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Clerk, Supreme Court of Appeals
Richmond, Va.

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Record No. 5100

In the Supreme Court of Appeals of Virginia at Richmond

W. S. HUNDLEY

v.

JESSE R. HULBER, ET AL.

FROM THE CIRCUIT COURT OF MECKLENBURG 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. 5100

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 14th day of October, 1959.

W. S. HUNDLEY, Appellant,

against

JESSE R. HULBER, ET AL., Appellees.

From the Circuit Court of Mecklenburg County

Upon the petition of W. S. Hundley an appeal is awarded him from a decree entered by the Circuit Court of Mecklenburg County on the 29th day of June, 1959, in a certain chancery cause then therein depending wherein the said petitioner was plaintiff and Jesse R. Hulber and others 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

* * * * *

BILL OF COMPLAINT.

To Honorable G. E. Mitchell, Jr., Judge:

W. S. Hundley, hereinafter referred to as "complainant, tenders his Bill of Complainant against Jesse R. Hulber, and others, hereinafter referred to as "respondents"; that Butler Lumber Company, Inc., Butler Land & Timber Company, Inc., J. T. Butler, J. W. Butler, C. R. Butler, and Dorothy Butler, Individually, and as partners, T/A Butler Lumber Company, are engaged in acquiring, manufacturing and selling lumber products, from time to time, acquiring timber in the name of different of its said organizations, or its individual members, all of which said individual or organizations are under the general direction of J. T. Butler, the principal manager thereof, the name of specific one of said group undertaking to take title to certain timber mentioned, to the prejudice of complainant herein, as hereafter set forth, being not known to complainant, and accordingly referred to as "Butler" herein, and states the following cause:

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1. That respondents, Jesse R. Hulber, Peter P. Hulber, Anthony Hulber and Louis Hulber, Jr., were, on the 9th day of April, 1959, the co-owners of the standing timber or trees, which measured 7 inches across the stump at a level of 7 inches above the ground, groving on two tracts or parcels of land in Boydton Magisterial District, Mecklenburg County, Virginia, containing 217.77 acres and 183.8 acres, respectively, adjoining the lands now or formerly owned by M. A. Allgood, Mrs. J. J. Oslin, Daniels and Parks, and others, being the tracts of land as conveyed them by deed of Anton Nagy dated September 20, 1951, and recorded in Deed Book 139, Page 360, in the Clerk's Office of Mecklenburg County, Virginia, with reference being made to said deed for a better description of the lands of which said timber is situate.

2. On the said 9th day of April 1959, complainant, after having spent a period of approximately 8 days in cruising, estimating and viewing the said timber, conferred with three of the co-owners, with a view to purchasing the said timber measuring 7 inches across the stump at a level 7 inches above the ground, excepting hickory and cedar trees, with

milling rights on said premises to December 31, 1962, negotiations with said three co-owners and complainant, on that day, made a firm offer to buy said standing timber for $64,000.00 in cash, which sum complainant stood ready to pay in cash, when said three of the four co-owners told complainant that they would accept said offer, but had to obtain the agreement of the fourth co-owner, who was in New York, to conclude said sale, which they agreed to do promptly, and which they did, in accordance with their agreement.

page 3 } 3. On April 12, 1959, respondents Anthony Hulber and Jesse R. Hulber, both of whom, with Peter P. Hulber, had previously accepted complainant's offer for said timber, but were awaiting the decision of their brother, Louis Hulber, Jr., then in New York, came to complainant's home at Boydton, Virginia, then exhibited to complainant the letter of Louis Hulber, Jr., accepting complainant's offer, and authorizing them to accept complainant's offer of $64,000.00 for said standing timber, with milling rights to December 31, 1962, whereby complainant's purchase was made fast, and firmly accepted, by which complainant became the legal owner of said timber (other than hickory and cedar) which measured 7 inches across the stump, 7 inches above the ground, together with the right of entering said premises and to employ the usual sawmill privileges thereon, to remove said timber at his convenience, but prior to December 31, 1962, which said sale and purchase was thereby definitely concluded, and said timber thereby became personal property.

4. Complainant avers that said Anthony Hulber, with the other former co-owners of said timber, then stated that they would have a writing prepared for execution by them, to evidence their sale of said timber to complainant, when on the 12th day of April 1959, they directed their attorney to prepare such a writing, to evidence their said timber sale to complainant, which delayed, but was dated on the 14th day of April 1959, an exact copy of which is hereto attached and made a part of this bill *fo* complaint. Complainant further avers that the sale of said standing timber was complete and absolute, and title to said standing timber passed to complainant with acceptance by respondents on April 12, 1959, of complainant's offer, it then being definitely agreed that complainant's payment should be made on a specified date later in that week.

page 4 } 5. Complainant avers that on the 13th day of April 1959, one Albert Butler, and others, representing, and as agents for either Butler Lumber Company, Inc., Chase City, Virginia, or Butler Land & Timber Com-

pany, Inc., Chase City, Virginia, or J. T. Butler, J. W. Butler, C. R. Butler, Dorothy Butler, Partners, T/A Butler Lumber Company, or as individuals, the exact principal among them being unknown to complainant, but which is well known to said respondents, approached Jesse R. Hulber and Peter P. Hulber, with reference to a purchase of the said standing timber, as had previously been sold complainant, when said respondents, Butlers, were advised that the standing timber aforesaid had been sold to complainant, and the writing in evidence of the sale had been sent to New York for execution, but notwithstanding this fact being well known to Butler Lumber Company, Inc., Butler Land & Timber Company, Inc., or J. T. Butler, J. W. Butler, C. R. Butler, and Dorothy Butler, Partners, T/A Butler Lumber Company, for one of whom said party or parties were then acting, entered the premises and, notwithstanding, that said timber had been purchased by complainant, engaged in viewing and cruising said timber on April 13, 1959, and April 14, 1959, after said sale had been concluded; that said Butler knowing of the said sale, and that Hulbers had prepared a writing in evidence of their sale, which had been sent to New York for execution by Louis Hulber, Jr., to be returned and executed by the other co-owners in Virginia, but to forestall the execution of said evidence, said Butler employed an attorney after normal office hours on the night of April 14, 1959, and had him obtain admittance to the Clerk's Office of Mecklenburg County, Virginia, after hours; to make an examination of the record status of said standing timber; to prepare in the nighttime a writing to be executed by said four former co-owners to either Butler Lumber Company, Inc., page 5 } Butler Land & Timber Company, Inc. or J. T. Butler, J. W. Butler, C. R. Butler, Dorothy Butler, Partners, T/A Butler Lumber Company, or to one or more of them individually, the exact grantee therein being unknown to complainant, since from time to time said parties acquire standing timber in different of their corporations or partnership organizations, all being under the control primarily of J. T. Butler, after which Butler engaged an airplane for an emergency flight to New York, taking the instrument as prepared by said attorney, and complainant is advised and avers that said Butler, well knowing complainant had purchased said standing timber, then offered the said Louis Hulber, Jr., in New York, and the other co-owners of said timber in Virginia, the sum of $68,500.00 therefor, with knowledge that the instrument in evidence of complainant's purchase was then in the possession of Louis Hulber, Jr., in New York, for execution, and complainant avers thereby

the said Butler, by said acts, and conspiracy, obtained execution of a writing from the said Hulbers to Butler as purported purchasers of the said standing timber, well knowing it was then owned by complainant.

6. Complainant avers that by the definite acceptance of complainant's offer for said standing timber by Anthony Hulber, Peter P. Hulber, Jesse R. Hulber, Louis Hulber, Jr., together with his right to enter said premises to cut and remove the said timber within a definite period, at his convenience, not later than December 31, 1962, without other conditions, said standing timber thereby became personal property, and was, at law, the personal property of complainant, which was known to the said Butler at the time they conspired to have the aforesaid instrument executed to them therefor, and that, at law, said standing timber is now the property of complainant, for which he stands ready to pay to said Hulbers in accordance with his contract of purchase with them.

page 6 } 7. That should the said Butler, or the one among said Butler respondents, taking the said instrument of purchase for the said timber, proceed to harvesting and removing the same, it would be wholly impossible for your complainant to get any proper, or adequate record of the amount, or quality of cut timber removed from his said purchase, so as to enable complainant to protect his rights at law, and to determine the damages done complainant by reason of the conspiring acts of said Butler with Hulbers; and that Butler ordinarily cuts timber into odd sizes and shapes to manufacture boxes, crates, etc., which is not susceptible to standard estimations, so complainant therefore avers that complainant would suffer irreparable injury and damage in the premises if specific performance of his contract of purchase of said timber be not decreed him by this Court; and that he has no adequate remedy at law.

8. Complainant therefore avers that since he would suffer irreparable injury and damage should the said Butler proceed to cut the standing timber so owned by complainant, and since the efforts of the said Butler to purchase the timber of the 4 Hulber co-owners was after they had knowledge complainant had purchased it, complainant is entitled to have specific performance of his contract of purchase made by Anthony Hulber, Peter P. Hulber, Jesse R. Hulber and Louis Hulber, Jr., under a decree of this Court; and is advised that a temporary injunction should be forthwith decreed enjoining and restraining Butler Lumber Company, Inc., Butler Land & Timber Company, Inc., J. T. Butler, J. W. Butler, C. R. Butler, Dorothy Butler, Partners, T/A

Butler Lumber Company, or either of them individually, but specifically the one among them named in said contract as purchaser, restraining such named grantee from entering said premises, or from cutting any of complainant's said timber, or undertaking to resell the same to an page 7 } innocent purchaser on the said written evidence of their alleged ownership held either of them, and that said injunction should be made permanent upon a final hearing herein; that this Court should appoint a Special Commissioner to receive the purchase price of $64,000.00 agreed to be accepted for said timber by Anthony Hulber, Peter P. Hulber, Jesse R. Hulber and Louis Hulber, Jr., from complainant, and he be directed to disburse the same to the said co-owners according to their interest at the time of their sale, which sum complainant avers he stands ready to pay to the Court in accordance with his purchase; that the said Hulbers and each of them, should be enjoined and restrained from interfering with complainant, his agents, assigns and employees, in entering said premises, and cutting, manufacturing and removing said timber therefrom, in accordance with his purchase.

Complainant therefore prays:

(A) That Anthony Hulber, Peter P. Hulber, Jesse R. Hulber, and Louis Hulber, Jr., be required to specifically perform their contract making sale of said standing timber to your complainant at their agreed price of $64,000.00; that a Special Commissioner be appointed by the Court to receive said sum from your complainant, which he stands ready to pay, and disburse the same to the Hulbers according to their interest; that said standing timber be decreed to be personal property, and that the same, at law belongs to your complainant under his said purchase of April 12, 1959, and it be adjudged that the Butler respondents had knowledge that complainant owned said timber at the time of their acts hereinbefore alleged.

(B) That Butler Lumber Company, Inc., Butler Land & Timber Company, Inc., J. T. Butler, J. W. Butler, C. R. Butler, Dorothy Butler, Partners, T/A Butler Lumber Company, all or either of them that undertook to acquire page 8 } title to said timber, as grantee in any writing as alleged herein, be by decree of this Court temporarily enjoined and restrained from entering the premises aforesaid, and from cutting or removing any of the said standing timber, or from assigning or transferring any alleged claim to ownership thereof to any purchaser until a final hearing herein by this Court; that it be adjudged that

Butler had full knowledge of complainant's ownership of said timber at the time of their acts as alleged herein, and that upon a hearing said injunction be made permanent.

(C) That all such other, further and more general relief be afforded complainant as the nature of his case might require.

W. S. HUNDLEY,
Complainant.

HODGES & HARRIS
South Hill, Virginia,
Counsel for Complainant.

Filed in the Clerk's Office the 28th day of April, 1959.

Teste:

N. G. HUTCHESON, Clerk.

* * * * *

page 9 } This deed made this the 14th day of April, 1959, between Anthony Hulber, Peter P. Hulber, Jesse R. Hulber, and Louis Hulber, Jr., all unmarried, parties of the first part, and W. S. Hundley, party of the second part.

WITNESSNETH, That in consideration of the sum of SIXTY-FOUR THOUSAND ($64,000.00) DOLLARS, cash in hand paid, receipt whereof is hereby acknowledged, the said parties of the first part, do grant, bargain, sell and convey unto the said party of the second part, with general warranty of title, all merchantable timber, except hickory and cedar, measuring seven inches across the stump, seven inches from the ground, on those two certain tracts or parcels of land in Boydton District, Mecklenburg County, Virginia, containing 217.77 acres, and 183.8 acres, respectively, adjoining lands now, or formerly, owned by M. A. Allgood, Mrs. J. J. Oslin, Daniels and Park, et al.; and being the two tracts described in a deed from Anton Nagy to the grantors herein, dated September 20, 1951, and recorded in Deed Book 139, Page 360; with the privilege of cutting and removing said timber anytime from date of this deed to December 31, 1962 and with the usual sawmill rights.

The party of the second part covenants that he will repair promptly and efficiently, at his own expense, all damages to fences; that he will remove all laps that may happen to fall

into fields and streams, and that he will leave seed trees on said lands as required by statute.

The parties of the first part covenant that they have the right to convey said timber, that they have done no act to encumber the same, and that the said parties of the first part will execute such further assurances of said timber as may be requisite.

Witness the following signatures and seals.

..... Seal
Anthony Hulber

..... Seal
Peter P. Hulber

..... Seal
Jesse R. Hulber

..... Seal
Louis Hulber, Jr.

page 10 } State of Virginia,
County of Mecklenburg, to-wit:

I, V. C. Daniels, Commissioner in Chancery of the Circuit Court of the County of Mecklenburg, in the State of Virginia, do certify that Anthony Hulber, Jesse R. Hulber and Peter P. Hulber, whose names are signed to the foregoing writing, bearing date on April 14, 1959, have acknowledged the same before me in my County aforesaid.

Given under my hand this the .... day of April 1959.

.....
Commissioner in Chancery.

State of New York,
..... of ..... to-wit:

I, ... a Notary Public of and for the ..... aforesaid, in the State of New York, do certfiy that Louis Hulber, Jr., whose name is signed to the foregoing writing bearing date on April 14, 1959, has acknowledged the same before me in my ..... aforesaid.

My commission expires on ..... day of ..... 19 ....
Given under my hand and seal this the ..... day of....
..... 1959.

.....
Notary Public.

* * * * *

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* * * * *

DEMURRER AND MOTION.

DEMURRER.

Come now the defendants by counsel and say that the bill of complaint filed against them in this proceeding by W. S. Hundley is not sufficient in law for the following reasons:

1—The relief sought is not cognizable in a Court of equity since the complainant has an adequate remedy at law.

2—It does not appear from the bill that any clear and binding agreement was ever entered into by and between the complainant and defendants Hulber.

3—The bill fails to show any consideration for the alleged oral contract.

4—The alleged oral contract is unenforceable since it relates to an interest in land and fails to meet the requirements of the Statute of Frauds (Section 11-2 of the Code of Virginia for 1950 as Amended). Defendants are advised and so allege that no action shall be brought upon any contract for the sale of real estate unless the contract or agreement be in writing and signed by the party or parties to be charged. They further allege that in Virginia and universally, growing timber is considered to be "land."

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MOTION.

Defendants charge and allege that Butler Land and Timber Company, Inc., and J. T. Butler, J. W. Butler, C. R. Butler and Dorothy Butler, individually and as partners t/a Butler Lumber Company, are improperly joined as parties defendant, and motion is hereby made that they be dropped as parties to this proceeding.

JESSE R. HULBER,
PETER P. HULBER,
ANTHONY HULBER,
LOUIS HULBER, JR.,
BUTLER LUMBER COMPANY, INC.,
BUTLER LAND AND TIMBER COMPANY, INC.,
J. T. BUTLER, J. W. BUTLER, C. R. BUTLER AND DOROTHY BUTLER, INDIVIDUALLY AND AS PARTNERS T/A BUTLER LUMBER COMPANY, Defendants
By Counsel.

BEDINGER & BEDINGER, p. q.
Boydton, Virginia.

Filed May 15, 1959.

N. G. HUTCHESON, Clerk.

* * * * *

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* * * * *

DECREE.

This cause, which has been regularly matured, set for hearing and docketed, came to be heard on the 26th day of June, 1959, upon the bill of complaint and exhibit filed therewith, and upon the defendants' demurrer to said bill, duly filed, and was argued by counsel.

Upon consideration whereof, the Court having heard the oral arguments of counsel and having fully considered all matters of law presented in the said bill of complaint and the demurrer thereto, doth Adjudge, Order and Decree that the said demurrer be, and the same hereby is, sustained, and further that the said bill of complaint be, and the same hereby is, dismissed.

And the Court doth further Adjudge, Order and Decree that the defendants do recover of the complainant their costs in this behalf by them expended.

And it is further Adjudged and Decreed that this cause be and the same hereby is dismissed from the docket, to which

ruling and action of the Court in sustaining the demurrer and dismissing the bill, and dismissing this cause from the docket, the complainant by counsel duly excepted. And the complainant indicating his intention to apply for an
page 21 } appeal to the Supreme Court of Appeals of Virginia from this decree, it is further Ordered that the execution of this decree be, and the same hereby is, suspended for a period of 60 days from the date this decree is entered, provided, however, that complainant within 10 days from the date of this decree, do enter into a bond before the Clerk of this Court in the amount of $10,000.00, with surety to be approved by said Clerk, and conditioned according to law.

Enter—June 29, 1959.

G. E. M., JR., Judge.

We ask for this:

BEDINGER & BEDINGER, Attys.
Counsel for defendants.

We have seen this decree and except thereto:

HODGES & HARRIS, Attys.
Counsel for complainant.

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• • • • •

NOTICE OF APPEAL AND ASSIGNMENT OF ERROR.

Now comes W. S. Hundley, complainant, by his counsel, and files with the Clerk of this Court in this cause notice of appeal from the decree of the Circuit Court of Mecklenburg County, Virginia, herein entered on June 29, 1959, and as the basis for the appeal set forth the following assignment of error:

1. The Court erred in sustaining the demurrer hereinbefore filed by defendants to complainant's bill of complaint, and entering said decree dismissing complainant's bill.

W. S. HUNDLEY, Complainant
By Y. MELVIN HODGES
Of Counsel for Complainant.

* * * * *

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* * * * *

Filed July 3, 1959.

N. G. HUTCHESON, Clerk.

* * * * *

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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