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Record No. 5029

In the Supreme Court of Appeals of Virginia at Richmond

ALFRED L. HISS, ET AL., ETC.

v.

SIDNEY M. FRIEDBERG, ET AL.

FROM THE CIRCUIT COURT OF FAIRFAX COUNTY

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. 5029

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 4th day of May , 1959.

ALFRED L. HISS, ET AL., ETC., Appellants,

against

SIDNEY M. FRIEDBERG, ET AL., Appellees.

From the Circuit Court of Fairfax County

Upon the petition of Alfred L. Hiss and John F. Rutledge, trading as Hiss and Rutledge, an appeal is awarded them from a decree entered by the Circuit Court of Fairfax County on the 1st day of December, 1958, in a certain chancery cause then therein depending wherein Sidney M. Friedberg and others were plaintiffs and Howard P. Horton, the petitioners and another were defendants: and it appearing that an appeal and *supersedeas* bond in the penalty of six thousand dollars, conditioned according to law, has heretofore been given in accordance with the provisions of sections 8-465 and 8-477 of the Code, no additional bond is required.

RECORD

* * * * *

Filed in Circuit Court Clerk's Office Jun 11, 1957.

THOMAS P. CHAPMAN, JR.
Clerk Fairfax County, Va.

BILL OF COMPLAINT AND PETITION FOR INJUNCTION.

To the Honorable Judges of said Court:

Your Complainants, Sidney M. Friedberg, Herbert L. Friedberg, and Sylvia Friedberg Nachlas, file this their bill of complaint and petition for injunction against the above Defendants, and in support of the said bill of complaint state as follows:

1. On April 5, 1957, your Complainants, Sidney M. Friedberg and Herbert L. Friedberg, entered into a contract with the Defendants Howard P. Horton and Anne K. Horton, for the purchase of certain property located near Bailey's Crossroads in Fairfax County, Virginia, said property beings Lots 43 through 52 of the tract known as Rock Terrace. The Complainant Sylvia Friedberg Nachlas was subsequently designated and treated by the parties hereto as an additional purchaser. The consideration for the foregoing property was the sum of $181,000.00, of which amount $105,000.00 was to be paid in cash at the time of settlement, with the balance of $76,000.00 being represented by two notes in the amounts of $72,000.00 and $4,000.00, said notes to be executed by the purchasers and payable to the Defendants Horton, page 2 } and being payable in ten years from the date of settlement with interest at six per cent.

2. A preliminary settlement conference on the aforesaid transaction was held on April 10, 1957, in the offices of the Defendants Alfred L. Hiss and John F. Rutledge, trading and doing business as Hiss and Rutledge, the said Defendants acting as attorneys for the Defendants Howard P. Horton and Anne K. Horton, and also acting as attorneys for the Complainants. Present at the settlement, among others, were the Defendants Howard P. Horton, Alfred L. Hiss and John F. Rutledge, and also the Complainant Herbert L. Friedberg and Nolan P. Chipman, an attorney from the firm of Gordon,

Feinblatt and Rothman of Baltimore, Maryland, who was representing the Complainants.

3. Prior to the settlement on the property, the Complainants had become aware that a leasehold interest with respect to the property being sold was claimed by a person or persons unknown to them. At the settlement the Complainant Herbert L. Friedberg and his representative, Nolan P. Chipman, asked the sellers and their attorneys, Hiss and Rutledge, what was going to be done about the said lease. At that time Mr. Horton and his attorneys, Hiss and Rutledge, represented to the said Complainant and Mr. Chipman and assured them verbally that the lease was no problem and that it did not constitute a valid lease.

4. The aforesaid property transfer could not be finally settled on the said April 10, 1957, as the signatures of all of the purchasers and their spouses were needed for the notes and deed of trust which the purchasers were to execute. It was agreed by the parties present that the sum of $105,000.00 held by Herbert L. Friedberg at that time was to be left with the firm of Hiss and Rutledge, and an agreement covering the retention of this money by Hiss and Rutledge was drawn up and signed by John F. Rutledge, Nolan P. Chipman, Howard P. Horton, and Herbert L. Friedberg, on behalf of the various parties concerned. This agreement is attached hereto as Complainants' Exhibit A and is prayed to be made
page 3 } and read as a part of this bill of complaint. Paragraph 4 of this agreement is as follows:

"4. At such time as GORDON, FEINBLATT & ROTHMAN shall deliver to HISS and RUTLEDGE the aforesaid executed Deed of Trust and Notes, HISS and RUTLEDGE shall record the aforesaid fully executed Deed and shall deliver to GORDON, FEINBLATT & ROTHMAN an Owners' Insurance Policy of an accredited title company in the State of Virginia guaranteeing fee simple title to be in Herbert L. Friedberg, et al., free and clear of any liens and encumbrances whatsoever."

5. Subsequent to this time, the Complainants delivered to Hiss and Rutledge the said two notes totaling $76,000.00 and executed by the Complainants and their spouses, together with a deed of trust conveying the property in question to John F. Rutledge and David P. Gordon, Trustees, signed by the same parties, to secure the said notes. The notes and the down payment of $105,000.00 were not to be turned over to or disbursed on behalf of the Defendants Horton until such time as the property could be conveyed free and clear of any liens

or encumbrances, as all parties agreed that a conveyance free and clear of any liens or encumbrances whatsoever and a title insurance policy to this effect were an integral and necessary part of the consideration for the transfer of the notes and the $105,000.00 cash. In addition, all of the Defendants knew that the Complainants were buying the property for the purpose of constructing thereon a bowling alley, and that they wanted and needed immediate possession in order to have construction finished by the beginning of the bowling season in September of this year.

6. The sum of $105,000.00 was subsequently disbursed to or on behalf of the Defendants Horton and the notes turned over to them by the Defendants Hiss and Rutledge, and the deed to the said property was recorded among the land records of Fairfax County in Deed Book No. 1544, at page 432. A copy of said deed is attached hereto as Complainants' Exhibit B and is prayed to be made and read as a part of this bill of complaint. The said deed conveys title to the property in question by general warranty of title, and the grantors also covenanted as follows:

page 4 } "SAID PARTIES OF THE FIRST PART COVENANT that they have the right to convey the said land unto the parties of the second part; that they have done no act to encumber the same; that the said parties of the second part shall have quiet possession of the said land, free from all encumbrances, and that they, the said parties of the first part will execute such further assurances of the said land as may be requisite."

7. In addition, at the time of settlement a question arose as to the area of the property to be conveyed, and an agreement dated April 10, 1957, was drawn up at that time to cover this discrepancy. Included in the said agreement was a commitment by Howard P. Horton and Anne K. Horton that, as of the said April 10, 1957, the date of the agreement, no leasehold interest existed on the property in question. A copy of this agreement is included herewith as Complainants' Exhibit C and prayed to be made and read as a part of this bill of complaint.

8. After the aforesaid disbursement of the sum of $105,000.00 and the delivery of the notes to the Defendants Howard P. Horton and Anne K. Horton, and the recording of the aforesaid deed conveying title to the Complainants, the Defendants were advised by counsel for one David B. Endy and K. E. Moore that the said David B. Endy and K. E. Moore are lessees of the property which is the subject matter of this suit,

by virtue of a written lease date February 28, 1956, the lease to be for a period of five years beginning April 1, 1956. The said counsel for Messrs. Endy and Moore stated that they intended to remain on the said property and would insist on their rights under the lease.

9. Despite the statement and agreement by the Defendants Howard P. Horton and Anne K. Horton under the aforesaid agreement of April 10, 1957, Exhibit C, that no leasehold interest existed on the property as of that date, and despite the covenant of the said Defendants in the aforesaid deed conveying title to your Complainants that the property would be conveyed free of encumbrances, with the grantees having quiet possession, these covenants and agreements page 5 } were broken by the said Defendants in that the aforesaid lease claim of the Messrs. Endy and Moore was still outstanding and an encumbrance at the time the conveyance was completed, and the said Defendants have still not removed the said lease claim as an encumbrance and an impediment to the right to possession in the Complainants which they were promised and for which they have paid.

10. The Defendants Alfred L. Hiss and John F. Rutledge have breached the obligation contained in paragraph 4 of the agreement dated April 10, 1957, Complainants' Exhibit A, in that they have never delivered to Gordon, Feinblatt and Rothman an owners' insurance policy of an accredited title company in the State of Virginia guaranteeing fee simple title to be in the Complainants free and clear of any liens and encumbrances, despite the aforesaid agreement and the consideration paid by the Complainants for such policy. In addition, the Defendants Hiss and Rutledge, because of their said contractual obligation to supply the Complainants with a title insurance policy guaranteeing fee simple title to be in the Complainants, free and clear of any liens and encumbrances whatsoever, and because of their responsibility and duty as settlement attorneys, were accordingly under obligation not to turn over the notes to the Defendants Howard P. Horton and Anne K. Horton and make disbursement of the said $105,000.00 unless the said property was in fact free and clear of any such liens or encumbrances.

11. Your Complainants have requested the Defendants to take action to dispose of the lease claim asserted by Messrs. Endy and Moore to enable the Complainants to take immediate possession of the said premises, and to give the Complainants an owners' title policy insuring that the said property is free and clear of any existing lien or encumbrance. Despite these requests, the said Defendants, and all of them,

have failed and refused to carry out their obligations in this respect, and the Complainants are still out of possession of the property which they purchased and have been kept from possession by the aforesaid lessee claimants.

page 6 } 12. The Complainants reasonably relied upon the aforesaid promises, agreements, and obligations, and the representations made by the Defendants to induce the Complainants to proceed with the purchase, and these were essential considerations for the Complainants' proceeding with settlement on the property and delivering to Hiss and Rutledge the cash sum of $105,000.00 and notes in the amount of $76,000.00. The Complainants would not have paid the sum of $181,000.00 for the property unless they were to receive title thereto free and clear of any liens or encumbrances whatsoever, and unless they would have the right to immediate possession needed by them. The Complainants do not want to be and have not accepted a position as lessors with respect to the presumably valid lease held by the Messrs. Endy and Moore.

13. Because of the breaches by the Defendants of their aforesaid promises, covenants and obligations, and the falsity in fact of their representations with respect to the sale and conveyance of the said property, resulting in the Complainants being unable to obtain possession thereof until the expiration of the outstanding lease on April 1, 1961, and in being unable to proceed with their intended use of the property, the Complainants have been greatly injured and damaged and will suffer considerable expense and loss of profits; that because of the aforesaid actions of the Defendants the Complainants have been damaged in the amount of $75,000.00.

14. That the Complainants are entitled to equitable relief in the premises, having no adequate remedy at law; that to permit the Defendants Howard P. Horton and Anne K. Horton to negotiate the aforesaid notes would do the Complainants irreparable injury in that if the said notes become the property of persons or concerns who could qualify as holders in due course, any defense against the said notes which the Complainants may be entitled to assert against the said Defendants would be unavailable to them in the case of such negotiation, and the Complainants would lose

page 7 } any right of offset which they may have against the said notes, and could be left with unenforceable rights against the said Defendants; and that the said Defendants should therefore be enjoined and restrained until further order of this Court from negotiating the said notes,

and if the said notes have been negotiated, enjoined and restrained from expending any of the proceeds thereof.

IN CONSIDERATION WHEREOF, and for as much as your Complainants are remediless in the premises save by the aid of a Court of equity where matters of this kind alone are cognizable, your Complainants pray that Howard P. Horton, Anne K. Horton, his wife, Alfred L. Hiss and John F. Rutledge, trading and doing business as Hiss and Rutledge, be made parties defendant to this bill and be required to answer the same, but not under oath, answer under oath being hereby expressly waived; that a temporary injunction be awarded the Complainants, to be made permanent upon proper hearings in this cause, enjoining and restraining the Defendants, Howard P. Horton and Anne K. Horton, from negotiating or attempting to negotiate the aforesaid two promissory notes in the amounts of $72,000.00 and $4,000.00, respectively, executed by the Complainants and payable to the said Howard P. Horton and Anne K. Horton, and if the said notes have been negotiated, enjoining and restraining the said Defendants from expending any of the proceeds thereof; that this Court require that the Defendants pay to the Complainants the sum of $75,000.00 to compensate the Complainants for the damage, expense, and loss suffered by them as a result of the breaches by the Defendants of their aforesaid promises, covenants, and obligations, and the falsity in fact of their representations with respect to the sale and conveyance of the aforesaid property, or, alternatively, that the Court decree that the Complainants are entitled to an offset against the aforesaid two notes, for the damages awarded; that reasonable attorneys' fees be allowed the Complainants; that process may issue against the Defendants; that all proper orders and decrees may be made; and that the Com-
page 8 } plainants shall have such other and further and general relief as the nature of their case may require, or to equity may seem meet.

And your Complainants will ever pray, etc.

SIDNEY M. FRIEDBERG
HERBERT L. FRIEDBERG
By Counsel.

SYLVIA FRIEDBERG NACHLAS,
By Counsel.

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Filed Nov. 22, 1957.

THOMAS P. CHAPMAN, JR.
Clerk of the Circuit Court of
Fairfax County, Va.

AMENDED BILL OF COMPLAINT AND PETITION FOR INJUNCTION.

To the Honorable Judges of the said Court:

Your Complainants, Sidney M. Friedberg, Herbert L. Friedberg, and Sylvia Friedberg Nachlas, having obtained prior leave of Court, file this their amended bill of complaint and petition for injunction against the above Defendants, and in support of said amended bill and petition, wish to state as follows:

The allegations of paragraphs 1 through 13 of the original bill are repeated and are incorporated by reference into the present amended bill as a part thereof.

14. That in order for the Complainants to obtain present possession of the said premises and proceed with their intended use thereof, it will be necessary to purchase the remaining three years of the adverse lease claim; that the Complainants have been advised by the present lessees that the amusement park which they operate on the premises is a profitable venture and that they have asked a page 44 } significant sum in return for surrendering their rights under the foregoing lease; that the Complainants have no assurance that any sum so paid to obtain possession from the lessees will be held to be recoverable from the Defendants.

15. That the Defendants have, since settlement on the property in April, 1957, consistently stated to the Complainants that the said lease was invalid and unenforceable and have requested the Complainants to allow them time to obtain removal of the present lessees from the premises; that the Complainants have given the Defendants ample opportunity to effect such removal and turn over possession to the Complainants, and in particular have waited while the Defendant,

Anne K. Horton, brought and prosecuted an action of unlawful detainer seeking to have the aforesaid lease declared invalid as to her and to have the lessees removed from possssion; that the Complainants were advised in November, 1957, that the Circuit Court of Fairfax County had dismissed the said action for unlawful detainer, and that for the first time it is evident to the Complainants that there is little or no remaining chance of having the aforesaid lease declared invalid or of otherwise delivering possession within any reasonable time; that for the first time the Complainants are confronted with a clear choice as to whether to pay a considerable sum in order to obtain immediate possession, or to seek to have the contract and transfer of property rescinded and be placed back in their original position; and that the Complainants feel that their better relief would be a request for rescission and restitution.

16. That the Complainants are entitled to equitable relief in the premises, having no adequate remedy at law; that there has been a substantial failure of consideration, to-wit, the failure of the Defendants Horton to turn over to the Complainants the possession for which they paid; that to require the Complainants to pay a large sum to obtain present possession from the lessees and then to bear the burden of seeking to recover the said sum from the Defendants could well subject the Complainants to loss, and that such loss would be due entirely to the position in which the Complainants have been placed by all of the aforesaid actions of the Defendants; and that the Complainants believe that the only manner in which they can be saved from damages by the aforesaid actions of the Defendants would be to have the contract of April 5, 1957, and the transfer of property between the Complainants and the Defendants Horton rescinded and the Complainants restored to their position immediately prior to the execution of the said contract; that, further, to permit the Defendants Howard P. Horton and Anne K. Horton to negotiate the aforesaid notes would do the Complainants irreparable injury in that if the said notes become the property of persons or concerns who could qualify as holders in due course, any defense against the said notes which the Complainants may be entitled to assert against the said Defendants would be unavailable to them in the case of such negotiation, and the Complainants would lose any right of cancellation or offset which they may have against the said notes, and could be left with unenforceable rights against the said Defendants; and that the said Defendants should therefore be enjoined and restrained until further order of this Court from negotiating the said notes.

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IN CONSIDERATION WHEREOF, and for as much as your Complainants are remediless in the premises save by the aid of a Court of equity where matters of this kind alone are cognizable, your Complainants pray that Howard P. Horton, Anne K. Horton, his wife, Alfred L. Hiss, and John F. Rutledge, trading and doing business as Hiss and Rutledge, be made parties defendant to this amended bill and be required to answer the same, but not under oath, answer under oath being hereby expressly waived; that a temporary injunction be awarded the Complainants, to be made permanent upon proper hearings in this cause, enjoining and restraining the Defendants, Howard P. Horton and Anne K. page 46 } Horton, from negotiating or attempting to negotiate the aforesaid two promissory notes in the amounts of $72,000.00 and $4,000.00 respectively, executed by the Complainants and payable to the said Howard P. Horton and Anne K. Horton, and if the said notes have been negotiated, enjoining and restraining the said Defendants from expending any of the proceeds thereof; that this Court decree that the contract dated April 5, 1957, between the Complainants and the Defendants Horton and the property transfer ensuing therefrom be rescinded and the property reconveyed to the Defendants Horton, and that the said parties be restored to their respective positions immediately prior to the signing of the said contract; that to this effect the Complainants pray that the aforesaid two notes in the amount of $76,000.00 be cancelled and the Complainants relieved of any obligation thereunder, and that the Defendants Horton be required to pay to the Complainants the cash down-payment of $105,000.00, and such other sums as may be required to restore the Complainants to their prior position, or in the event that the said Defendants are not in a position to return this down-payment in the immediate future, that this Court decree that the land which is the subject matter of this suit be sold, and that after the costs of such sale have been paid, the balance of the sales price to the extent of the said $105,000.00 be paid over to the Complainants; that the Court further decree that the Complainants be allowed from the proceeds of the said sale counsel fees and other amounts necessary to restore the Complainants to their prior position; that, alternatively, this Court require that the Defendants pay to the Complainants the sum of $75,000.00 to compensate them for the damage, expense, and loss suffered by them as a result of the breaches by the Defendants of their aforesaid promises, covenants, and obligations, and the falsity in fact of their representations with respect to the sale and conveyance of the aforesaid property, or that the Court decree

that the Complainants are entitled to an offset against the aforesaid two notes, for the damages awarded; page 47 } that reasonable attorneys' fees be allowed the Complainants; that process may issue against the Defendants; that all proper orders and decrees may be made; and that the Complainants shall have such other and further and general relief as the nature of their case may require, or to equity may seem meet.

And your Complainants will ever pray, etc.

SIDNEY M. FRIEDBERG,
By Counsel.

HERBERT L. FRIEDBERG,
By Counsel.

SYLVIA FRIEDBERG NACHLAS,
By Counsel.

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ORDER.

This day came counsel for the Complainants and counsel for the Defendants Howard P. Horton and Anne K. Horton, and showed unto the Court that all matters in controversy between them, as set forth in the bill of complaint and amended bill of complaint heretofore filed in this cause, have been settled to the satisfaction of the said parties, in accordance with the release dated April 16, 1958, which is attached hereto; and counsel for the said parties moved the Court that the said bills of complaint be dismissed as to the Defendants Horton.

IN CONSIDERATION WHEREOF, it is ADJUDGED, ORDERED AND DECREED that all claims made by the Complainants against the Defendants Howard P. Horton and Anne K Horton as set forth in the bills of complaint filed herein, be, and they hereby are, dismissed with prejudice.

AND THIS CAUSE IS CONTINUED.

Enter May 14, 1958.

ARTHUR W. SINCLAIR
Judge of said Court.

* * * * *

page 70 } Filed May 14, 1958.

THOMAS P. CHAPMAN, JR.
Clerk of the Circuit Court of
Fairfax County, Va.

RELEASE.

THIS RELEASE made and entered into this 16th day of April, 1958, by and between SIDNEY M. FRIEDBERG, HERBERT L. FRIEDBERG and SYLVIA FRIEDBERG NACHLAS, parties of the first part; and HOWARD P. HORTON and ANNE K. HORTON, his wife, parties of the second part.

WITNESSETH:

WHEREAS, with reference to the chancery cause styled Sidney M. Friedberg, et al., *v.* Howard P. Horton, et al., In Chancery No. 11961, the parties of the first part, complainants in the said cause, desire to waive the tort claims as set forth in the bills of complaint filed therein and rely for protection on the claims for breach of contract as set forth in the said cause; and,

WHEREAS, the Defendants Howard P. Horton and Anne K. Horton have agreed to accept the sum of Thirty-six Thousand Dollars ($36,000.00) for the two notes described in the bill of complaint, both dated April 5, 1957, one note in the original amount of Seventy-two Thousand Dollars ($72,000.00) and one note in the original amount of Four Thousand Dollars ($4,000.00), the said sum of $36,000.00 to discharge in full the liability of the makers of said notes for principal and interest thereon, in exchange for a release of liability of the Defendants Howard P. Horton and Anne K. Horton from the claims of the Complainants for breach of contract; and,

WHEREAS, the Complainants consider that the failure to deliver possession of the real estate purchased from the De-

fendants Howard P. Horton and Anne K. Horton, and the breach of the covenants against encumbrances and for quiet possession made by the Defendants Howard P. Horton and Anne K. Horton, and the damages flowing directly therefrom, are fully satisfied except as hereinafter stated by the reduction in liability on said notes to the sum of $36,000.00; and,

WHEREAS, while the Complainants relied on the covenants of the Defendants Howard P. Horton and Anne K. Horton to deliver possession at settlement as covenanted, the page 71 } said Complainants relied upon the Defendants Hiss and Rutledge, Attorneys, to protect them against the necessity of having to resort to litigation to secure their rights in the real estate purchased by them from the Hortons, and contracted with Hiss and Rutledge for this express purpose; and

WHEREAS, it is the position of the Complainants that the Defendants Hiss and Rutledge have breached their contractual obligations and the Complainants have been forced by the said breaches of contract to resort to litigation and otherwise incur considerable expenses in an effort to secure their rights with respect to the said property; and,

WHEREAS, the Complainants consider that the expenses for which they have become obligated, other than the expenses of removing a claimed leasehold interest, but specifically including all expenses of litigation, are expenses caused by the breach of the said contractual obligations by the Defendants Hiss and Rutledge; and,

WHEREAS, the Complainants desire to release the Defendants Howard P. Horton and Anne K. Horton from the claimed liability hereinabove set forth, but reserve the right to proceed against the Defendants Hiss and Rutledge for recovery of the loss attributable to their breaches of contract; and,

WHEREAS, the Defendants Howard P. Horton and Anne K. Horton have been advised by counsel that they have been placed in a position where it will be to their advantage to settle their differences with the Complainants and hold the Defendants Hiss and Rutledge, Attorneys, liable for the loss incurred by the Defendants Howard P. Horton and Anne K. Horton as a result of such settlement, the Defendants Howard P. Horton and Anne K. Horton having been further advised

that there is no possibility of their prevailing in the law suit, Chancery No. 11961, now pending; and,

WHEREAS, the Defendants Howard P. Horton and Anne K. Horton, in reliance upon said advice of counsel, are desirous of effecting a settlement with the Complainants.

page 72 } NOW, THEREFORE, for and in consideration of a reduction in liability on two notes dated April 5, 1957, one for the original sum of $72,000.00 and one for the original sum of $4,000.00, both principal and interest to be discharged by payment of the sum of $36,000.00, receipt of which in cash or in new notes acceptable to the Defendants Howard P. Horton and Anne K. Horton, is hereby acknowledged by Defendants Howard P. Horton and Anne K. Horton, the Complainants, Sidney M. Friedberg, Herbert L. Friedberg, and Sylvia Friedberg Nachlas, do hereby release and forever discharge the Defendants Howard P. Horton and Anne K. Horton from liability for any and all claims they may have against the said Defendants arising from, or which may yet arise from, the matters alleged in the bill of complaint filed herein, or any other matters arising from the sale by Defendants Howard P. Horton and Anne K. Horton to the Complainants of a tract of land near Bailey's Crossroads, Virginia, sold to the Complainants by contract dated April 5, 1957, conveyed to the Complainants by deed dated April 10, 1957, recorded among the land records of Fairfax County, Virginia, in Deed Book 1544, at page 432.

And the Defendants Howard P. Horton and Anne K. Horton, in exchange for the sum of $36,000.00, in cash or notes, receipt of which is hereby acknowledged, do hereby release and forever discharge the Complainants, Sidney M. Friedberg, Herbert L. Friedberg and Sylvia Friedberg Nachlas, from any and all claims they now have or may have against the said Complainants arising from said contract of sale and conveyance of real estate.

WITNESS the following signatures and seals:

SYLVIA FRIEDBERG NACHLAS (Seal)
SIDNEY M. FRIEDBERG (Seal)
HERBERT L. FRIEDBERG (Seal)
HOWARD P. HORTON (Seal)
ANNE K. HORTON (Seal)

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Box 222, Fairfax, Virginia,
November 13, 1958.

Mr. R. J. Lillard,
Attorney at Law,
Fairfax, Virginia.

Mr. Armistead L. Boothe,
Attorney at Law,
505 King Street,
Alexandria, Virginia.

Re: Friedberg, et als. *v.* Horton, et als., Chancery 11961.

Gentlemen:

This is to advise you of my opinion to render judgment in favor of the plaintiffs against the defendants, Alfred L. Hiss and John F. Rutledge, in the sum of $5,292.70. In arriving at this conclusion, it is my opinion that the damages sought of Hiss and Rutledge are legally cognizable and distinct and separate from those sought of the defendants, Horton, the latter claim having been settled between the plaintiffs and the Hortons.

It is my opinion that the acts of counsel, Hiss and Rutledge, in conducting settlement and disbursing the money after notice had been brought to their attention of possible rights of the parties in possession of the land resulted in damages to the complainants. Further, I do not believe such damages would have been properly chargeable to the sellers in an action for breech of warranty.

However, in arriving at the total amount of damages awarded against the defendants, I have excluded therefrom the fees for preparing the deeds of trust and notes, amounting to $40.00, but included the fees paid for settlement, title search and premium on title insurance policy. Also included in the total damages is the sum of $4,165.70, which represents the legal fees paid by the Complainants to the firm of Richardson, McCandlish, Lillard, Marsh and Van Dyck. I have not included the fees which have been paid to the complain-

ants' Maryland counsel for his services, as I feel that upon the employment of local counsel then no separate fees for Maryland counsel should be chargeable to the defendants. It is my further opinion that if Mr. Chipman is entitled to any fee it would only be for services rendered from the date of settlement to the employment of local counsel.

page 94 } Whatever be this amount it cannot be ascertained from the record and I believe it proper only to include the fee of local counsel.

I shall appreciate it if a decree will be prepared carrying the foregoing into effect.

Very truly yours,

AWS:elc

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* * * * *

FINAL DECREE.

This cause came on to be heard the 2nd day of July, 1958, upon the pleadings theretofore filed, including an order entered on the 14th day of May, 1958, dismissing with prejudice all claims made by the Complainants against the Defendants, Howard P. Horton and Anne K. Horton, with a copy of a release attached to and made a part of said order; upon evidence heard *ore tenus* and exhibits admitted to evidence relative to the claims of the Complainants against Defendants Alfred L. Hiss and John F. Rutledge; and was argued by counsel.

UPON CONSIDERATION WHEREOF, the Court was of opinion that the Complainants are entitled to recover of the Defendants Alfred L. Hiss and John F. Rutledge, jointly and severally, the sum of $5,302.70, with interest from the date of judgment, and costs.

WHEREFORE, it is ADJUDGED, ORDERED and DECREED that judgment be, and the same hereby is,

page 96 } rendered in favor of the Complainants, Sidney M. Friedberg, Herbert L. Friedberg and Sylvia Friedberg Nachlas against Defendants Alfred L. Hiss and John Rutledge jointly and severally, for the sum of $5,302.70, plus costs, with interest from the date of judgment.

To which ruling of the Court the Complainants excepted on

the ground that the following item of damage suffered by them, but excluded from the judgment, was damage caused directly by the wrongful conduct of the Defendants Hiss and Rutledge, was legally cognizable damage, and, under the law of the case and the evidence before the Court should have been included in the judgment:

Fees paid to Gordon, Feinblatt & Rothman, Attorneys at Law, Baltimore, Maryland, value of time lost by the Complainants in preparation for and conduct of litigation to protect their rights, and expenses of the Friedbergs in preparation for and conduct of litigation to protect their rights $4,880.37

And to which ruling of the Court Defendants Alfred L. Hiss and John F. Rutledge by counsel excepted on the grounds:

1. That the Defendants Hiss and Rutledge fulfilled their obligations to the Complainants in this cause.
2. That the Complainants did not suffer any damages over and above those for which they were compensated by the Defendants Horton.
3. That the Complainants were not entitled to recover counsel fees, costs and expenses paid or incurred by them in connection with this cause totaling $4,165.70.
4. That the Complainants were not entitled to recover damages for settlement fees and charges for title search and title insurance totaling $1,137.00.

page 97 } 5. That the release of the Defendants Horton and dismissal of the cause as to those Defendants by the Complainants constituted a release of the Defendants Hiss and Rutledge, or an accord and satisfaction, or a waiver or estoppel preventing the Complainants from recovering against the Defendants Hiss and Rutledge.

And the Defendants Alfred L. Hiss and John F. Rutledge, t/a Hiss & Rutledge, having indicated their intention to petition for an appeal to the Supreme Court of Appeals of Virginia from this decree, it is ORDERED that the execution of this decree be suspended until such petition is acted on by the said Supreme Court of Appeals of Virginia if such petition is actually filed within the time specified by law, provided that the said Defendants Hiss and Rutledge, or someone for them, within thirty (30) days from the date of this decree, shall give or file a bond in the sum of $6,000.00 condi-

tioned according to Section 8-477 of the Code of Virginia of 1950, as amended.

AND THIS DECREE IS FINAL.

Entered this 1st day of December, 1958.

ARTHUR W. SINCLAIR
Judge of the Circuit Court of
Fairfax County, Virginia.

* * * * *

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* * * * * *

Filed Jan. 27, 1959.

THOMAS P. CHAPMAN, JR.
Clerk of the Circuit Court of
Fairfax County, Va.

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

The defendants in the above entitled suit, aggrieved by the decree entered by this Court on December 1, 1958, file this Notice of Appeal and allege that the Court erred in the following particulars:

1. The Court erred in finding that the defendants Hiss and Rutledge were under any obligation to the plaintiffs.
2. The Court erred in finding that the defendants Hiss and Rutledge had not fulfilled their obligations, if any, to the plaintiffs.
3. The Court erred in finding that the plaintiff suffered any damages over and above those for which they had been compensated by the defendants Horton.
4. The Court erred in finding that the plaintiffs could recover from the defendants Hiss and Rutledge, counsel fees, costs and expenses paid or incurred by them in
page 163 } this litigation.
5. The Court erred in failing to find that the release of the defendants Horton and dismissal of the suit against the defendants Horton by the plaintiffs was a release of the defendants Hiss and Rutledge, or an accord and satis-

faction or a waiver or estoppel preventing the plaintiffs from recovering from the defendants Hiss and Rutledge.

6. The Court erred in rendering judgment in favor of the plaintiffs for the sum of Five Thousand Three Hundred Two Dollars and Seventy Cents ($5,302.70) plus costs and interest.

7. The Court erred in entering judgment for the plaintiffs in any sum.

ALFRED L. HISS AND
JOHN F. RUTLEDGE,
t/a HISS & RUTLEDGE
By Counsel.

* * * * *

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* * * * *

ASSIGNMENT OF CROSS-ERROR.

The Complainants file this assignment of cross-error and allege that the Court erred in the following particulars:

(1) The Court erred in finding that the following items of damage were not recoverable and in excluding them from the judgment rendered:

(a) Fees paid to Gordon, Feinblatt & Rothman, Attorneys at Law, Baltimore, Maryland, for legal services in the litigation and expenses	$2,931.37
(b) Value of time lost and expenses borne by the Complainants in preparation for and conduct of the litigation	1,949.00
	$4,880.37

(2) The Complainants claim that the items enumerated in paragraph numbered 1 (a) were costs of litigation borne by them, directly caused by the breaches of duties owed by the Defendants Hiss and Rutledge, were legally cognizable damages, and should have been included in the judgment.

SIDNEY M. FRIEDBERG
HERBERT L. FRIEDBERG
SYLVIA FRIEDBERG NACHLAS
By R. J. LILLARD
Counsel.

Noland P. Chipman.

Filed Jan. 30, 1959.

THOMAS P. CHAPMAN, JR.
Clerk of the Circuit Court of
Fairfax County, Va.

* * * * *

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* * * * *

NOLAND P. CHIPMAN,
was called as a witness and having been previously duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION.

By Mr. Lillard:

Q. Would you state your name, address and occupation, for the record?

A. Nolan P. Chipman. I live at 6810 Campbell Road, Baltimore 7, Maryland. I am a lawyer.

Q. Are you a member of a firm of lawyers?

A. I am a member of the firm of Gordon, Feinblatt and Rothman, practicing law in Baltimore City.

Q. In the practice of law there, have you had occasion to advise or represent the complainants here, Mr. Sidney M. Friedburg, Mr. Herbert L. Friedburg and Mrs. Sylvia Friedburg Nachlas?

A. I have.

Q. Would you state the length of time that that representation has continued, and the character of the representation?

A. Those three individuals have been retainer clients of the firm for approximately five years.

Mr. Lillard: If the Court please, I would like to place in the file this summons.

The Court: All right.

page 15 } By Mr. Lillard:

Q. I hand you a sales contract and ask you if you can identify that?

A. This?

Noland P. Chipman.

Q. Can you identify it?
A. Yes, I can.
Q. What is that document, Mr. Chipman?
A. This is a duplicate original of a sales contract dated April 5, 1957, between Sidney Friedburg and Herbert Friedburg and Howard P. Horton and Anne K. Horton, pertaining to the property at Bailey's Crossroads.

Mr. Lillard: I would like to offer this in evidence as Complainant's Exhibit No. 1.
Mr. Boothe: No objection.
The Court: Complainant's Exhibit No. 1.

(The document referred to was marked Complainant's Exhibit No. 1 and received in evidence.)

By Mr. Lillard:
Q. When did that contract first come to your attention, Mr. Chipman?
A. That contract first came to my attention on the morning of April 10, 1957.
Q. Was any action concerning the contract scheduled for that day?
A. Settlement of the sale under the contract was set for that day.
page 16 } Q. Where was that settlement to be had?
A. At the office of Hiss and Rutledge in Arlington, Virginia.
Q. Was the settlement held in that office on that day?
A. It was.
Q. Who was present?
A. Present at that settlement were Al Hiss, John Rutledge, myself, Herbert Friedburg, a real estate agent named Turney Gratz, and a lady from his office was also there part of the time.
Q. Now, would you state the role assumed by you at the settlement?
A. The day before settlement, I was told by David Gordon, senior partner in our firm, that the Friedburgs were settling for a substantial piece of property in Fairfax, Virginia, on the following day and that it would be a good idea for me to go along to a settlement with Herbert as part of our office practice of participating in anything of substance that those people entered into.

Noland P. Chipman.

Q. Would you state the role of Messrs. Hiss and Rutledge in the settlement?

A. They were to do all the preliminary title work and were to handle the settlement and were to represent the Friedburgs at the settlement with regard to the purchase of that property.

page 17 } Q. Were they responsible for ascertaining and reporting to the Friedburgs the status of the title?

A. They were.

Mr. Boothe: Now, Your Honor, I think we have got papers in here which show the obligations of the parties. I don't think they ought to be varied under the parole evidence rule. I don't think that Mr. Chipman, with all due respect to him, Mr. Chipman's concept of the role of the other parties is evidentiary. I think he can say what happened and what happened and what written agreements were made and if they are clear, I don't see any reason to go into a lot of parole evidence, if you please, sir.

The Court: What agreements are you referring to?

Mr. Lillard: No, Your Honor, that would not bring into question parole evidence rules to this testimony that I know about. There were agreements written but I don't see how this testimony tends to vary them in any way.

Mr. Boothe: I am just wondering—Mr. Lillard mentioned in his opening statement—I referred to it, too—the agreement given by Hiss and Rutledge on April 10, this very day we are talking about, to Mr. Chipman's clients. I think that establishes the extent of their liability, if any; I do not think that Mr. Chipman's, as I say, concept of their role is relevant. I think you have got to draw the legal conclusions from the facts.

page 18 } The Court: Well, is that the same agreement?

Mr. Lillard: It is.

The Court: Is that in the record?

Mr. Lillard: Yes, sir. That is an outgrowth of the role, but in no way that I know would this statement by Mr. Chipman of the role of Hiss and Rutledge vary the terms of it, so I think the parole evidence rule is entirely inapplicable.

I think, further, this witness was present and is entitled to state what conception he had of the role of the various parties who were present.

The Court: Let us have Mr. Chipman state it moer amply.

Mr. Boothe: Maybe he can speed it up this way, Your Honor: I won't object any further, but I would like to reserve

my objection and take an exception to the admission of this kind of testimony. I don't really object to it going in, since Your Honor is hearing the case, but I think the record should show that inadmissible testimony should not be before the Court. That is my sole purpose. If it will save any time, I will be glad to wait until Mr. Chipman finishes and then move to strike from the record any parts of his testimony I feel should be stricken.

The Court: All right.

By Mr. Lillard:

Q. Would you state the role of Hiss and Rutledge on April 10, as you understood it?

page 19 } A. They were to search the title of this property and were to prepare all of the papers to be used at settlement and were to conduct the settlement and were to represent the Friedburgs at the settlement with regard to the purchase of the property.

Q. Now, on that day, did difficulties arise in the course of the settlement?

A. They did.

Q. Would you state what those difficulties were?

A. One difficulty pertained to the fact that a survey of the property seemed to show a discrepancy between the number of feet in the property with the description in the deed and some of the words in the contract.

Another question arose with regard to the existence of any lease on the property.

Questions arose with regard to whether or not certain parcels were to be subject to a deed of trust and there were questions of subordination. There were other questions under the contract.

Q. How long did this settlement last?

A. We arrived at their offices at approximately 10:30 and we left somewhere between six and seven in the evening.

Q. Did you resolve the question concerning the square footage in the property?

A. We did.

Q. I hand you this paper and ask you if you can

page 20 } identify it.

A. I can.

Q. What is this paper, Mr. Chipman?

A. This is a duplicate original of an agreement dated April 10, 1957, between the Hortons, the Friedburgs and the trustees

under the deed of trust pertaining to the adjustment to be paid because of the claim of a shortage in the property.

Q. Does that contain any reference to the leasehold interests?

A. It does.

Q. Would you read that for the record, please?

A. This agreement states that the parties of the first part do further agree as of the date of signing this agreement, no leasehold interest exists on subject property.

Q. Who were the parties of the first part?

A. The Hortons.

Q. Who else signed the agreement?

A. All of the Friedburgs, John F. Rutledge, and David P. Gordon.

Mr. Lillard: I offer this in evidence as complainant's Exhibit No. 2.

Mr. Boothe: No objection, sir.

The Court: Complainant's Exhibit No. 2.

(The document referred to was marked Complainant's Exhibit No. 2 and received in evidence.)

page 21 } Mr. Boothe: Is Anne Horton's name on there? Not that it makes any difference.

The Court: Anne K. Horton.

By Mr. Lillard:

Q. What disposition was made of the question which arose concerning a leasehold interest?

A. At settlement—

Mr. Boothe: Here, again, Your Honor, I would just like to note my objection.

The Court: All right.

Objection overruled.

The Witness: I told Mr. Hiss and Mr. Horton that I had heard from Herbert Friedburg in driving over to their office that morning that he had heard that there was an amusement park which, in the past, had conducted an operation on the property and who might be coming back there that summer to continue his operation and that there might be a lease between the Hortons and that operator.

Mr. Hiss and Mr. Horton said that an individual named Endy with a partner had conducted an operation on that

property and that there was a lease. Mr. Hiss didn't know whether or not it was in writing. He said he never had seen a copy of it, or that he had never had a copy of it, one or the other, and that that was no problem at all for the reason that Endy usually came back by that time and he hadn't
page 22 } come back and he may not ever come back. And, further, that if he did, he was a personal friend of Howard Horton's and that it would be no problem at all to convince him that he could conduct his operation on another property either owned by Horton or which Horton could get for Endy.

Mr. Hiss stated further that he knew that Endy had breached whatever lease he might have in a number of ways and that there was no problem at all in terminating whatever lease that there was, and it was stated that we would be entitled to possession at the time of the completion of the settlement by both Mr. Hiss and Horton in the presence of each other.

So we went on to other problems.

That same problem was discussed again at another time during the day and the same statements were made and the final reference to the problem was made in an agreement which was signed near the end of the settlement.

Q. I hand you this paper and ask you if you can identify it.

A. I can.

Mr. Boothe: All right, no objection.

By Mr. Lillard:

Q. What is that paper, Mr. Chipman?

A. This is an agreement dated April 10, 1957, between Hiss and Rutledge, Gordon, Feinblatt and Rothman, Howard Horton on behalf of himself and Anne K. Horton and Herbert Friedburg on behalf of himself and the other two Friedburgs.

page 23 } Q. Now, would you read for the record paragraph four of that agreement?

A. "At such time as Gordon, Feinblatt and Rothman shall deliver to Hiss and Rutledge the aforesaid executed deed of trust and notes, Hiss and Rutledge shall record the aforesaid fully executed deed and shall deliver to Gordon, Feinblatt and Rothman an owner's insurance policy of an accredited title company in the State of Virginia guaranteeing fee simple title to be in Herbert Friedburg, et al., free and clear of any liens and encumbrances whatsoever."

Noland P. Chipman.

Mr. Lillard: We offer this in evdience as Complainant's Exhibit No. 3.

The Court: Number 3.

(The document referred to was marked Complainant's Exhibit No. 3 and received in evidence.)

By Mr. Lillard:

Q. Was an owner's policy of title insurance delivered to the purchasers?

A. It was.

Q. Is the paper which I am handing you the policy in question?

A. It is.

Mr. Lillard: I would like to offer this in evidence as Complainant's Exhibit No. 4.

The Court: Number 4.

page 24 } (The document referred to was marked Complainant's Exhibit No. 4 and received in evidence.)

By Mr. Lillard:

Q. Now, was the purchase price, or any part of it, paid on April 10, 1957? If so, to whom?

A. A check for $105,000 was delivered to Hiss and Rutledge that day.

Q. Were the purchase money notes and other documents involved in the transfer delivered on that day?

A. No.

Q. Why not?

A. The deed conveying the property to the Friedburgs had to be signed by both Howard Horton and his wife and Mrs. Horton was not present so that Hiss and Rutledge had to get her signature on the deed and since only Herbert Friedburg was present, it was necessary to get the signatures of the other Friedburgs on the deed of trust and on the notes being secured by the deed of trust.

Also, I had to get the signature of David Gordon on the agreement with regard to the $4000 note. I think, also that Mrs. Horton had to sign that paper.

Q. Now, were those papers subsequently fully executed and delivered to Hiss and Rutledge?

A. They were.

Noland P. Chipman.

Q. I hand you this paper and ask you if you can
page 25 } identify it.
A. This is a settlement sheet dated April 10, 1957, with regard to the same property.

Mr. Boothe: It is all right, sir. No objection.

By Mr. Lillard:
Q. Is that a settlement sheet for the purchaser?
A. Yes.
Q. Does it show the status of the account between the purchaser and Hiss and Rutledge and the seller, Mr. Horton?
A. Yes.
Q. Were the fees shown on that sheet, being chargeable to the purchaser, paid?
A. They were.

Mr. Lillard: I offer this in evidence.
The Court: Complainant's Exhibit No. 5.

(The document referred to was marked Complainant's Exhibit No. 5 and received in evidence.)

By Mr. Lillard:
Q. Can you state who prepared or dictated the two instruments prepared that day identified as Complainant's Exhibits 2 and 3, which I hand you herewith?
A. These were dictated in the afternoon of the day of settlement and John Rutledge and I were in a separate office with a secretary of their firm and I cannot say absolutely who dictated what with the exception that I am certain that I dictated paragraph 4 of this agreement that is Exhibit 3.
page 26 } Q. Is that the paragraph which has to do with the delivery of an owner's title policy?
A. It is, but as to who did what dictation, I am not certain. I do know that John Rutledge said—of course that doesn't answer who did what dictating.
Q. Do you know whether or not possession was delivered at settlement to the purchasers?
A. It was not.
Q. Has it been delivered to the purchasers to this day?
A. It never has.
Q. I hand you this paper and ask you if you can identify that?

Noland P. Chipman.

A. This is our office copy of a letter dated April 17, 1957, from me to Alfred Hiss.

Mr. Boothe: That is all right, sir.

Your Honor, I feel that these letters written by counsel for the parties, or by the parties themselves, are self-serving declarations. I would just object to any of them going in for that reason.

If the Court would like to see them over my objection I would just like it to be subject to that objection. I think self-serving declarations do not add anything to the case.

Mr. Lillard: It is a self-serving declaration only in the sense that the person who is testifying wrote the
page 27 } letter. It is being introduced for the purpose of showing to the Court the attitudes and positions taken by the parties involved with respect to the delivery or possession.

The Court: I think they should be permitted for that purpose.

Mr. Lillard: I offer this in evidence.

The Court: Number 6.

Mr. Boothe: Note an exception, please.

(The letter referred to was marked Complainant's Exhibit No. 6 and received in evidence.)

Mr. Boothe: I would like to make the same objection—same ruling—same exception.

The Court: All right.

Mr. Lillard: Now, if the Court please, I have here a course of correspondence between Mr. Chipman and Mr. Hiss which I would like to introduce in evidence. I would rather not encumber the record by having detailed statements concerning each of these made by the witness. I would like to have him identify these letters separately and place them in the record as exhibits so that they will then speak for themselves.

The Court: All right.

By Mr. Lillard:

Q. I show you complainant's exhibit—

The Court: Number 7.

By Mr. Lillard:

Noland P. Chipman.

Q. Will you state what Exhibit No. 7 consists of?
page 28 } A. This is my copy of a letter dated May 17, 1957, from me to Mr. Hiss.

Mr. Boothe: Mr. Lillard, without trying to interfere, don't you think it would be advisable to put these in chronological order?

Mr. Lillard: He is going to do that. It will be in reverse chronological order with the last one first. We can turn it around if you prefer.

If the Court please, may we strike the identification of the first item and start with the first letter in a series, identify the oldest letter first?

The Court: Suppose the reporter just changes the date and inserts the correct date for Exhibit No. 7 which you want to offer now.

The Witness: The first one, Your Honor, is one dated May 2, 1957.

The Court: That will be exhibit No. 7.

Mr. Boothe: Number 7.

(The document previously marked and received as Exhibit No. 7 was renumbered and the last document referred to was marked Complainant's Exhibit No. 7 and received in evidence.)

The Witness: This is the original of a letter dated May 2, 1957, from Mr. Hiss to me.

The Court: Number 8.

page 28A } (The letter was marked Complainant's Exhibit No. 8 and received in evidence.)

The Witness: This is an original of a letter dated May 3, 1957, from Mr. Hiss to me.

The Court: No. 9.

The Witness: This is my office copy of a letter—

The Court: Just a moment, Mr. Chipman.

The Witness: This is my office copy of a letter dated May 6, 1957, from me to Mr. Hiss.

The Court: No. 10.

(The documents referred to were marked Complainant's Exhibits Nos. 9 and 10 and received in evidence.)

Noland P. Chipman.

The Witness: This is my office copy of a letter dated May 9, 1957, from me to Mr. Hiss.
The Court: Number 11.

(The document referred to was marked Complainant's Exhibit No. 11 and received in evidence.)

Mr. Boothe: Exhibit 10 was dated what date?
The Court: May 6.
Mr. Boothe: That was Chipman to Hiss?
The Court: That's correct.
Mr. Boothe: Thank you, sir.
The Court: The other was May 9, 1957, Chipman to Hiss.
The Witness: This is my office copy of a letter dated May 13, 1957 from me to Mr. Hiss.
page 28B } The Court: No. 12.

(The document referred to was marked Complainant's Exhibit No. 12 and received in evidence.)

The Witness: This is my office copy of a letter dated May 17, 1957, from me to Mr. Hiss.
The Court: Thirteen. The date is May 17.

(The document referred to was marked Complainant's Exhibit No. 13 and received in evidence.)

By Mr. Lillard:
Q. Following the letter of May 17 which has been admitted to evidence as Complainant's Exhibit No. 13, I believe it is, did you authorize the filing of litigation in Fairfax County, Virginia?
A. I did.
Q. By me and my firm?
A. I did.
Q. Did you see, prior to filing, and authorize the filing of the bill of complaint in this case?
A. I didn't hear the first part of your question.
Q. Did you see, prior to filing, and authorize the filing of the bill of complaint in the record in this case?
A. I did.
Q. Have you and members of your firm worked with me and members of my firm since that day in the prosecution of this litigation?

Noland P. Chipman.

A. We have.

page 29 } Q. Has your firm submitted to the clients a bill for services rendered?

A. We have.

Q. I ask you to examine that and ask you if you can identify it.

A. This is that bill that our firm submitted to the Friedburgs for services rendered in connection with the purchase of this Bailey's Crossroads property to July 1, 1958.

Q. Can you state what part of the amount there charged was for services rendered on or before April 16, 1958, which is the date of the settlement agreement with Mr. and Mrs. Horton?

A. $2875 was the fee for services to April 16, 1958.

Q. How about the expense item? Was that incurred prior to April 16, 1958?

A. This long distance telephone call item of $48.47 actually represents calls paid for from January 8, 1958 through May 1958. It does not take into consideration phone calls made from April 10, 1957 to January 1958, because of our office accounting with Friedburg. I couldn't absolutely identify the phone calls from that period, from April 10, 1957 to January 1958.

Q. Can you testify that the telephone calls between April 10, 1957 and April 16, 1958, equalled or exceeded the figure you have there?

A. They greatly exceeded this $48.47.

Q. When did you incur the expenses of photo-

page 30 } stats shown on that bill?

A. That expense was incurred early in these proceedings and I am certain it was incurred sometime in 1957.

Q. Has this bill been paid?

A. It has.

Mr. Lillard: We offer that in evidence as plaintiff's Exhibit No. 14.

The Court: Fourteen.

(The paper referred to was marked Complainant's Exhibit No. 14 and received in evidence.)

By Mr. Lillard:

Q. I hand you this paper and ask you if you can identify it.

A. When I say that that bill has been paid, the services

from April 10, 1957 to April 16, 1958, about which you asked me, have been paid. But that other item which is on the bill, to July 1, has not been paid.

I can identify this.

Q. What is that paper?

A. This is a bill dated July 1, 1958, of Richardson, McCandlish, Lillard, Marsh and VanDyke for services rendered in this matter.

Q. Services rendered through what date?

A. From May 1957 through April 16, 1958.

Q. Does that include certain expenses borne by
page 31 } that firm?

A. It does.

Q. What is the total of the fees and expenses?

A. $4165.70.

Q. Has that bill been paid?

A. It has.

The Court: Fifteen.

(The paper referred to was marked Complainant's Exhibit No. 15 and received in evidence.)

Mr. Boothe: What was the total of Exhibit 14, sir?

The Court: $3406.37.

Mr. Lillard: If the Court please, I consider that the release which was signed on April 16, 1958, which was attached to an order dismissing the bill of complaint as to Horton is now a part of the record. Do you agree with that, Mr. Boothe, so it is not necessary to identify it?

Mr. Boothe: It would certainly save time. That is the release of April 16, 1958.

Mr. Lillard: Yes, sir.

Mr. Boothe: Yes, sir.

By Mr. Lillard:

Q. I call your attention to Complainant's Exhibit No. 4 which is the owner's policy of title insurance delivered to you for the purchasers. Does that insure against the rights of parties in possession?

page 32 } A. It does not.

Q. Did you accept that policy as meeting the requirement of paragraph 4 in complainant's Exhibit No. 3?

Mr. Boothe: Now, Your Honor, I would like to make this

observation rather than an objection. I think the answer is just to the question: Did he accept it—that is a matter of fact. Whether or not the policy was a fulfillment of the obligation of paragraph 4 is, I think, a conclusion for the Court.

The Court: I think the question was, did he accept it.

Mr. Lillard: As such.

The Court: That's right.

By Mr. Lillard:

Q. Did you accept it as being a compliance with the obligation assumed by Hiss and Rutledge in paragraph 4 of Complainant's Exhibit No. 3?

A. I did not.

Q. Why did you not accept it as such?

A. Because there is an exception in the policy specifying that the policy does not insure against rights of parties in actual possession of all or any part of the premises other than the insured, and it was just about the same time that I received the policy that I learned that the gentleman named Mr. Endy was very much in existence and was either actually in possession or planning to take possession immediately.

page 33 } Mr. Lillard: That's all from this witness.

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page 70 }

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RE-DIRECT EXAMINATION.

By Mr. Lillard:

Q. Mr. Chipman, I invite your attention to this release dated April 16, 1958, a copy of which is in the file. I invite your particular attention to the preliminary recitals there and ask you if they reflect the basis for your claim against the Hortons, the basis for your claim against these defendants, Hiss and Rutledge, and also reflect the claim which you intended to settle when you settled with Mr. Horton and his wife?

Mr. Boothe: Your Honor, I guess I will object to it because here is the release. I think it speaks for itself and I don't see how Mr. Chipman's testimony can add any more to what is right there. It is obviously one written by them. It is self

Noland P. Chipman.

serving, anyhow. I just don't see how he can add anything to the words of the release.

The Court: It is pretty obvious what Mr. Chip-
page 71 } man's answer is going to be, what it will add.

Mr. Lillard: Confirmation of the statements there, as well as what was intended to be there, that's all.

Mr. Chipman himself did not sign it; his clients did.

The Court: Well, I don't like to receive anything self-serving but I don't think it will harm anything.

Mr. Boothe: As I understand, it is being heard by the Court and I wouldn't object.

The Court: All right.

The Witness: I have forgotten the question.

(The reporter read the question referred to.)

The Witness: They reflect the basis of the claim against the Hortons and the basis of the claim against Hiss and Rutledge and they recite in part, but not in their entirety, what was meant to be settled with the Hortons, according to my understanding.

By Mr. Lillard:

Q. Well, now, after the settlement which was made at this time and the delivery of $36,000 in cash or notes to the Hortons, were the Hortons to be liable for any further payments because of the presence of Endy and Moore on the property with a claimed leasehold interest?

A. They were not.

Q. They were discharged in full as to that?

A. They were.

page 72 } Q. Have you, as attorney, had experience with land titles, searching of titles?

A. Very little.

Q. Have you had any experience with the searching of land titles in the State of Virginia?

A. None.

Q. Have you undertaken to familiarize yourself with the law which would affect land titles, which is peculiar to the State of Virginia?

A. I have not.

Q. At the settlement on April 10, 1958, did you examine any part of the land records of Fairfax County, Virginia?

A. I did not.

Noland P. Chipman.

Q. Did you undertake to advise your clients whether the title of that land was good or bad?

A. I did not.

Q. Did you have an understanding as to who was responsible for that service to your clients?

A. I did.

Q. Who was that?

A. Hiss and Rutledge.

Q. Now, you have testified concerning various discussions of the leasehold interests. Did you make known to Hiss and Rutledge your concern about the possible leasehold interests?

page 73 } A. I did.

Q. Now, you left the $105,000 of your client's money in their hands. What did you expect to happen before that money was disbursed?

Mr. Boothe: Your Honor. I just don't see any reason to fill in the record with opinions. We have got the facts here. Let's stick to them. What this man intended, and so on, I don't think is evidentiary in this case.

Mr. Lillard: This is not opinion; I want him to state what he expected them to do.

The Court: Is this a proper part of redirect examination?

Mr. Lillard: Yes, sir.

Mr. Boothe: I don't know what the purpose is, anyway.

The Court: Was anything brought out about this on cross examination? I don't recall anything.

Mr. Lillard: All of the details of the settlement, I believe, were included in the cross examination. I believe that he was asked about the instruments which were drawn, who dictated those instruments.

The Court: Well, maybe I missed something. If that is the case, go ahead.

The Witness: It was my understanding that Hiss and Rutledge would get Mrs. Horton to sign the deed, would get Mrs. Horton's signature on the agreement that had

page 74 } to do with the $72,000 and the $4,000 notes, would record the deed and would, at the same time, furnish us with a title policy of an accredited title company in the State of Virginia guaranteeing fee simple title to be in the Friedburgs, free and clear of any liens and encumbrances and particularly any lien or encumbrance of any lease, whether recorded or unrecorded.

Joseph A. Alexander.

The Court: What about the money, the $105,000, whatever amount it was?

The Witness: They were to hold the money until the deed was recorded and, at that time, we were to get the title policy.

By Mr. Lillard:

Q. Were they authorized to disburse the money if they couldn't supply you that policy?

A. They were not.

Mr. Lillard: That 's all.

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JOSEPH A. ALEXANDER,

was called as a witness and after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Lillard:

Q. Would you state for the record your name, address, and your business?

A. Joseph A. Alexander, 3908 Lorain Avenue, Falls Church, Virginia, Title Insurance Underwriter.

Q. Are you the Alexander of Alexander Title Agency?

A. Yes, sir.

Q. Now, sir, we have an exhibit here, a policy written by Kansas City Title Insurance Company, insuring title to property belonging to Sidney M. Friedburg, Howard H. Friedburg, and Sylvia Friedburg Nachlas. Is that policy issued through your office? I am showing the witness

page 80 } Complainant's Exhibit No. 4.

A. Yes.

Q. This printed form contains as exception No. 2 under Schedule B, the following:

"Rights of parties in actual possession of all or any part of the premises other than the insured"—is it possible to secure a policy from you with that exception eliminated?

Joseph A. Alexander.

A. Yes.

Q. How is that done?

A. We normally eliminate that exception on assurances from the attorney that the owner is in possession of the property and when accompanied by a plat of survey by competent surveyor, certifying as to the condition and status of the physical property.

Q. Well, now, when you asked for the plat of survey, is that to show encroachments, if any?

A. That is one of the purposes.

Q. Would you expect a survey to show you whether or not a person claimed to be a tenant of the premises?

A. Sometimes a survey would. Normally not, but surveyor's report which accompanies the plat of survey would normally show that information.

Q. If the information supplied you through the attorney applying for the policy of title insurance, supplemented by such other information as you might have, convinced you that there was no tenant, would you eliminate this exception upon request?

page 81

A. Yes.

Mr. Lillard: I have no further questions.

CROSS EXAMINATION.

By Mr. Boothe:

Q. Mr. Alexander, is the Kansas City Title Insurance Company an accredited title company in the State of Virginia?

A. I hope so.

Q. Is this policy to which you have reference, that is an owner's insurance policy, is it not?

A. Yes, sir.

Q. Will you tell us whether or not it is your standard policy?

A. It is.

Q. What other policy do you issue, if any?

A. Formerly we issued an unmarketable form of owner's policy and I hope the Court will not ask me to define the word "marketable" which also has printed exceptions as is now used in the marketable form of policy. We do not any longer use the unmarketable form of owner's policy. This form of this policy, I believe, Exhibit 4 is our standard owner's policy. We also issue a mortgage policy known as a standard loan, American Title Association policy, and we also issue,

Joseph A. Alexander.

not too frequently, a record or guaranty policy.

page 82 } Q. If a person requested from you a Kansas City owner's policy, guaranteeing fee simple title free and clear of any liens and encumbrances whatsoever, would he get this policy?

A. He would get the standard owner's policy, Exhibit No. 4.

Mr. Boothe: That's all, sir.

RE-DIRECT EXAMINATION

By Mr. Lillard:

Q. Mr. Alexander, having issued this policy, if it appears that a tenant is in possession of the property and was at the time that policy is issued, do you admit liability under the policy?

A. Where we left the exception in as in Exhibit 4?

Q. Right.

A. We would not assume liability for a tenant in possession where the exception is printed or typed in the policy.

Q. So that is what encumbrance you did not insure against; isn't that true?

A. If you want to call that an encumbrance, we would not insure against it in this instance.

Mr. Lillard: No further questions.

Mr. Boothe: That's all.

The Court: All right, Mr. Alexander, you are excused.

Mr. Boothe: Let me ask one other question

page 83 } before you leave.

RE-CROSS EXAMINATION.

By Mr. Boothe:

Q. As I understand, this policy does insure against all matters of record, all encumbrances of record; is that correct?

A. That's correct.

Mr. Boothe: That's all.

Mr. Lillard: Let me ask one more question, too.

RE DIRECT EXAMINATION.

By Mr. Lillard:

Joseph A. Alexander.

Q. Do you have the application with you for this policy of title insurance?
A. I do.
Q. May I see it, please?
A. Yes, sir.
Q. Does that contain any representation to you concerning the rights of parties in possession other than the owner?
A. Yes.
Q. What is that representation?
A. None.
Q. Did you accept that as an application by Hiss and Rutledge?
A. Accept.
Q. This application?
page 84 } A. This, sir, is an application from Hiss and Rutledge, correct.
Q. On the basis of that, you issued the policy?
A. Correct.

Mr. Lillard: I have no further questions.
Mr. Boothe: I just want to make that clear, Mr. Alexander.

RE-CROSS EXAMINATION.

By Mr. Boothe:
Q. In the application submitted to the Kansas City Title Insurance Company by Messrs. Hiss and Rutledge, in this particular case, under the Schedule B, paragraph 8, which says, "rights of parties in possession other than owner," they put, "None"; isn't that correct?
A. Correct.
Q. Indicating that they wanted a policy where there would be no rights, where the rights of parties in possession would be nil?
A. Right.
Q. On the basis of this certificate, you issued Exhibit No. 4 which did except the rights of parties in actual possession of all or any part of the premises other than the insured?
A. That's correct.
Q. Thank you, sir.
page 85 } That is the standard procedure?
A. With us, yes.

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HERBERT L. FRIEDBURG,
was called as a witness and after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Lillard:

Q. Will you state for the record your name, address, and occupation?

A. Herbert L. Friedburg, 3502 Shelburne Road, Baltimore, 1, Maryland, and I operate bowling lanes.

Q. Are you one of the complainants here?

A. Yes.

Q. Is Mr. Sidney M. Friedburg your brother?

A. Yes.

Q. And Sylvia Friedburg Nachlas is your sister?

A. Yes.

Q. They are associated with you in the business of running bowling alleys?

A. That's right.

Q. Now, we have in evidence here as Complainant's Exhibit No. 1, a contract for the purchase of real estate
page 87 } here in Fairfax County, Virginia, from Howard Horton and wife. Are you familiar with that transaction?

A. Yes.

Q. Were you at the settlement of the contract?

A. Yes.

Q. Where did that take place?

A. It took place in the office of Hiss and Rutledge.

Q. Who was present there besides you?

A. Mr. Hiss, later Mr. Rutledge, Nolan Chipman, Turney Gratz, a realtor and his assistant—rather, someone from his office, Mr. Horton, and I think that was it.

Q. Why was Mr. Chipman there?

A. Well, this was a substantial transaction for us and he is on a retainer basis with us and I brought him over thinking there might be some tax matters or corporate matters that would come up.

Herbert L. Friedburg.

Q. What was the role of Hiss and Rutledge at this settlement?

A. They were the lawyers we had engaged to represent us at the settlement.

Q. Were they supposed to examine the title?

A. Supposed to examine, do the title search, examine the title and make sure we got a clear title to the—

Q. Were they supposed to act as settlement attorneys?

A. Yes.

page 88 } Q. Did you pay any money to them on that day?

A. Yes, we did.

Q. Do you remember how much that was?

A. Approximately $600—$600-and-a-few-cents.

Q. Did you pay any part of the purchase price to them on that day?

A. Yes, we paid $105,000.

Q. Now, during the settlement, was there a discussion of a possible leasehold interest?

A. Yes, there was.

Q. And you heard of that prior to settlement?

A. I had heard rumors about it and I wanted to make sure it came up at settlement time.

Q. What representations were made to you, if any, by either Mr. Hiss or Mr. Rutledge, concerning this leasehold interest?

A. Mr. Hiss said there was a tenant on the property who had breached his lease in a number of ways and that, furthermore, he was a friend of Mr. Horton's and would get off at any time that Mr. Horton asked him to; that there was no problem regarding this tenant; that we would receive the property free and clear from him.

Q. Did you expect to receive the property free and clear of the leasehold interest?

A. I certainly did.

page 89 } Q. When did you desire possession of the property?

A. Just as soon as we could get it.

Q. The contract provided for possession at settlement?

A. We expected to get it at settlement, make use of it.

Q. Why did you buy this property, Mr. Friedburg, you and your associates?

A. We bought it to have erected on the property a bowling establishment.

Q. Have you as a group, or you individually, made it a practice to buy real estate on a speculative basis?

Herbert L. Friedburg.

A. As far as I know, as far as I can recall, we have never bought real estate on a speculative basis.

Q. Now, when did you intend to place improvements on the property, specifically the bowling alley building?

A. We wanted to move very rapidly, obtain equity capital for financing and go ahead with it.

Q. Did you have any reason for wanting to move rapidly with respect to this location?

A. Yes, there was another bowling concern, company, that was trying to get located in the area, and we felt that this would be a considerable advantage in being first in the area. As a matter of fact, we felt pretty certain that if we were first, we might prevent them from going up at all.

Q. Had you known that you could not get possession of the property for a considerable period of time, would
page 90 } you have been interested in buying it?

A. Not at all.

Mr. Boothe: I object to that question and object to the answer. I don't think—it is purely speculative in his own mind; would he have been interested in buying it and so forth. I don't think that is a proper question.

Mr. Lillard: I think he can rightly say whether he would have been interested in purchasing this property with a leasehold interest outstanding with two or three years to run.

Mr. Boothe: I think the facts are the best evidence.

The Court: I think if you ask him directly if he would have purchased the property with a leasehold interest outstanding, it would be admissible and serve the same purpose.

By Mr. Lillard:

Q. Would you have purchased the property with a leasehold interest outstanding with more than two years yet to run?

A. No.

Q. Has possession of that property been delivered to you?

A. No, it has not.

Q. Have you authorized attorneys to file legal proceedings in your behalf to secure your rights in this connection?

A. I don't think so.

page 91 } Q. Did you confer with Gordon, Feinblatt and Rothman in Baltimore concerning methods of getting your rights, your possession?

Herbert L. Friedburg.

A. Yes, we are eager to get possession of the property if that is what you mean.

Q. Have you conferred with Gordon, Feinblatt and Rothman, or Mr. Chipman, concerning methods of doing that?

A. Yes.

Q. Did you authorize them to file suit for you to secure or protect your rights?

A. Yes, we did.

Q. Now, has it been necessary for you to lose time from your work to confer with the attorneys?

A. It certainly has.

Q. Would you state how much time you have lost in that way?

Mr. Boothe: Now, Your Honor, I would just like to note an objection here, that I don't think it makes a bit of difference. I don't think a person has got any right to recover any damages, a litigant, for time he spends conferring or consulting with attorneys in a case. I don't think that is an element of damages in any case. I just want to note my objection.

Mr. Lillard: I admit that that is the general rule. I think that is not the case where, as here, he is forced to undertake litigation by a breach of contractual or any other
page 92 } duty of someone else.

Here he is making a claim against defendants, Hiss and Rutledge, with a claim that they breached a contractual duty to him, and that, as a result of that breach, he is involved in litigation.

In a situation like that, he is entitled to his expenses and his time.

Mr. Boothe: Could I make a suggestion in order to save time? That the testimony be allowed to go in subject to our objection and exception and motion to strike it out later?

The Court: Well, I intend to let it go in and then whether the Court permits recovery on it will be something else.

By Mr. Lillard:

Q. How much time have you devoted to conferring with attorneys on this case?

A. We spent at least four times in Baltimore and—

Q. By "we" do you mean—

A. My brother and I.

Q. Is that Sidney M. Friedburg and you?

A. That's right.

Herbert L. Friedburg.

Q. On each of those trips to the attorneys' office in Baltimore, how much time did you lose from your normal pursuits?

A. At least a half day.

Q. That would be a half day, then, for each of
page 92A } you?

A. Yes.

Q. Now, have you found it necessary to make trips out of Baltimore?

A. Yes, I have.

Q. How many were made by you and how many by your brother?

A. I made two trips over here to Virginia and he made three.

Q. How much time was required for each of those trips?

A. On those occasions we spent the whole day.

Q. What value do you place on the loss of a day's work in your business?

A. $100 a day.

Q. Would that be the same for your brother?

A. Yes.

Q. Now, have you been required to bear any expenses because of the litigation that you would not otherwise have borne?

A. We have had the expense of attorneys.

Q. Now, we have here in evidence the bills from Gordon, Feinblatt and Rothman and from my own firm, which Mr. Chipman has testified has been paid.

A. Yes.

Q. This one as well?

A. Yes.

Q. All right. Did you have any other expenses,
page 93 } make any long distance telephone calls?

A. Long distance telephone calls, in the neighborhood, I'd say, of about $25.00.

Q. Did you have any travel expenses?

A. Automobile expenses, coming over.

Q. What would you estimate those expenses would be per trip?

A. I would say somewhere around $8 a trip?

Q. How many trips would be involved as far as travel is concerned? You say that you came twice and your brother Sidney came three times?

A. So that would be five times.

Q. On none of those occasions you came together?

Herbert L. Friedburg.

A. I would say that we came together the times that I came so that would make it three trips.

Q. Three trips involved at $8 per trip?

A. Yes.

Q. Are there any other expenses?

A. Attorney, auditing fees, perhaps.

The Court: I didn't hear that, Mr. Friedburg.

The Witness: Auditing fees in our office, perhaps.

By Mr. Lillard:

Q. Do you have any auditing fees which you can segregate and say they were caused directly and specifically by the litigation?

A. Well, there were problems involving the fact
page 94 } that we had the $105,000 tied up in this property
and we couldn't get to it and considerable work in that regard.

Q. Would you estimate what those auditing fees would amount to?

A. As I recall, it was $1,000 in that respect on problems in the office.

Q. Now, you say that the fact that you didn't have the $105,000 created problems. What do you mean by that?

A. Well, we are in process of expansion and—

Mr. Boothe: Your Honor, I am going to object to this testimony. The evidence again has indicated that in their settlement they got last year's rent in the amount of $5,500; that they got a refund on all the interest on the $105,000.

I think that any evidence now, attempted testimony, as to what they could have done with the $105,000 is entirely too speculative and should be ruled out.

Mr. Lillard: I don't recall any evidence that they got interest on the $105,000.

Mr. Boothe: Got it back and didn't pay interest on it.

Mr. Lillard: You are talking about the interest on the $76,000?

Mr. Boothe: $76,000, right.

Mr. Lillard: We are talking about the $105,000
page 95 } which they paid in.

Mr. Boothe: They got the summer's rent for that, nearly $6,000—$5,500.

The Court: It seems to me that evidence of what these

folks could have done with that $100,000 would be pretty speculative.

Mr. Lillard: I admit that any attempt to show a specific loss because they did not have the $105,000 in their possession would be too speculative to be admitted into evidence. I am trying to show that the fact that they did not have the $105,000 was embarrassing to them in the conduct of their business. I am not expecting to claim a specific amount of damage because they didn't have any. I think it would be admissible for that damage.

The Court: All right, no damages claimed.

By Mr. Lillard:

Q. What was the effect on your business of the fact that you had laid out $105,000 for this property and was unable to proceed with your business on the property?

A. Well, cash means expansion to us.

Mr. Boothe: Your Honor, would the record just show my exception to the admission of this testimony for any purpose.

The Court: All right.

page 96 } The Witness: Each time we open up a new bowling establishment, we require, naturally, a certain amount of cash. We are in process of investigating hundreds of locations for establishments in the Baltimore-Washington area and elsewhere.

During this time, it was, made it very difficult for us to consider locations where large amounts of cash might be needed.

Q. Did you discuss at settlement your desire for immediate possession?

A. Yes, I did.

As a matter of fact, I discussed it with Mr. Hiss, pointed out to him the importance of it. I think Mr. Hiss had also spoken of a bowling group which he belonged to that might be available for reservation in the fall.

Q. Do you know of your own knowledge whether or not your competitor has established his bowling center in the area?

A. Yes, he has.

Q. Where was that established?

A. Edsall and Shirley Highway.

Mr. Lillard: We have no further questions.

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WYNNE TOLBERT,
was called as a witness and after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Lillard:

Q. Would you state for the record your name, address and occupation, please?

A. Wynn Tolbert, Attorney, 5154 North 33rd
page 100 } Street, Arlington.

Q. In your practice as an attorney, have you represented a gentleman named Endy and Moore who claim a right to possession of property at Bailey's Crossroads?

A. Yes.

Q. What right in that property do they claim, Mr. Tolbert?

A. Leasehold interest in a tract of something over three acres that I believe was owned at the time of lease by some people by the name of Horton. I think the lease is dated February 1956, and is a five year lease.

Q. I hand you this paper and ask you if you can identify that.

A. This appears to be an—I won't say an exact copy but it appears to have the same terms. I haven't mine to compare. I think it is in my file back there. I only have a photostat copy myself.

Q. From an examination of that, would you say that it is a copy of the lease claimed by Endy and Moore?

A. Yes, I think it is.

Mr. Boothe: You made this up, did you?

Mr. Lillard: I made the copy.

Mr. Boothe: All right, sir.

Mr. Lillard: I would like to offer in evidence this copy of the lease.

Wynne Tolbert.

The Court: Exhibit No. 16, I believe. Com-
page 101 } plainant's Exhibit 16.

(The paper referred to was marked as Complainant's Exhibit No. 16 and received in evidence.)

By Mr. Lillard:

Q. Has that instrument been recorded among the land records of Fairfax County, Virginia?

A. I don't believe so.

Q. Did you ever undertake to record it?

A. When we first undertook to represent these parties, I did bring a copy of the lease which was given to me by our clients to this courthouse to record.

Q. Do you recall what day that was?

A. It was April 15, 1957.

Q. Now, why didn't you record it?

A. In looking at the papers that had been, in examining the land records briefly, including the papers that had been recorded that day and were in the basket at the Clerk's office, I found two deeds which had been recorded earlier that day which made the recording of this lease somewhat unnecessary and moot, if it had any value at all in the first place.

Q. Do I understand you to say that the property which is covered by the lease had been conveyed to people other than the lessors?

A. Yes. I think there were two deeds that I found recorded that day.

page 102 } Q. But in any event, at that time, the record title to the property was not in the Hortons who were the lessors in the written lease which you brought to the court house?

A. That's right.

Q. While you were in the record room, did you discuss your lease with any representative of the firm of Hiss and Rutledge?

A. As I recall, I did not know the person that was later pointed out to me as being a representative. I did not know that he was with or employed by that firm at the time that I went up there. However, I was directed to a Mike Sullivan up there in that room at the time and had a brief discussion with him.

Q. Did you exhibit the lease to him?

A. Yes, I think, I am sure he saw the lease.

Q. Did you confer with Mr. Hiss or Mr. Rutledge on that day?

A. Later that day, after I returned to the office, I called Mr. Hiss.

Q. What was the subject of your conversation with Mr. Hiss?

A. I advised him that our office had undertaken to represent these parties and I advised him of this leasehold interest and I don't recall the conversation except that I think—

page 103 } Q. Did you advise him whether or not your clients were willing to release the leasehold interest?

A. I advised him that they had told me that they had no understanding whereby they would remove from the property. I am sure of that.

Q. Have they removed from the property?

A. No.

Q. They are there as of today?

A. No, they are in possession so far as I know; I am still representing them in connection with certain matters to do with that.

Q. Now, how do you recall anything further of the conversation between you and Mr. Hiss on the 15th of April, 1957?

A. I don't recall the conversation. I think Mr. Hiss indicated he was rather surprised.

Q. Was anything said about the money in his hands, received at settlement?

A. I didn't have any interest in that, of course, since this was the same day it had been recorded. There may have been some conversation regarding that point, I don't recall the exact terms, the exact—

Q. Do you recall any discussion of it at all?

A. Well, not enough to be complete on it.

Mr. Lillard: We have no further questions.

CROSS EXAMINATION.

By Mr. Boothe:

page 104 } Q. Mr. Tolbert, this lease, I believe it is dated February 28, 1956. Do you have a copy of that before you?

A. No, I don't believe I do; no.

Q. Is that Exhibit 16?

Wynne Tolbert.

Mr Lillard: I did put a copy in.
Mr. Boothe: That is it; February 28, 1956.
The Witness: February 28, 1956.

By Mr. Boothe:
Q. And that was for a term of five years, commencing April 1, 1956, is that correct?
A. That's correct.
Q. It calls for a minimum rental of $6,000 per year, is that correct?
A. Yes, sir.
Q. With certain percentages on gross sales, whichever would be greater?
A. Yes, sir.
Q. When did you first know of this lease?
A. When did I?
Q. When did you first know of this lease, approximately?
A. Probably Wednesday or Thursday of the week preceeding April 15. First time I had anything to do with the case.
Q. Do you knew who drew it?
A. No, sir, I do not.
page 105 } Q. You didn't draw it yourself?
A. No.
Q. Do you know whether Hiss or Rutledge drew it?
A. I am advised they did. But I do not know.
Q. As a matter of fact, you were advised by your clients that they and Mr. Horton drew it together, weren't you?
A. Yes.
Q. Now, as I understand, it never has been recorded?
A. No, no.
Q. Up to this date.
Now, then, I believe shortly after the transaction of April 15, that you advised the purchasers, did you not, of your representation of Endy and Moore?
A. Yes,—the Friedburgs.
Q. Advised the Friedburgs?
A. Yes.
Q. Subsequent to that time, was any action begun by any person to try to get Endy and Moore off the property?
A. Yes.
Q. Who was the complainant in that action?
A. Mrs. Horton, Howard Horton's wife, I believe.
Q. Did the Friedburgs join in that proceeding?
A. No.
Q. Was any other action subsequently commenced? Was

there a declaratory judgment suit filed?

page 106 } A. Not that I know of. There was an attempt made to bring Endy and Moore into this suit at one time, I believe.

Q. And who tried to bring them in?

A. I believe the Friedburgs, I believe. This case has gone on so long—

Q. Since April 16, 1958, has Mr. Friedburg, either directly or through counsel, made any—engaged in any negotiations with you to try and get Endy and Moore off the property?

A. I don't recall enough about April 16. Is that the last time I was subpoenaed to testify in this case?

Q. That was probably April 7, but to make it easier, can you tell us just what efforts Friedburg interests have made, if any, to try and get Endy and Moore off the property?

A. I would say they have made none. In fact, they withdrew the offer that had been previously made.

Q. Can you place roughly what you mean by the "offer previously made", of when it was made?

A. There was an offer submitted by Mr. Lillard early in April, prior to the time this case was originally set for trial, to purchase the leasehold interest and that offer was not accepted by our clients.

Q. What was that for?

A. $20,000.

Q. Did you make any counter offer?

page 107 } A. $25,000.

Q. In other words, as counsel for the Endy and Moore interests, you offered to accept $25,000 to get them off the property?

A. I did obtain that for the—

Q. You have authority from your clients to make that counter offer?

A. Yes.

Q. Then you say after the settlement, the $20,000 offer was withdrawn?

A. Yes.

Q. And subsequently were any other offers made to you?

A. No. That offer was withdrawn in Mr. Lillard's office the same afternoon as this case was, I believe, originally set for trial because I remember I was coming up there in the afternoon just as I did today, to testify.

Q. So that offer was withdrawn April 7?

A. Whatever date it was I was subpoenaed, the date I was subpoenaed, the other time.

Wynne Tolbert.

Q. Have you had any more negotiations since that time?

A. I think Mr. Chipman did say on that date, the attorney for the Friedburgs, that the $20,000 offer was off and that the only thing he would offer at that time was the equivalent of $6,000 I believe, or maybe it wasn't even that much. He would let us stay rent free this year up to a certain date. I don't even remember. I wasn't interested enough page 108 } in the offer to remember the date. It was August or September of this year. He said they weren't in any hurry now for the property, as of this year or this summer, and that we could stay there and they would forgive the rent for this year if we would get off at the end of that time.

Q. When you say "that time", you mean September?

Mr. Lillard: I would like the record to show at this time that this examination is beyond the limits of the direct examination. I realize that Mr. Boothe can call Mr. Tolbert as his own witness if he wants to.

Mr. Boothe: I am glad to.

Mr. Lillard: He is putting in testimony which should be brought in as direct testimony on his part.

The Court: You say you are making him your witness?

Mr. Boothe: Just to save time and avoid any complications, while he is here, I would like to continue.

DIRECT EXAMINATION.

By Mr. Boothe:

Q. So, as I understand, on the afternoon of April 7, indicated that by way of settlement, they would like your client to stay there until the end of September 1958?

A. I don't believe it was that long. I just don't remember. I didn't have any notes with me. I think probably the first of the month of September.

Q. Free of rent?

page 109 } A. Yes, of this year. We would have to pay last year's rent which we had not paid at that time.

Q. I see.

On that score, you had collected last year's rent?

A. Had collected part of it. It was—I was holding part of it in escrow.

Q. Subsequently, to whom did you pay it?

A. I paid it to Mr.—together with additional rents that had become due, were all paid, the Friedburgs, in full, as of April.

Q. This year?

Now, then, when they said that, as I understand it, at the time that Mr. Chipman indicated that you all might be allowed to stay there rent free until September of this year, did I understand you also to say that he made some further comment about whether or not they needed the property?

A. He said—

Q. Or were in a hurry for it?

A. He said they were far enough into the season now that they wouldn't probably be using the property anyway until fall.

Q. I see, sir.

A. That was the essence of it.

Q. After that conversation, and since that conversation, have the Friedburgs, through counsel, made any attempt to further propose to you—made any attempt to

page 110 } to get Mr. Endy and Moore off the property?

A. No, sir.

Mr. Lillard: If the Court please, I would like the record to show that I object to this line of questioning. This has been up before and you have allowed it to come in. I just want the record to show my objection and I take exception to the admission of it.

The Court: All right, sir.

By Mr. Boothe:

Q. Mr. Tolbert, just let me ask you one other question: Had any legal proceedings begun against Endy and Moore for any portion of the property?

A. Yes.

Q. What portion is that?

A. A certain alleged part that was excepted from the lease. They filed an unlawful detainer action in this court which is pending.

Q. That does not cover all the property, does it?

A. No, it covers only the part that is supposed to be excepted, or they say is excepted.

Q. Do you know how much it is, allegedly excepted, out of the three and a half acres?

A. Well, they refer to that portion, the less and except portion, in this Exhibit 16—whatever that may be—I don't know what that is supposed to include.

page 111 } Q. Have any extra legal activities gone on there at the property?

A. Yes.

Mr. Lillard: We object to this, Your Honor. I feel that this is completely immaterial.

Mr. Boothe: I will withdraw it.

The Court: Extra-legal, did you say?

Mr. Boothe: I think we are confined to the legal steps. That's all right. I will withdraw it.

That's all.

Mr. Lillard: I believe Mr. Tolbert testified that attempt was made by the Friedburgs to bring in Endy and Moore as parties defendant in this cause.

Suggest any of the record will show that that attempt was made by counsel for Mr. and Mrs. Horton.

The Court: I think the record so shows, in looking it over this morning.

Mr. Boothe: I am glad it does.

CROSS EXAMINATION.

By Mr. Lillard:

Q. As I recall the negotiations concerning the figure for which Endy and Moore would surrender possession of the property, you said that you made a firm offer of $25,000.

A. I think I made a response to your offer of $25,000. I don't believe I went first.

page 112 } Q. At the time you communicated that to me, had you then confirmed it with both clients?

A. I had not confirmed it with Endy because he was enroute from Florida but Mr. Moore, who supposedly holds the purse, I think had all the authority I needed to settle it as far as that is concerned.

Q. Didn't you say to me at that time that you had not confirmed it with Mr. Endy and you would not need to do that?

A. I don't think I said—you asked me if I had the authority and I said, yes, I was satisfied I did. There was some discussion about that. I don't think those particular words—

Q. At that time, did we discuss the manner of payment of the $25,000?

A. Yes, it was to be in cash, I think. Of course, there was a credit there included in that of the rent that had not been paid because there hadn't been anyone to pay it to since last May of '57.

Howard P. Horton.

Q. Do you recall when that was paid and to whom?
A. I don't believe I understand.
Q. The rent which you said had not been paid at the time we had this discussion. You testified it has since been paid.
A. It has since been paid to the office of Mr. Chipman in Baltimore by Mr. Endy.
Q. Do you remember when it was paid?
page 113 } A. Probably the latter part of April of this year.
Q. It was paid after April '57—April 16, 1958, was it not?
A. Yes, it was paid; we had some correspondence back and forth, I think, among our offices about some of the requirements prior to the payment of the rent and we did pay it within the time stipulated.
Q. How much of that money did you have in escrow?
A. I think it was $3000.

Mr. Lillard: That's all, Your Honor.

* * * * *

HOWARD P. HORTON,
was called as a witness and after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Lillard:
Q. Would you state for the record your name, address and occupation?
A. My name is Howard P. Horton. I live at 610 DeLashmutt Circle, Falls Church. I am a broker.
page 114 } Q. Mr. Horton you sold some land at Bailey's Cross Roads to Sidney M. Friedburg, Herbert L. Friedburg and Sylvia Friedburg Nachlas; is that right?
A. That's right.
Q. Would you state when the cash which was coming to you from the settlement was paid to you?
A. In April 16, 1957.

Mr. Lillard: I have no further questions.

* * * * *

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* * * * *

LYTTON H. GIBSON,
was called as a witness and after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Boothe:
Q. You are Mr. Lytton Gibson?
A. Yes, sir.
Q. An attorney practicing in this court?
A. Yes, sir.
Q. With offices at Falls Church, I believe, sir?
A. Yes, sir.
Q. Mr. Gibson, during the past year or more, you represented Mr. Howard K. Horton, or you have represented Mr. Howard K. Horton, have you not, in a certain chancery proceeding begun by Sidney M. Friedburg and others?
page 129 } A. Yes, sir.
Q. As a matter of fact, I guess you still do represent him, do you not?
A. Well, that part of it is over.
Q. That part of it is over.
Are you familiar with a release dated April 16, 1958, which is by agreement of counsel part of the record in this case appearing in the court papers?
A. Yes, I assume this is a copy of it. I am sure it is. It is signed by the Hortons.
Q. That is the release whereby the Hortons released the Friedburgs and the Friedburgs released the Hortons from all liability in connection with this litigation; is that correct?
A. Yes.
Q. Now, Mr. Gibson, in that release, I believe it says, does it not, that in order to settle the case, the Hortons accept the sum of $36.000 in payment of $76,000 worth of notes which they were holding?
A. That, of course, is what the face of the release says. There was interest which would have been accumulated, too,

on those notes. It isn't mentioned specifically but that interest, of course, is waived by the terms of the release.

Q. That was paid back to the Friedburgs?

page 130 } A. That interest was paid into the court and I am sure the interest that was paid into the court has been released to Mr. Lillard.

Q. Yes, sir.

In other words, apart from the fact that I believe there is to be some cash to make up the $36,000 and some other notes, substantially, as far as the face figures are concerned, $36,000 obligation was settled, or approximately $36,000; isn't that right, on the part of the Friedburgs under that release?

A. As far as Horton is concerned, yes.

Q. Yes, sir, as far as Horton was concerned.

Now, you were representing Mr. Horton during the week prior to, or during the two weeks prior to, the execution of that release of April 16, were you not?

A. Yes, sir.

Q. You were representing Mr. Horton on April 7, 1956, when this—'58—when this case was originally set for hearing?

A. Yes, sir.

Q. Were you representing him during the week prior to that date?

A. Yes, sir.

Q. Now, during that preceeding week, of course, Hiss and Rutledge were parties to the chancery cause, along with Mr. and Mrs. Horton; isn't that correct?

page 131 } A. That's right.

Q. And were there negotiations between you representing the Hortons and myself, representing Hiss and Rutledge, and Mr. Lillard, representing the complainants, in an effort to settle the case?

A. Yes, sir; many negotiations.

Q. And did there come a time when we reached an agreement on a settlement figure provided the two defendants could raise the amount stipulated?

A. It is hard for me to say that we had positively reached an agreement. It was my understanding, however, that if a certain sum could be arrived at, which would be evidenced by either reduction in the notes, by payment of cash, or otherwise, regardless of the mechanics of settlement, a settlement could be reached.

Q. What was that figure?

A. Well, the figure that we had either arrived at or ten-

Lytton H. Gibson.

tatively arrived at, subject to the practical application of it, was $43,500.

Q. In other words, the reduction of the obligation was $43,-500?

A. Yes.

Q. Did that not—do you remember whether or not that entailed, however, the defendants, Hiss and Rutledge, making additional contributions in order to affect the settlement?

A. Yes.

page 132 } Q. How much was that?

A. $7500.

Q. So that the net figure then demanded by the complainants was a reduction to $36,000 in the $76,000 obligation; is that correct?

A. Mr. Boothe, I would have to say I think it is correct, but if I was to say that it was absolutely correct, I would be attempting to read what was in their minds. I am not so sure what was in their minds.

Q. Let me ask you two more questions:

That proposition broke down for what reason?

A. Because you wouldn't come up with the money, with $7500; that is the main reason, I think.

Q. Wouldn't come up with any amount of money?

A. Yes, sir; I should say, I believe, that in fairness to your question, that this settlement was not absolutely firm. This proposed settlement was not absolutely firm with Horton; that it was firm as far as Mr. Lillard and I were concerned, as far as I went, because I felt that I could get Mr. Horton to settle it for that amount. In fact, I had no question in my mind that I could.

I had not, however, gone to the ultimate point of having him say, yes, that's all right.

Q. Just let me ask you this last question:

In the final settlement which was made, which shows in that release of April 16, 1958, was the action one

page 133 } that gave to the plaintiffs what they were demanding, either finally or tentatively, the week before; isn't that correct?

A. There, again, my answer would have to be the same as it was before. It gave to the plaintiffs what I understood to be their demand; whether as a practical matter that was what they had in mind or not, I can't say.

Q. But on April 7, the day of the trial, they did agree to that, in settlement, reduction of the obligation to $36,000

subject to certain conditions; is that correct?

A. Yes, sir.

Q. An extra $7500 instead of coming from me came out of Mr. Horton's pocket; isn't that right, in effect?

A. In effect, by reduction of the notes.

Q. It didn't come out of Mr. Friedburg's, complainant's, pockets, did it?

A. No, no money came out of his pocket in that respect.

Mr. Boothe: That's all, sir.

CROSS EXAMINATION.

By Mr. Lillard:

Q. Mr. Gibson, that proposed settlement you have been talking about involved a simple reduction in the balance of the notes, is that not correct?

A. The final settlement.

Q. The settlement which Mr. Boothe was questioning you about.

A. The proposed settlement?

page 134 } Q. Right.

A. That is the way we were considering it, yes, sir.

Q. Isn't it true that the final settlement involved not a reduction in notes due ten years hence but a payment of so much now, or within a year, that is, $20,000 in cash and $16,000 a year for the discharge of those notes?

A. That's correct. That is why I said in response to Mr. Boothe's question, that I could not say what you had in mind as to the practical way in which this would be settled. That's correct.

Q. Isn't it true that the two are also not the same, that the settlement that was discussed which did not go through because Mr. Boothe would not come up with the money, involved a reduction in a liability to fall due ten years later, whereas the settlement that was made required a discharge of a liability, more than half in cash, then, and the balance in cash within a year?

A. I think that is substantially the way it was. I believe, if my memory is right, that we had discussed several different ways that it could be handled and certainly the method that you mention as being the method was certainly one of them.

Q. Isn't it true that prior to the day when we met here

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in the court room, there had never been any discussion of the production of $20,000 in cash by the Friedburgs?

A. No, there never had been.

page 135 } Q. We had never discussed the production of any cash by the Friedburgs?

A. That figure had never been mentioned. We discussed the possibility of cash one time and the only cash figure I can recall that we discussed specifically was $55,000 in cash, but that is what I was asking you for. That is the only figure I can recall.

Q. Let me state it this way: Isn't it true that prior to the day of the hearing at which time the figure of $36,000 payable by the Friedburgs, $20,000 in cash and $16,000 within a year, there had never been a proposal even made to you whereby the Friedburgs were to pay cash in order to affect the settlement?

A. No, sir, you never agreed to pay cash.

Q. Now, was it not a material consideration on that day, that a liability otherwise falling due ten years later was being settled for cash at a much closer date?

A. Well, there certainly was in my mind. I assumed there was in Horton's mind, that if you got cash today, it would certainly be worth more than a promise to pay cash ten years later, even secured.

Q. Is it not also true that the final settlement agreement which was made between the complainants and the Hortons is completely reflected in the release dated April 16?

A. I am sure that is so, yes, sir. I don't think I even have to look at it. I am sure that is so.

page 136 } Q. And that, as a part of the negotiations on the day that we appeared in court, and throughout the negotiations up to the signing of that agreement on the 16th day of April, that it was always understood that because of action of the Friedburgs against defendants, Hiss and Rutledge for counsel fees and costs, was not being settled?

A. Mr. Lillard, I can't say to my own knowledge that that was your understanding prior to the day we settled. I do know that was your understanding the day we settled because you said it was. But you were not saying—I don't think we ever discussed whether that was or was not considered beforehand. I don't know whether you intended to still pursue your action against Hiss and Rutledge or not.

Q. Are you talking about the day when we were considering

the offer of $43,500, all of which included a contribution of $7500 from these defendants?

A. Yes, I don't know whether you intended to—

Q. Of course, if they contributed $7500 toward the settlement, they would expect a release. That was understood?

A. But I didn't know what was in your mind on that. You had two separate actions, one tort and one contract. I didn't know what you intended to do with them.

Mr. Boothe: Off the record.

(Discussion off the record.)

The Witness: I do know, Mr. Lillard, trying
page 137 } to answer your question directly, that the day of
the settlement in the court, you said before we ever started talking settlement that day, that you were not intending to release Hiss and Rutledge, and you emphasized that several times during the day.

By Mr. Lillard:

Q. That's right.

A. That you were not intending.

Q. At all times when we were discussing the proposal which was finally agreed upon, which involved the payment of $20,000 in cash and $16,000 within a year, that included a discussion which specifically retained the right to proceed against Hiss and Rutledge.

A. That day; there is no question about that. You spoke of that several times.

Mr. Lillard: No further questions.

RE-DIRECT EXAMINATION.

By Mr. Boothe:

Q. Mr. Gibson, one thing: Of course, the notes which were payable in the future also bore interest at six per cent per annum, did they not?

A. The note? The $16,000 note?

Q. And $76,000 worth of notes.

A. Oh, yes, those notes; I don't think it was six per cent. I don't recall. It might have been six. I thought it was five,

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but I don't recall. I don't know what it was. They
page 138 } did bear interest.

Mr. Boothe: That's all. Thank you, sir.

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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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