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Richmond, Va.

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Record No. 5051

In the Supreme Court of Appeals of Virginia at Richmond

FIRST NATIONAL TRUST AND SAVINGS BANK, TRUSTEE, ETC.

v.

LOUISE G. RAPHAEL, ET AL.

FROM THE CORPORATION COURT OF THE CITY OF LYNCHBURG

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.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 5051

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 23rd day of June, 1959.

FIRST NATIONAL TRUST AND SAVINGS BANK, TRUSTEE, ETC., Appellant,

against

LOUISE G. RAPHAEL, ET AL., Appellees.

From the Corporation Court of the City of Lynchburg

Upon the petition of First National Trust and Savings Bank, Trustee, under the will of Minnie J. Knight, deceased, an appeal is awarded it from a decree entered by the Corporation Court of the City of Lynchburg on the 26th day of March, 1959, in a certain proceeding then therein depending wherein the said petitioner was plaintiff and Louise G. Raphael and others were defendants; no bond being required.

RECORD

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COMPLAINT.

To the Honorable S. Duval Martin, Judge.

Your complainant, First National Trust & Savings Bank, Trustee, under the will of Minnie E. Knight for the Krise Memorial Fund, respectfully shows unto your honor as follows:

1. Complainant holds legal title to a certain lot in the City of Lynchburg fronting on the southwest side of Main Street between Eighth Street and Ninth Street, the building whereon is designated as No. 823 Main Street. This property, now under lease to Chamberlains Clothes, Inc., is being used solely for the purpose of the sale of merchandise. The said lot owned by this complainant fronts for a distance of 15 feet more or less, on Main Street, and runs back to a depth of 132 feet. Said lot is occupied by a three-story building, which extends back from Main Street for a distance of 60 feet more or less. The remaining portion of the lot on the southwest end thereof is entirely unoccupied and unproductive.

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2. The property immediately adjacent to the store house aforesaid is designated as 821 Main Street and is owned by the respondents, Louise G. Raphael, Fannie G. Ries, A. Leonard Goodman and Sidney A. Goodman, residing as above set forth. Said lot fronts on the southwest side of Main Street about 21 feet, and extends back to the full depth of said lot a distance of 132 feet. The building thereon is three stories in height and is now occupied and used by Jackson's Drug Store under lease, the building being used entirely for merchandising purposes, the said Drug Store and sale activities occupying the first floor and the upper floors are utilized solely for the storage of merchandise for sale in the said store.

3. About the year 1847 the property No. 823 Main Street, now owned by complainant, was owned by Samuel McCorkle and the adjoining property now owned by respondents, was owned by Hamilton Boyd. At that time Boyd utilized the ground floor of his building as a store and occupied the upper floor for a family residence. McCorkle was then preparing to erect a building on his lot adjoining the eastern wall of Boyd's house and wished to utilize that wall as a party wall, for the distance that the McCorkle building extended back

from Main Street. In order to authorize McCorkle
page 3 } to utilize the eastern wall of the Boyd lot the parties
entered into a deed dated October 10, 1847, recorded in Lynchburg Clerk's Office in Deed Book R, page 128, whereby Boyd gave McCorkle permission to utilize the eastern wall of his house No. 821 Main and McCorkle agreed that he would not extend his building further back, by reason of the fact that such extension "might inconvenience and damage Boyd by darkening and obstructing the windows and lights of that part of his house now used as a family residence and store." And in consideration of the use of the party wall McCorkle agreed that he would never erect in the rear of his building "any buildings, improvements or other things which will in any manner or by any means whatsoever lessen, obstruct, impede or hinder the flow or use of light now enjoyed by the said Boyd from that direction or which will in the remotest degree darken his lights, apertures and windows in that part of his house now occupied as a family residence as aforesaid." A copy of the deed aforesaid is herewith filed marked Exhibit A.

4. In recent years it has become desirable and financially advantageous to the property No. 823 Main Street to have the building on said lot enlarged with increased floor space available on the Main Street level for sales purposes. In considering the enlargement of the building complainant has been restrained and hindered by reason of the covenant aforesaid and has sought permission from the respondents to enlarge the said building to the full depth of the lot. Respondents have refused this permission, except upon the payment
of a financial consideration which complainant be-
page 4 } lieves to be prohibitive, and to be destructive of the
profit that Complainant would receive as a result of the extended construction. Complainant believes that it would be greatly to the financial benefit of the complainant's property if the building could be extended and enlarged.

5. The tenants of the respondents occupying their building have long since abandoned the use of the same for residential purposes and utilize the upper floors for storage purposes alone, deriving no benefit whatever from the retained privilege of receiving light over complainant's lot, unobstructed by building. In recent years Main Street real estate is no longer occupied in its upper floors for residential purposes, especially in the case of narrow buildings whose upper floors are not adapted for residential occupation and have no means of access provided except through the business operation on the ground floor. Under modern construction and design, artificial lighting has already taken the place of light from outside

windows. Under these tendencies and customs the property of the respondents has for a long time been deriving its light from within their said building, without relying upon or utilizing the window openings adjoining the property of the complainant, and complainant now alleges that day light and sun light derived through window openings have become an obsolete source of illumination and have fallen into disuse and the privilege is of no value to the respondents.

7. The easement originally created for the benefit of the respondents' property, for the particular purpose of adapting the upper floor of the property to residential use, no page 5 } longer serves any useful purpose, and with the abandonment of such use the easement over complainant's property should come to an end. Complainant alleges that the parties to the deed of 1847 intended that the said easement should continue so long, and only so long, as the reserved right of light served any purpose useful or valuable to the respondents. Since such easement serves no such purpose and will never again serve such purpose, complainant alleges that the said easement has failed of its purpose, is worthless to the respondents, and should therefore be cancelled and annulled so as to permit complainant to extend its building upon the property.

8. An actual controversy having arisen between the parties concerning their rights under the deed of 1847 and particularly the complainant's right to construct a building on said lot, complainant prays that this Court render a declaratory judgment with respect to the existence of said easement and that the same may be cancelled and annulled and complainant be permitted to construct its building over the entire area of its said lot.

FIRST NATIONAL TRUST AND
SAVINGS BANK TRUSTEE
UNDER THE WILL OF MINNIE
E. KNIGHT
By S. H. WILLIAMS
Attorney.

Filed Dec. 12, 1958.

H. H. M., Clk.

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page 6 } EXHIBIT A.

This Indenture, made and entered into by and between

Samuel McCorkle of the first part and Hamilton Boyd of the second part, both of the Town of Lynchburg, Va., Witnesseth, That whereas the said parties are each the owners of certain real property, adjoining one the other, on Main or 2d Street of the said Town on the south side, and immediately above "Quinn's Corner," and the said Boyd, on his lot has had for many years, a store house and family residence. And whereas the said McCorkle has of late erected and is now finishing a large house of two tenements on the lot owned by him, the lesser of which tenements of said house, by the consent and permission of the said Boyd, has been erected so as to abut and adjoin the eastern wall of said Boyd's house, making that wall common both to said Boyd & said McCorkle, so far as the lesser tenement of the latter extends back, as will be better explained by a diagram annexed to this Indenture, and to be regarded as part and parcel of it. And whereas the permission thus given by said Boyd has been of pecuniary benefit to said McCorkle. But as the farther extension back of said lesser tenements by said McCorkle or the building of any other house or houses immediately in the rear thereof might both seriously incommode, as well as damage the said Boyd by darkening and obstructing the windows and lights of that part of his house now used as a family residence and store.

Now therefore for and in consideration of the premises the said parties for themselves, their heirs &c mutually covenant, one with the other as follows:—the said Boyd binds himself, his heirs &c that the said lesser tenement of said McCorkle's House, and the said wall of his, said Boyd's house, shall forever stand each to the other as they now do. The said tenement adjoining the eastern wall of Boyd's house, and that wall answering as a common wall to both houses, so far as the said lesser tenement extends back at this time. In consideration of which the said McCorkle binds himself, his heirs &c, never to erect in the rear of the said lesser tenement of his house (on the vacant space of ground now page 7 } there) any buildings, improvements or other thing whatsoever, which will in any manner, or by any means whatsoever lessen, obstruct, impede or hinder the flow or use of light now enjoyed by said Boyd from that direction—or which will in the remotest degree darken his lights, apertures and windows, in that part of his house now occupied as a family residence as aforesaid and the said McCorkle further agrees that the rain water which now falls off said Boyd's house in the rear of said lesser tenement, shall, as it now does, continue to fall upon and also be carried off on said McCorkle's ground without hindrance or obstruction.

In Witness whereof the parties to these presents have hereunto set their hands and affixed their seals this 10th day of October A. D. 1847.

SAML. McCORKLE (Seal)
H. BOYD (Seal)

Diagram referred to in deed.

* * * * *

"Printers note: Diagram not printed."

In the Clerk's Office of the Lynchburg Hustings Court June 6th 1848. This deed was acknowledged before the Clerk by Samuel McCorkle and Hamilton Boyd, parties thereto and admitted to record.

Teste:

JAMES BENAGH, Clerk.

A Copy—Teste:

HUBERT H. MARTIN, Clerk.

Filed Dec. 12, 1958.

H. H. M., Clk.

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DEMURRER.

The respondents, Louise G. Raphael, Fannie G. Ries, A. Leonard Goodman and Sidney A. Goodman, demur to the bill of complaint and say that the said bill of complaint is not sufficient in law.

WM. ROSENBERGER, JR.
Attorney for the Respondents
407 First Colony Life Building,
Lynchburg, Virginia.

I, Wm. Rosenberger, Jr., attorney for the respondents, certify that a copy of the foregoing Demurrer was mailed to S. H. Williams, Esq., 709 First Colony Life Building, Lynch-

burg, Virginia, attorney for the complainant, on this the 16th day of January, 1959.

WM. ROSENBERGER, JR.
Attorney for the Respondents
407 First Colony Life Building,
Lynchburg, Virginia.

Filed Jan. 16, 1959.

H. H. MARTIN, Clerk.

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GROUNDS OF DEMURRER.

For grounds of demurrer, the respondents say that the bill of complaint shows:

(1) That the predecessors in title of the parties, for a valuable consideration, by their writing under seal, duly recorded in the Clerk's Office of this City, made a covenant running with the land now owned by the complainant, and thereby established a perpetual easement of light, air and view, and a perpetual easement for drainage, for the benefit of the land of the respondents over the land of the complainant, which has not been extinguished, and the complainant purchased the property with due notice thereof;

(2) That the predecessors in title of the parties, for a valuable consideration, by their writing under seal, duly recorded in the Clerk's Office of this City, made a covenant running with the land now owned by the complainant, and thereby established a party wall agreement that the wall common to both buildings, so far as the building on the land of the complainant extends back, "shall forever stand each to the other as they *now do,*" thereby restricting the building on the complainant's property to the area then occupied by it, and the complainant purchased the property with due notice thereof; and

(3) That the respondents own a vested property interest in the land of the complainant, located to the rear of the building locally known as 823 Main Street, Lynchburg, Virginia, and to grant the prayer of the bill of complaint would constitute the taking of private property for private use, without due process of law, in violation of the Constitution of

the Commonwealth of Virginia and the Constitution of the United States of America.

WM. ROSENBERGER, JR.
Attorney for the Respondents
407 First Colony Life Building,
Lynchburg, Virginia.

Filed by leave of court: Mar. 26, 1959.

H. H. M., Clk.

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ORDER.

This day came all the parties by their respective counsel, and the defendants, by counsel, asked leave of court to file the grounds of their demurrer: and the plaintiff, by counsel, not objecting, leave is given to file the said grounds of the demurrer, and same is accordingly filed. And this case came on this day to be heard upon the complainant's bill of complaint and exhibit filed therewith, upon the demurrer of the defendants to the complainant's bill of complaint, and the grounds thereof. And the said demurrer was argued by counsel for the respective parties.

UPON CONSIDERATION WHEREOF, the Court deeming as well taken the grounds of said demurrer, doth sustain same and order that the complainant's bill of complaint be dismissed.

And nothing further remaining to be done herein, it is ordered that this case be stricken from the docket.

The complainant, by counsel, excepted to all the foregoing actions of the Court, and same is here noted.

Enter 3-26-59.

S. D. M.

Seen:

S. H. WILLIAMS
Atty. for complainant.

WM. ROSENBERGER, JR., p. d.

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NOTICE OF APPEAL AND ASSIGNMENT OF ERROR.

To H. H. Martin, Clerk of the Corporation Court for the City of Lynchburg:

The complainant, First National Trust & Savings Bank, Trustee, by counsel hereby gives notice, pursuant to the provision of Sec. 4 of Rule 5:1 of the Rules of the Supreme Court of Appeals of Virginia of its appeal from the final judgment entered in the above action on March 26, 1959.

The complainant assigns as error the action of the court in sustaining a demurrer to the bill of complaint, seeking a declaratory judgment and alleging that an actual controversy has arisen between the parties.

Respectfully,

FIRST NATIONAL TRUST &
SAVINGS BANK, TRUSTEE
By S. H. WILLIAMS
Attorney for complainant.

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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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SUPREME COURT OF APPEALS
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