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Record No. 5223

In the
Supreme Court of Appeals of Virginia
at Richmond

ROBERT MELVIN, JR., ET AL.,

v.

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF ACCOMACK 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. 5223

VIRGINIA:

In the Supreme Court of Appeals held at the Masonic Building in the City of Staunton on Wednesday the 31st day of August, 1960.

ROBERT MELVIN, JR., ET AL., Plaintiffs in Error,

against

COMMONWEALTH OF VIRGINIA, Defendant in Error.

From the Circuit Court of Accomack County

Upon the petition of Robert Melvin, Jr., Royce Melvin and Joshua Merritt a writ of error and *supersedeas* is awarded them to a judgment rendered by the Circuit Court of Accomack County on the 12th day of April, 1960, in a prosecution by the Commonwealth against the said petitioners for misdemeanors; but said *supersedeas*, however, is not to operate to discharge the petitioners from custody, if in custody, or to release their bond if out on bail.

RECORD

* * * * *

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* * * * *

Virginia:

Circuit Court of the County of Accomack, on Tuesday, the 12th day of April, in the year of our Lord, Nineteen Hundred and Sixty.

The Commonwealth, Pltff.

against

Robert Melvin, Jr., Deft.

Upon an appeal from the judgment of B. T. Gunter, Jr. County Court Judge, on a Warrant for feloniously taking, stealing and carrying away, without permission of the owners, certain oysters of the value of $45.00.

AND

The Commonwealth, Pltff.

against

Royce Melvin, Deft.

Upon an appeal from the judgment of B. T. Gunter, Jr. County Court Judge, on a Warrant for feloniously taking, stealing and carrying away, without permission of the owners, certain oysters of the value of $45.00.

AND

The Commonwealth, Pltff.

against

Joshua Merritt, Deft.

Upon an appeal from the judgment of B. T. Gunter, Jr. County Court Judge, on a Warrant for feloniously taking, stealing and carrying away, without permission of the owners, certain oysters of the value of $45.00.

This day came again the Attorney for the Commonwealth; and the defendants appeared in Court in person and by their Attorneys, William E. Fears and Wescott B. Northam, and entered pleas of not guilty to the warrants herein and of this put themselves upon the country and the plaintiff likewise. Whereupon, came a Jury, to-wit: H. A. Wessells, Kathryn Scott, Ernestine Lang, Joyce Lassiter and Howard C. Miles, who were summoned, elected, tried and sworn, well and truly to try the issue joined between the parties. Whereupon, the defendants, by their Attorneys, moved the Court to allow them the right to *voir dire* the jury as to whether any juror was the owner or lessee of oyster grounds in this county, which motion thereupon being fully argued, same was overruled, to which ruling of the Court, the defendants, by counsel, objected. Thereupon, the Jury, having fully heard the evidence and arguments of counsel was sent out of Court to consult of its verdict, and after sometime returning into Court returned the following verdict as to each Warrrant: 1960, April 12—"We, the Jury, find the defendant guilty and assess against him a fine of $50.00." Thereupon, the de-
page 6 } fendants, by their Attorneys, moved the Court to set aside the verdict of the Jury and grant them a new trial on the following grounds: 1. That the verdict was contrary to the law and the evidence; 2. That the Court erred in denying Instructions C and C as amended, which motion being duly argued, the same was overruled by the Court, to which ruling of the Court, the defendants, by their Attorneys, excepted. Therefore, it is considered by the Court that the Commonwealth recover against each of said defendants Fifty Dollars ($50.00), the fine by the Jury in its verdict assessed, and its costs by it about its prosecution in this behalf expended.

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

To the Clerk of the Circuit Court of Accomack County:

Counsel for the defendants, Robert Melvin, Jr., Royce Melvin, and Joshua Merritt, in the above-entitled action, hereby gives notice of appeal from the judgment on the verdict of the jury entered April 12, 1960, and sets forth the following assignments of error:

1. That the court erred in refusing counsel for defendants the right to *voir dire* the members of the jury panel as to whether any juror was the owner, lessee, or operator of assigned oyster grounds in this county;
2. That the court erred in refusing defendants' instructions C and C as amended, as offered; and
3. That the court erred in overruling the defendant's motion for a new trial on the grounds that the verdict was contrary to the law and the evidence, and contrary to the instructions C and C as amended, which should have been allowed by the court.

WESCOTT B. NORTHAM
WILLIAM E. FEARS
Counsel for Defendants.

Filed April Term, 1960. (Apr. 13).

Teste:

J. FULTON AYRES, Clerk
By BEULAH LOWE MASON, Dy.

* * * * *

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* * * * *

STIPULATED TESTIMONY OF WITNESSES IN THE ABOVE-STYLED CASE.

R. Norris Bloxom, Commonwealth's Attorney, made complaint that the above defendants did on the 21st day of January, 1960, unlawfully and feloniously take, steal and carry away, without permission of the owners, certain oysters, being the property of Leroy Jester and Orville Fleming, part-

ners trading as Nelson P. Collins and Company, said oysters being of the value of $45.00.

Trial was held in the Circuit Court of Accomack County on Tuesday, the 12th day of April, 1960.

A panel of eleven jurors was duly drawn and they took seats in the jury box. The trial judge, Honorable Jefferson F. Walter, asked the panel if any of them were related to the defendants by blood or marriage, or if any of them knew any reason why they could not sit on the case and give the defendants a fair trial. Several members of the jury panel stated that they had heard the case discussed and disqualified themselves, whereupon they were replaced by other members.

At this time the court asked the attorney for the Commonwealth and the attorneys for the defense whether they wished to examine the members of the jury panel of their *voir dire;* whereupon the attorney for the defendant asked the court if he might inquire as to whether either of the members of the jury panel was the owner, lessee or operator of assigned oyster grounds in Accomack County. The court refused to permit this question, to which ruling counsel for the defendants excepted.

page 14 } The plaintiff and defendants, respectively, exercised their three pre-emptory challenges and the trial proceeded.

ORVILLE FLEMING,

for the prosecution.

Orville Fleming testified that he and Leroy Jester were partners and they own and operate the Nelson P. Collins Oyster Company, of Sinnickson, in Accomack County, Virginian. The company held, by assignment from Basil Hickman, certain oyster grounds located in Little Mosquito Creek which assignments were identified by plat of record in Plat Book No. 2, at page 346, in the Clerk's Office of the Circuit Court of Accomack County. He testified that the grounds held by assignment from Basil Hickman were located in Little Mosquito Creek, and that the basin was approximately 3 or 4 acres in size. He testified that the company owned all the oyster planting ground in Little Mosquito Creek, which led to the basin. Fleming stated that the leases had been held originally by Basil Hickman's father, then by Basil Hickman, who assigned same to his father-in-law, Mr. Nelson Collins, since deceased, and that the present company had derived their title from Mr. Collins.

Orville Fleming.

Fleming testified that on January 21, 1960, he drove his pickup truck to a point northwest of the basin area of Little Mosquito Creek, and walked to within approximately 300 yards of the basin, when he observed three men picking up oysters which were owned by him and Mr. Jester. The men were on the flat and below the low water mark. He testified that he watched them about one-half hour but could not identify either. The time was approximately 10:30 A. M. and the weather was clear and cold. He stated that he then went to the nearest telephone and called Mr. Wilfred Adams, oyster inspector, from Chincoteague, Virginia and he requested that he meet him at the Mosquito Creek Bridge. He then proceeded to Mosquito Creek Bridge, where he was met by Adams and, at approximately the same time, the three men arrived by boat. At that time he and Adams observed that there were approximately 8 to 10 bushels of oysters page 15 } in the boat, and the fair market value of the oysters was approximately $4.50 per bushel. Fleming testified that Adams asked the defendants where they got the oysters; whereupon the defendant, Robert Melvin, Jr. offered to give the oysters back to Fleming, "if you won't do nothing with us." At the time Fleming testified that Melvin said that he was over on the base side. Fleming stated that he told him at that time that he was on the middle ground. At that time Robert Melvin, Jr. requested that they return to the area in question; whereupon Melvin, Adams, and Fleming, in Fleming's boat, went back to the area from which he testified the oysters were taken.

Fleming further testified that while proceeding up Little Mosquito Creek to the basin there were 13 "No Trespassing" signs posted, which signs Adams pointed out to the defendant, Melvin, Jr. Upon arrival at the basin, Fleming, Adams and Melvin observed the footprints on the flat at which time Melvin, the defendant, said, "that's where we were." Adams, in the presence of Fleming, pointed out to Melvin the oyster stakes around the basin, whereupon Melvin stated they knew they had no business there. Fleming further testified that Robert Melvin, Jr. stated, "I did not know you owned it"; whereupon Adams told the defendant, "it looks as though you overstepped the mark."

Fleming further testified that there were numerous footprints in the basin which led out to the middle ground and this was beyond the low water mark. He stated that, at that time, the tide was down, and many footprints were clearly visible. He further testified that the basin was staked all the

way around, which stakes designated that it was privately held oyster ground.

Fleming testified that he had held this particular ground for several years; that there was no public oyster ground within one-half mile from this area, and that his ownership of title in the basin in no way at any time had been questioned. He further testified that approximately 10 days prior to this date he had seen Melvin, Jr. at the mouth of Little page 16 } Mosquito Creek, at which time Melvin, Jr. asked Fleming what he owned in the creek. Fleming testified that he told Melvin, "we own from the first reach where we had it staked, all the way up to and including the basin." At that time Melvin, Jr. said that Mr. Steelman, the inspector, said it was all right to work in the gut running up to the base. This time Fleming said, "we don't have anything to do with that." Fleming further testified that he had been back to the area in the basin since the 21st day of January, 1960, and when he went back to the area there were no stakes whatsoever present. He testified that he made several calls to *Inspctor* Steelman in the Fall asking that the inspector afford them some protection for their oyster grounds. He further testified that he had not at any time been advised by Inspector Steelman that the grounds were improperly staked.

On cross examination Fleming testified that the area in question in the basin had been staked some four or five years ago, and that the remaining part of the Mosquito Creek area had been staked in the Fall of 1959.

Through Fleming, counsel for the defense introduced a large chart demonstrating the position of the stakes, tracts, oyster grounds, and other landmarks in the Little Mosquito Creek area.

LEROY JESTER,

for the prosecution.

Jester testified that he is co-owner with Orville Fleming of the oyster grounds in question and that they had planted oysters there for many years. Jester had not seen the accused working on the grounds and was not present when they were apprehended. Jester testified that he had had considerable trouble with people taking oysters from their grounds; that the grounds had been staked off at the basin some four or five years prior to this time; that the basin was properly staked off on the 21st day of January, 1960. Jester further

testified that on the afternoon of January 21, he was present at oyster house at Sinnickson, Virginia, when Robert
page 17 } Melvin, Jr., the defendant, came to his oyster house and asked him not to prosecute him and the two others for this offense. Jester testified that he stated to Melvin, Jr. at that time that he had been told that the footprints led to the middle ground. At that time Jester testified that Melvin stated, "that's right."

WILFRED ADAMS,

for the prosecution.

Adams testified that he is an oyster inspector, lives at Chincoteague, Virginia; that he has been an oyster inspector for about two years, and that he has planted oysters and worked in the oyster and seafood industry most of his life. He stated that he received a call from Fleming on January 21 asking him to meet him at Mosquito Creek Bridge; that he, Fleming and the three accused men arrived at the Mosquito Creek Bridge at about the same time. Adams testified that he, at the request of Melvin, Jr. and together with Fleming, went by boat back to the area in question; that he pointed out some of the "No Trespassing" signs to Melvin on the way back to the area in question; that when they arrived at the basin he pointed out the footprints to Melvin, at which time Melvin, Jr. stated, "that's where we were." Adams further testified that when he first entered the basin he did not notice particularly the stakes in area at the eastern end of the basin but in the area of the footprints the oyster ground was properly staked off with stakes which he also pointed out to Melvin at that time. Adams testified that when he pointed out the staked area to Melvin that Melvin said, "we knew we had no business there." Adams testified that in his opinion the oyster grounds were properly staked in a manner that would notify the public that these were private oyster grounds. Adams pointed out, on the plat introduced in evidence, the point where the tracts were, which point was below the low water mark and within the staked area.

Upon cross examination he testified that the ground could have been staked better. He further testified on cross examination that it is difficult to tell where the
page 18 } mean low water mark is located but that one skilled

Basil Hickman.

in the water profession can fairly well locate a mean low water mark and that the stakes from one side of the oyster ground ran from one mean low water mark on the south side over to the mean low water mark on the north side.

He testified that while the parties were at the Mosquito Creek Bridge, prior to the time they had gone to the basin, Melvin, Jr. offered the oysters back to Fleming if he would not do anything with them, but that Fleming refused to have anything further to do with the matter and told Melvin that he intended to prosecute all three of them for stealing his oysters.

BASIL HICKMAN,

for the prosecution.

Hickman testified that he inherited the oyster ground in question in the Little Mosquito Creek area from his father and that the old plats were recorded in the plat book several years ago. The records show that the plat was dated December 14, 1894. He testified that the plat introduced in evidence represented the oyster grounds owned by him and assigned to Mr. Fleming and Mr. Jester. He testified that he had paid the required license fee on the property for each year and it had been properly assigned. He testified that he was over 60 years of age and had inherited these grounds from his father; that he owned from the mean low water mark on the south side to the mean low water mark on the north side. He testified that the area had been staked as long as he had owned it and the last time he was in the area he noticed that it was properly staked off to notify other persons that this was private property. Hickman testified that at no time in his memory had his title to the oyster planting grounds in this area been questioned.

Through Hickman a sketch identified as Com. Exhibit No. 5 was introduced in evidence. Hickman testified that the sketch had been made by Melvin, Jr. in the presence of Hickman, and was made when Melvin went to see Hickman subsequently to January 21 to ask Hickman the area he owned.

page 19 } Hickman stated that Melvin, Jr. indicated on the sketch the point where he and the co-defendants had been working by a cross mark within a circle. At that time Hickman testified that he told Melvin that he was working property that was leased from him.

NATHANIEL STEELMAN,
for the defence.

Steelman is an oyster inspector from Chincoteague, Virginia. He testified that he had been working for the Commissioner of Fisheries approximately thirty years, that he had been an oyster inspector for three years and that his father before him was an oyster inspector. He testified that he was familiar with the Little Mosquito Creek area and that on several occasions, at least two during the month of October and one later occasion in 1959, he visited the Little Mosquito Creek area and found that it was not staked. On several occasions, he talked with Orville Fleming and Leroy Jester, the prosecution witnesses, and advised them that they must stake off their Little Mosquito Creek oyster grounds or that they would not have protection against trespassers. He testified that on the afternoon of January 29th he visited the Little Mosquito Creek area and that the area in the basin from which the defendants were accused of taking oysters was not staked to indicate private oyster grounds, but that new stakes had been placed along the narrow entrance of Little Mosquito Creek. He further testified that on his prior visits to the Little Mosquito Creek basin the area was not staked to give the public notice of the assignment of the oyster grounds. He testified that he had generally known the Little Mosquito Creek area most of his life and that on each of five visits to the basin over a period of from early Summer through the late Fall of 1959, it was not staked. On cross examination this witness stated that he was not completely sure when he talked to Fleming and Jester, but he thought it was sometime in September and around the middle of October of 1959. He stated that he did remember one call from Jester with reference to their oyster planting ground and he
page 20 } remembers one visit made to him in the Fall by Fleming with reference to their oyster grounds. He further testified that the entire area was designated by the Commissioner of Fisheries as a polluted area and that no one, including Fleming and Jester, would have the right to remove any oysters from the area without a permit from the Commissioner of Fisheries, and that the defendants did not have such a permit. Steelman stated that there was a large yellow sign at the entrance to Little Mosquito Creek, which plainly designated that the entire area was a polluted area. This witness further stated that he was thoroughly familiar with the area of Little Mosquito Creek and the Basin in question and that he knew that the grounds assigned

to Fleming and Jester went to the low water mark of each side of the basin.

WESLEY JEFFRIES,

for the defence.

Jeffries testified that he was from Chincoteague, Virginia. He testified that he had been a waterman most of his life; that he had worked in and about the water around Chincoteague and that his occupation is oyster planter. At the request of Robert Melvin, Jr., he visited the Little Mosquito Creek basin in question sometime during the week of January 29 and on the afternoon of January 29 and observed the tracks made on the ground; that there were working tracks along the old piling located along the Naval Base property. He found no stakes that would indicate that there were private oyster grounds in the basin area.

MOCK McGEE,

for the defense.

McGee testified that five or six days before Christmas, 1959; he was oystering in the area of Little Mosquito Creek and noticed that there were no stakes in the Mosquito Creek Basin that would place a third party on notice of private owned oyster ground, at the time he was with Raymond Merritt. On cross examination this witness testified that although he was oystering at the time, he did not take any oysters from this basin because "I thought I did not have any business there." He further stated, "the pres-
page 21 } ence of oysters made me suspicious."

* * * * *

ROBERT MELVIN, JR.,

for the defence.

Melvin, Jr. testified that he approached Orville Fleming on January 15, 1960, while Fleming was tonging oysters at the mouth of Little Mosquito Creek. Fleming was unknown to Melvin, Jr. at that time and Melvin, Jr. asked Fleming if he owned the oyster grounds in Little Mosquito Creek and the basin beyond. Fleming answered that he owned everything and Melvin, Jr. asked, "how about on the Navy side?" Fleming answered that he did not have a damn thing to do

with the Navy. Melvin, Jr. then proceeded up Little Mosquito Creek, into the basin, and worked along the Navy's shore line where he gathered several bushels of oysters.

On January 21, 1960, Robert Melvin, Jr., Royce Melvin, and Joshua Merritt returned to the same basin area and gathered approximately five bushels of oysters between the shore line of the Navy property and the low water mark. The time was about 10:30 A. M., the weather was clear and very cold; there being ice on the water. It took them about

page 22 } an hour to gather the five bushels whereas, if they had worked in the Little Mosquito Creek area further out in the middle ground area of the basin, where oysters were quite plentiful, they could have swamped the boat in ten or fifteen minutes. They saw no stakes that would indicate they were on private oyster grounds. They did see two stakes along the south side of the drain or channel area which appeared to them to be channel markers. They tied their boat to one of these stakes while they gathered the oysters. After they gathered the oysters, they proceeded by boat to Mosquito Creek Bridge where they had parked their car. They were met there by Wilfred Adams. A short time later, Orville Fleming arrived at the bridge in his boat. Fleming asked Melvin, Jr. if he had seen anyone up Little Mosquito Creek. Melvin, Jr. answered that he and his two companions had just come from there and that they were the only persons in the area. Fleming then accused Melvin, Jr., Melvin, and Merritt of stealing his oysters from the middle ground in the basin. Melvin, Jr. guided them to the area and showed them the tracks that they had made where they had worked along the shore. Adams then said that it appeared to him that they had stepped over the line. Melvin, Jr. asked Adams how he could say that when there were no stakes to indicate private oyster grounds. Adams pointed out a series of stakes along the shore and said that they marked private oyster grounds. Melvin, Jr. denied that said stakes marked off oyster grounds, many of which were broken off, but insisted that said stakes were old fence posts from a fence that rotted away many years ago.

Melvin, Jr. stated that he was familiar with the area because when the Navy was occupying and operating the Chincoteague Naval Air Station, he had a permit from the Navy to trap muskrats there. He said the Navy had never objected to anyone taking oysters from that shore, but that he knew the waters were restricted because of possible pollution and that a permit was required from the Commissioner of Fish-

eries to take oysters from the area. On cross examination this witness admitted that he knew he was taking
page 23 } oysters that belonged either to the Navy or to Fleming, and that he did not have any permit from the Navy to take oysters.

He further testified on cross examination that the stakes which Adams pointed out to him were part of an old fence and were up on the high land.

Agreed to by:

R. NORRIS BLOXOM
Commonwealth's Attorney
Accomack County, Virginia.

WILLIAM E. FEARS
Attorney for Defence.

Received June 11, 1960, 6:30 p. m.

Signed and filed in Clerk's office this 21st day of June, 1960.

JEFFERSON T. WALTER, Judge.

Filed June 21, A. D., 1960.

Teste:

J. FULTON AYRES, Clerk.

* * * * *

page 33 } INSTRUCTION C.

The Court instructs the Jury:

That sixty days after posting of the notice of application, the inspector shall notify the county surveyor, or such surveyor as may be designated by the Commission of Fisheries, to proceed to survey the ground, conforming to the rules and regulations of the Commission of Fisheries, and make a plat in duplicate of the same. The surveyor shall forward the plat of survey to the office of the Commission of Fisheries to be approved by the engineer of the Commission within thirty

days, before same is assigned by the inspector. The ground shall be marked at the expense of the applicant, at the time the survey is made, and at the direction of the surveyor, with suitable stakes, smooth and free from snags and spurs; provided that where the War Department of the United States Government forbids the use of such stakes on account of interference with navigation, such other markers, as may be permitted by the War Department and approved by the Commission of Fisheries, may be used instead of stakes; and such suitable stakes or other markers, as aforesaid, shall be kept by the lessee in their proper places at all times during the continuance of such lease, so as to conform accurately to the survey. Should such stakes or other markers be removed, rot down, or be carried away, the lessee shall replace them in their proper places; and if he fails to do so within thirty days after being notified by the inspector of the district in which the ground lies, the lessee shall have no claim against and person for trespassing on the ground in any manner.

Refused 4/12/60.

J. F. W.

page 34 } INSTRUCTION C. (As amended)

The Court instructs the jury that an owner or lessee of private oyster grounds shall use suitable stakes or other markers, and they shall be kept by the owner or lessee in their proper places at all times during the continuance of such lease, so as to conform accurately to the survey. Should such stakes or other markers be removed, rot down, or be carried away, the lessee shall replace them in their proper places; and if he fails to do so within thirty days after being notified by the inspector of the district in which the ground lies, the lessee shall have no claim against any person for trespassing on the ground in any manner.

Refused 4/12/60.

J. F. W.

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A Copy—Teste:

H. G. TURNER, Clerk.

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