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Richmond, Va.

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Record No. 5037

In the Supreme Court of Appeals of Virginia at Richmond

T. J. MARSHALL

v.

ENNIS DEAN, ET AL., ETC.

FROM THE CIRCUIT COURT OF ROCKINGHAM 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. 5037

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 17th day of June, 1959.

T. J. MARSHALL, Plaintiff in Error,

against

ENNIS DEAN, ET AL., ETC., Defendants in Error.

From the Circuit Court of Rockingham County

Upon the petition of T. J. Marshall a writ of error and *supersedeas* is awarded him to a judgment rendered by the Circuit Court of Rockingham County on the 23rd day of January, 1959, in a certain motion for judgment then therein depending wherein the said petitioner was plaintiff and Ennis Dean, John Smith and David Yancey, Trustees, etc., were defendants; upon the petitioner, or some one for him, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of three hundred dollars, with condition as the law directs.

RECORD

* * * * *

Filed in the Clerk's Office the 17th day of Sept., 1958.

Teste:

MARGIE BOWERS, D. C.

MOTION FOR JUDGMENT.

To Ennis Dean, John Smith, and David Yancey, Trustees of the Grottoes free Pentecostal Church:

You are hereby notified that on the 12th day of November, 1941, the Plaintiff, T. J. Marshall, because of his devotion to and belief in the doctrine of the Free Pentecostal Church, did convey unto N. J. Morris, Stuart Morris, and T. J. Marshall, Trustees of the Grottoes Free Pentecostal Church, or their successors of the said church, certain real estate located in Grottoes, Virginia, the deed of conveyance therefor being duly recorded in the Clerk's Office of Rockingham County, Virginia, in Deed Book 185, at page 134, and described therein as follows: All that certain lot or parcel of land, situate and lying in the Town of Grottoes, Virginia, being known and designated as Lots Nos. 32 and 33 in Block No. 88 on a plat of Grottoes (Shendum), Virginia, recorded in Deed Book 38, at pages 424 and 425.

(1) That on February 19, 1947 the above named defendants were duly appointed Trustees of the Free Pentecostal Church of Grottoes, Virginia, by order of the Honorable W. V. Ford, Judge of the Circuit Court of Rocking-
page 2 } ham County, Virginia, of record in Common Law Order Book 22, at page 208, as successors to the above-named grantees.

(2) That the plaintiff, T. J. Marshall, expressly reserved in the said deed of conveyance a reversionary interest in said real estate, the fee simple title to immediately revert to the plaintiff if at any time in the future the said real estate should cease to be used as a place of worship by the said Free Pentecostal Church of Grottoes, Virginia; or, should any congregation seek to use said real estate as a place of religious worship not being governed and controlled in their worship as set forth in the aforesaid deed of conveyance, an attested

copy of which is hereto attached and marked as Exhibit No. 1, then the said title to immediately revert to the grantor.

(3) That on or about the 11th day of July, 1958, and up to the time this action was commenced, the hereinbefore described real estate has not been used as a place of worship by the members of the Free Pentecostal Church of Grottoes, Virginia, as required by the aforesaid deed of conveyance as a condition to the defendants retaining possession of and title to the said real estate.

(4) That the hereinbefore described real estate is now in the possession of, and the church located thereon is now being governed by, a congregation whose beliefs are foreign to those of the Free Pentecostal Church.

WHEREFORE, the plaintiff prays judgment in ejectment against the defendants for the delivery of possession of the premises to him, and for the title thereto.

T. J. MARSHALL
By Counsel.

JAMES R. SIPE
510 First National Bank Bldg.
Harrisonburg, Virginia.

GEORGE R. ALDHIZER, JR.
410 First National Bank Bldg.
Harrisonburg, Virginia
Counsel for Plaintiff.

page 3 } EXHIBIT NO. 1.

THIS DEED made and entered into this 12th day of November, 1941, by and between T. J. Marshall of the first part, and N. J. Morris, Stuart Morris, and T. J. Marshall, Trustees of the Grottoes Free Penecostal Church, or their successors of the said church, a corporation of the second part, WITNESSETH: That, for the consideration of the sum of Eighty Dollars ($80.00), cash in hand, and other good and valuable consideration receipt of all which is hereby acknowledged, at and before the sealing and delivery of these presents the said party of the first part, do hereby grant and convey with general warranty of title unto the parties of the second part; And their successors in office as trustees as aforesaid, the following described real estate, together with all appurtenances thereunto belonging or, anywise appertaining to-wit: all that certain lots, or parcel of land situate and laying

in the Town of Grottoes, Virginia, being known and designated as Lots No. 32 and 33 in Block No. 88 and being the same lots conveyed to T. J. Marshall by deed dated the 5th day of August, 1939, by Mrs. Sallie M. Leeth, and duly of record in the Clerk's Office in Harrisonburg, Rockingham County, Virginia, Deed Book 180, at page 439, reference is herein made. This conveyance is made to said three Trustees to have and to hold said real estate for the sole and exclusive use and benefit of the Free Pentecostal Church of Grottoes, Virginia, which said church or congregation for the purposes of this Deed shall be defined as a religious congregation who shall be governed by a board of three deacons or deaconesses, who shall have had the experience of the baptism of the Holy Ghost with the initial evidence of speaking in other tongues, according to the Bible, Acts 2 and 4, at the election, page 4 } which deacons or deaconesses; or their successors in office, shall be reelected or elected anew annually by the members of the above named congregation of worship. This conveyance is made upon the express reservation, and the said parties of the first do hereby expressly reserve and provide, that should at any time in the future the property hereinbefore conveyed cease to be used as a place of worship by the said Free Pentecostal Church of Grottoes, Virginia, or should any congregation seeking to use said property, as a place of religious worship not being governed and controlled in their worship in the manner hereinbefore provided, then and in that event said real estate shall immediately revert to T. J. Marshall;

Given under my hand and seal.

T. J. MARSHALL, (Seal)

State of Virginia,
Rockingham County, to-wit:

I, L. H. Bruce, a notary public in and for the aforesaid county do certify that T. J. Marshall whose name is signed to the above writing bearing date of November the 12th day 1941, has acknowledged the same before in my aforesaid County. My commission expires July the 25th day 1942. Given under my hand this 14th day of Nov. 1941.

L. H. BRUCE,
Notary Public

Virginia:

In the Clerk's Office of the Circuit Court of Rockingham County. The foregoing deed of BARGAIN & SALE was this day presented in the office aforesaid and is together with the certificate of acknowledgment annexed, admitted to record this 14th day of November, 1941, 4:20 P. M.

Teste:

J. ROBERT SWITZER, Clerk.

Copy
Atteste:

J. ROBERT SWITZER, Clerk.

page 5 } PROOF OF SERVICE.

Virginia:

In the Circuit Court of the County of Rockingham.

LAW NO. 3960.

T. J. Marshall, Plaintiff,

v.

Ennis Dean, Elkton, Virginia, John Smith, Grottoes, Virginia, David Yancey, Port Republic, Virginia In their capacity as Trustees of The Free Pentecostal Church of Grottoes, Virginia, Defendants.

Returns shall be made hereon, showing service of Notice issued September 17, 1958, with copy of Motion for Judgment filed September 17, 1958, attached:

Executed on the 22 day of Sept., 1958, in the County of Rockingham, Virginia, by delivering a true copy of the above mentioned papers attached to each other, to John Smith and David Yancey, Ennis Dean in person.

A. L. STRAWDERMAN
Sheriff, County of Rockingham, Va.
By ROBERT H. RAYNES, Deputy Sheriff.

Returned and filed the 26th day of Sept., 1958.

J. ROBERT SWITZER, Clerk
By MARGIE BOWERS, Deputy Clerk.

* * * * *

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* * * * *

Filed in the Clerk's Office Rockingham County, Va. Oct. 9, 1958.

J. ROBERT SWITZER, Clerk.

DEMURRER.

The defendants, Ennis Dean, John Smith, and David Yancey, Trustees of the Free Pentecostal Church of Grottoes, Virginia, say that the plaintiffs Motion for Judgment in this action is not sufficient at law and state the grounds of this demurrer as follows:

(1) The Motion fails to allege any facts showing that the subject real estate has not been used as a place of worship by the members of the Free Pentecostal Church of Grottoes.

(2) The Motion fails to allege any facts showing that said church is not being governed according to the requirements of the Marshall deed.

(3) The Motion fails to allege that the plaintiff has made demand for possession of said real estate and that such demand has been refused.

(4) The Motion fails to allege who is now in possession of said real estate.

(5) The Motion fails to allege any facts justifying judgment in ejectment against the defendants.

ENNIS DEAN, JOHN SMITH,
and DAVID YANCEY, Trustees
of the Free Pentecostal Church
of Grottoes
By Counsel.

page 7 } GEORGE D. CONRAD
DONALD D. LITTEN
First National Bank Building
Harrisonburg, Virginia
Counsel.

* * * * *

page 8 }

* * * * *

ORDER OVER-RULING DEMURRER AND REQUIRING FILING OF BILL OF PARTICULARS.

This 4th day of November, 1958, came the parties by counsel and after hearing argument on the defendants' demurrer to the plaintiff's motion for judgment, it is ORDERED that said demurrer be and is over-ruled, to which action of the court the defendants, by counsel, excepted.

And upon motion of the defendants, by counsel, it is further ORDERED that the plaintiff file a bill of particulars with respect to the alleged violation of the restrictive covenants in the Marshall deed, within 10 days from the date of this Order, and that the defendants be allowed 21 days after the filing of such statement for the filing of their statement of defense or other pleadings to the plaintiff's motion for judgment.

Enter.

H. H.

Seen.

G. J. C.

Seen.

G. R. A., JR.

Seen.

J. R. S.

* * * * *

page 9 }

* * * * *

Filed in the Clerk's Office Rockingham County, Va. Nov. 15, 1958.

J. ROBERT SWITZER, Clerk.

BILL OF PARTICULARS.

Now comes the plaintiff and for his Bill of Particulars says:

That the conditions in the deed referred to and made a part of the Motion for Judgment have been breached as follows:

That the deed expressly requires that the religious congregation of the Free Pentecostal Church of Grottoes be governed by a board of three deacons or deaconesses. That on or about the 16th day of July, 1958, a meeting of the congregation of the then Free Pentecostal Church of Grottoes was called by its Minister, John Morris, for the purpose of voting whether to remain in the Free Pentecostal Conference by continuing to accept their doctrines, or accept the Jesus Only or Apostolic doctrines and be excluded from the Free Pentecostal Conference. The three deacons then in office were Noah Morris, Joseph Gibson, and Nelson Meadows. Said board of deacons was not consulted in order to decide which course of action should be taken although the deed expressly requires that the religious congregation shall be governed by a board of three deacons or deaconesses.

That the deed further requires that the boards of three deacons or deaconesses shall be elected annually. Noah Morris, Joseph Gibson and Nelson Meadows were elected as the three members of the board of deacons in or about June, 1958 and were removed as deacons on or about the latter part of July, 1958, thereby breaching the condition in the deed which requires that such board shall be elected annually.

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T. J. MARSHALL
By Counsel.

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Filed in the Clerk's Office Rockingham County, Va. Dec. 4, 1958.

J. ROBERT SWITZER, Clerk.

STATEMENT OF DEFENSE AND MOTION FOR SUMMARY JUDGMENT.

The defendants will rely upon the following defenses in this action:

1. They deny that the meeting that the congregation held on or about July 16, 1958, was called by the Minister and aver that such meeting was called by the three deacons then in office or by majority of such deacons.

2. They admit that the meeting was called for the purpose of voting whether to remain in the conference of the Free Pentecostal Churches, but deny that the meeting was called for the purpose of considering any change in the doctrine of the church.

3. They aver that The Free Pentecostal Church of Grottoes has at all times prior to the institution of this suit been governed by a board of three duly elected and qualified deacons and aver that there is no restriction in the covenants in said deed which prohibits the said congregation from removing any deacon or from electing a successor to any deacon who might be removed or resign.

4. They deny that there has been any violation of restrictive covenants set out in the deed from T. J. Marshall which is filed as an Exhibit in this suit.

page 12 } 5. They aver that the lot which was conveyed by T. J. Marshall for the use of The Free Pentecostal Church of Grottoes is of only slight or nominal value and that the main value of the property involved in this action is in the buildings and improvements which are of considerable value and which were erected there by the congregation of The Free Pentecostal Church of Grottoes by their own labor and at their own expense, that in the event judgment is rendered for plaintiff in this proceeding his recovery should be limited to the value of said lot, or he should be required to pay to the defendants for the benefit of said congregation the value of the improvements on said land as a condition precedent to the recovery of possession of said property.

6. They aver that the facts stated in the bill of particulars, even if true, are not sufficient to constitute a cause of action, and therefore move for summary judgment in favor of the defendants in this suit.

ENNIS DEAN, JOHN SMITH AND
DAVID YANCEY, TRUSTEES OF
THE FREE PENTECOSTAL
CHURCH OF GROTTOES, VIRGINIA
By Counsel.

* * * * *

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MEMO OF COURT.

The motion for judgment for the recovery of the church property at Grottoes, legal title to which is held by defendants, is founded on the allegation that there has been a breach in the stated conditions of the plaintiff—grantor's deed—in that said property has ceased to be used by the Grottoes Free Pentecostal Church and is no longer in its possession, but now in the control of a congregation of different belief and faith.

Yet the bill of particulars filed by plaintiff does not support the breach alleged in the motion for judgment. It merely sets out that a congregational meeting was called to vote on its withdrawal from the Free Pentecostal Conference and that the three formerly elected deacons were removed.

Being of the opinion that the particulars stated by plaintiff are insufficient to support his motion, an order may be drawn sustaining defendants' motion for a summary judgment.

HAMILTON HAAS, Judge.

January 14, 1959.

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* * * * *

ORDER FOR SUMMARY JUDGMENT FOR DEFENDANT.

This 23rd day of January, 1959, came the parties by counsel and the court having heard argument on the motion of the defendants for summary judgment on the pleadings, and having maturely considered the same, and it appearing to the court that the parties in this case are at issue, and that the facts stated in the plaintiff's bill of particulars are not such as to constitute a violation of the restrictive covenants in the Marshall deed, or to support the charge of such violation as stated in the plaintiff's motion for judgment, the court is of the opinion and doth hereby ORDER that the defendants motion for summary judgment be sustained, and it is further

ORDERED that final judgment be and is hereby entered in favor of the defendants and that the defendants do recover of the plaintiff their costs in this behalf expended to which action of the court the plaintiff by counsel excepted.

Enter.

H. H.

Seen.

G. R. A., JR.

Seen.

J. R. S.

* * * * *

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* * * * *

Filed in the Clerk's Office Rockingham County, Va. Mar. 16, 1959.

J. ROBERT SWITZER, Clerk.

NOTICE OF APPEAL AND ASSIGNMENT OF ERROR.

To J. Robert Switzer, Clerk of Circuit Court of Rockingham County, Virginia:

T. J. Marshall, Plaintiff in the above-styled action at law, hereby gives notice, pursuant to the provisions of Section 4, Rule 5:1 of the Rules of the Supreme Court of Appeals of Virginia, of his intention to appeal from that certain final order entered January 23, 1959, in which the Court sustained the Defendants' Motion for Summary Judgment and dismissed the action in ejectment brought by the Plaintiff, T. J. Marshall.

The Plaintiff hereby assigns the following errors:

(1) The Court erred in sustaining the Defendants' Motion for Summary Judgment and dismissing Plaintiff's action in ejectment because the Defendant is not entitled to judgment as a matter of law in this case.

(2) The Court erred in sustaining the Defendants' Motion for Summary Judgment and dismissing Plaintiff's action in ejectment because there are material facts genuinely in dispute in this case that cannot be taken away properly and legally from a jury.

(3) The Court erred in sustaining the Defendants' Motion for Summary Judgment and dismissing Plaintiff's action in ejectment since it did so on the basis of the Plaintiff's Bill of Particulars alone, without considering the Plaintiff's motion for judgment in making this determination.

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(4) The Court erred in sustaining the Defendants' Motion for Summary Judgment and dismissing Plaintiff's action in ejectment since the Court, having previously overruled the Defendants' demurrer, determined that the Plaintiff in his Motion for Judgment had stated a cause of action.

T. J. MARSHALL
By Counsel.

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.

CLERK
SUPREME COURT OF APPEALS
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RICHMOND, VIRGINIA