, the burden is on the plaintiff. But the testimony, as I recall, from the witnesses put on, Mr. Simpson and the ladies—all testified that there wasn't any discussion at all about it. I think unquestionably that this lady, the respondent, expected and had planned to subdivided it. That was her expectation. She didn't want that much land for her own home, I take it, and she had plans and she had it in her mind all the way through the transaction. But the Court is not convinced at all that it was communicated or that the complainants here knew anything about page 72 } it until after the obligation had been fixed by an assignment under the contract. The Court is of the opinion that the prayer of the bill should be answered in that the decree should be entered granting specific performance for the amount of the purchase price.

* * * * *

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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