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Clerk, Supreme Court of Appeals
Richmond, Va.

209 VA 544

# Record No. 6824

## In the Supreme Court of Appeals of Virginia at Richmond

## GEORGE O. HINTON

v.

## HARVEY ALBERT HINTON, ET AL.

FROM THE CIRCUIT COURT OF NORTHUMBERLAND COUNTY

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 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

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**Record No. 6824**

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VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 27th day of November, 1967.

GEORGE O. HINTON, Appellant,

*against*

HARVEY ALBERT HINTON AND J. WARNER HINTON, III, Appellees.

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From the Circuit Court of Northumberland County
Daniel Weymouth, Judge

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Upon the petition of George O. Hinton an appeal is awarded him from a decree entered by the Circuit Court of Northumberland County on the 14th day of June, 1967, in a certain proceeding then therein depending, wherein the said petitioner was plaintiff and Harvey Albert Hinton and another 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 $300, with condition as the law directs.

## RECORD

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BILL FOR DECLARATORY JUDGMENT

TO THE HONORABLE DANIEL WEYMOUTH, JUDGE

The Plaintiff respectfully represents unto this Honorable Court as follows:

1. That E. J. Marsh and Mary E. Marsh conveyed a certain parcel of land known as Bunker Hill Farm to Mrs. Emma M. Hinton, their daughter, by deed dated January 28, 1927, and recorded in the Clerk's Office of the Circuit Court of Northumberland County, Virginia, in Deed Book "GG" at Page 261. A certified copy of said deed is attached hereto and marked Exhibit A and asked to be read as a part hereof.

2. The aforesaid land was conveyed by E. J. Marsh and Mary E. Marsh as follows:

"unto the said party of the Second Part (Mrs. Emma M. Hinton), and confirm to her her natural life time and then to the natural heirs of her body forever—to her as long as she may live, then at her death to the natural heirs of her body, if any of her children of her body may then be living, and if no natural heir or heirs of her body may survive her, then at her death to the nearest heirs of her body or blood relatives . . ."

The habendum clause of the deed aforesaid further provided:

". . . to have and to hold and defend unto her, the aforesaid Mrs. Emma M. Hinton, party of the Second Part her natural life time, then to the children of her body, if any survive her, if no child of her body survives her, then and in that case at her death to her nearest blood relatives, as above, forever."

3. Mrs. Emma Marsh Hinton died on August 6, 1966, and left surviving her one (1) son, George O. Hinton, age 44, the plaintiff herein, he being the only child of Emma Marsh Hinton who survived her. She also left surviving her two

(2) grandchildren, the sons of James Warner Hin-
page 3 } ton, Jr., who predeceased her, he having died on August 16, 1956, the grandchildren being J. Warner Hinton, III, age 23, and Harvey Albert Hinton, age 21, the defendants herein.

4. By virtue of the language used in the aforesaid deed, there now exists an actual controversy between the plaintiff and the defendants as to the ownership of the lands described in the deed attached hereto as Exhibit A.

5. That the said defendant, Harvey Albert Hinton, is in the military service of the United States of America as defined in the Soldiers and Sailors Civil Relief Act of 1940.

WHEREFORE the plaintiff prays that the Court inquire into, declare and determine the rights of the parties hereto, if any, in the afore described lands,

AND the plaintiff further prays that he be awarded such other and further relief as the nature of his case shall require and to equity shall seem meet and just.

GEORGE O. HINTON

By Counsel

FOSTER, CLARKE & JOHNSTON

By DIXON L. FOSTER

Filed in the Clerk's Office the 6 day of Feb., 1967.

Teste:

EMELINE A. HALL, Clerk

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PROOF OF SERVICE

Virginia:

*In the* Circuit *Court of the County of* Northumberland:

GEORGE O. HINTON, Plaintiff

CHANCERY NO.....

*vs.*

J. WARNER HINTON, III
Miskimon
Virginia, et al, Defendants

Returns shall be made hereon, showing service of Subpoena in Chancery issued February 6, 1967, with copy of Bill of Complaint filed February 6, 1967, attached:

Executed on the 9 day of February, 1967, in the County of Northumberland, Virginia, by delivering a true copy of the above mentioned papers attached to each other, to J. Warner Hinton, III, in person.

W. H. SHIRLEY
*Sheriff, County of* Northumberland, *Va.*
*Sergeant.*
*By*....., *Deputy Sheriff.*

(Use this space below if a different form of return is necessary.)

Legal & Timely service of a copy in writing of the within Bill of Complaint is hereby accepted in Northumberland County Virginia on behalf of Harvey Albert Hinton this 14th day of June, 1967.

ROLAND M. DAMERON, JR.
Attorney for Harvey Albert Hinton

Returned and filed the 10th day of February, 1967.

....., *Clerk.*
FRANCES B. SWAN, *Deputy Clerk.*

* * * * *

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ANSWER

The answer of Harvey Albert Hinton and J. Warner Hinton, III to a Bill For Declaratory Judgment filed against them in this Court.

The Defendants, reserving unto themselves the benefit of all

just exceptions to the said Bill For Declaratory Judgment, for answer thereto, or to so much thereof as they are advised that it is material they should answer, answer and say that by virtue of the language used in the Deed described in said bill, they are owners of undivided interests in and to the land described therein.

And now, having fully answered the Plaintiff's bill, the Defendants pray to be hence dismissed with their reasonable costs by them in this behalf expended.

HARVEY ALBERT HINTON
J. WARNER HINTON, III

By Counsel

ROLAND M. DAMERON, JR., p.d.
Heathsville, Virginia

* * * * *

Filed June 14, 1967. D. W., Judge

* * * * *

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* * * * *

This cause came on this day to be heard upon a Bill of Complaint filed in chancery for a declaratory judgment by George O. Hinton, Complainant against Harvey Albert Hinton and J. Warner Hinton, III, Defendants; upon proof of personal service of process upon J. Warner Hinton, III and upon proof of acceptance of service of process by Roland M. Dameron, Jr. for Harvey Albert Hinton; upon the joint and separate answer of Harvey Albert Hinton and J. Warner Hinton, III by their attorney, Roland M. Dameron, Jr.; and was argued by counsel.

In consideration whereof, and upon evidence *ore tenus* it appears to the Court:

I

That there is recorded in the Clerk's Office of this Court a deed from E. J. Marsh and Mary E. Marsh, his wife, to Mrs. Emma M. Hinton (their daughter) dated January 28, 1927 in Deed Book GG at Page 261, conveying two hundred

forty-three (243) acres of land, situated and lying in Heathsville Magisterial District, near Miskimon, Northumberland County, Virginia and generally known as the Bunker Hill Farm but fully described in said deed;

II

That the GRANTING CLAUSE, being the first clause of the deed herein referred to, provides as follows:

"unto the said party of the Second Part (Mrs. Emma M. Hinton), and confirm to her her natural life time and then to the natural heirs of her body forever—to her as long as she may live, then at her death to the natural heirs of her body, if any of her children of her body may then be living, and if no natural heir or heirs of her body may survive her, then at her death to the nearest heirs of her body or blood relatives . . ."

and the HABENDUM CLAUSE, being the second clause of the deed herein referred to is as follows:

". . . to have and to hold and defend unto her, the aforesaid Mrs. Emma M. Hinton, party of the Second Part
page 12 } her natural life time, then to the children of her body, if any survive her, if no child of her body survives her, then and in that case at her death to her nearest blood relatives, as above, forever."

III

That the said Mrs. Emma M. Hinton departed this life on August 6, 1966 and left surviving her as and for all of her heirs at law the aforesaid George O. Hinton, a son, and Harvey Albert Hinton, a grandson, and J. Warner Hinton, III, a grandson, the latter two aforesaid parties being the children of J. Warner Hinton, Jr., a son of the said Emma M. Hinton, who departed this life in 1957.

IV

That by virtue of the language used in the aforesaid deed in the GRANTING CLAUSE and the HABENDUM CLAUSE there exists an actual controversy between the Complainant and the Defendants as to the ownership of the land described in the aforesaid deed;

V

That the parties hereto have requested that this Court inquire into, declare and determine the rights of the parties in and to the land conveyed in said deed; and therefore the Court doth ADJUDGE, ORDER and DECREE as follows:

(a)

That the two clauses in said deed are, that is the GRANTING CLAUSE and the HABENDUM CLAUSE are two utterly irreconcilable clauses in the deed, each clause expressed in clear and unmistakable language and that the two clauses are utterly repugnant to each other;

(b)

That the rule of law in Virginia is that when two such clauses in a deed are repugnant or irreconcilable the first shall prevail—that is the granting clause or first clause shall prevail and take precedence over the second clause or habendum clause;

(c)

That under the granting clause the land conveyed in said deed clearly is granted to the following persons in the following shares: George O. Hinton, one-half (½), Harvey Albert Hinton, one-fourth (¼) and J. Warner Hinton, III, one-fourth (¼);

(d)

That as a consequence of the above adjudication the said land covered by said deed is now owned by the aforesaid parties in fee simple in the following shares, to-wit: George O. Hinton, one half (½), Harvey Albert Hinton, one-fourth (¼) and J. Warner Hinton, III, one-fourth (¼);

page 13 } (e)

That the Clerk of this Court shall record this Decree in the current Deed Book as well as the Chancery Order Book and the same shall be indexed in the General Index to Deeds;

(f)

That the costs in this case are assessed one-half (½) against George O. Hinton and the other half against Harvey Albert Hinton and J. Warner Hinton, III.

(g)

That Counsel for the Complainant noted their exceptions to the above decree upon the basis that the decision is contrary to the law and the evidence.

ENTER—CHANCERY June 14, 1967.

DANIEL WEYMOUTH, Judge

I ask for this:
ROLAND M. DAMERON, JR., p.d.

Seen: & objected to
FOSTER, CLARKE & JOHNSTON

By DIXON L. FOSTER

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NOTICE OF APPEAL AND
ASSIGNMENTS OF ERROR

TO THE CLERK OF THE CIRCUIT COURT OF NORTHUMBERLAND COUNTY:

The Complainant, George O. Hinton, by counsel, 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 appeal from that certain final decree entered in the above styled cause on the 14th day of June, 1967, and assigns the following errors:

1. The Court erred in construing the deed dated January 28, 1927, from E. J. Marsh and Mary Marsh as granting, upon the expiration of the life estate of Emma M. Hinton, a one-fourth (¼) fee simple interest therein to the Defendant, Harvey Albert Hinton, a one-fourth (¼) fee simple

interest therein to the Defendant, J. Warner Hinton, III, and a one-half (½) fee simple interest therein to George O. Hinton in the lands known as Bunker Hill Farm, which are described in the said deed.

2. The decree of the Court entered June 14, 1967, is contrary to the law and the evidence of the case.

GEORGE O. HINTON

By Counsel

FOSTER, CLARKE & JOHNSTON
Lively, Virginia

By M. RAY JOHNSTON

Filed in Clerk's Office July 10, 1967.

EMELINE A. HALL, Clerk
Circuit Court of Northumberland
County, Virginia

* * * * *

page 18 } STATEMENT OF FACTS

The following is the evidence which was presented at the trial of the case of George O. Hinton, Complainant, vs. Harvey Albert Hinton and J. Warner Hinton, III, Defendants, in the Circuit Court of Northumberland County, Virginia, on June 14, 1967:

George O. Hinton, a witness of lawful age, first being duly sworn, testified as follows:

Emma Marsh Hinton, his mother, was the daughter of E. J. Marsh and Mary Marsh; that by deed dated January 28, 1927, E. J. Marsh and Mary E. Marsh, his wife, conveyed to Emma M. Hinton 243 acres of land situate, lying and being in Heathsville Magisterial District, near Miskimon, Northumberland County, Virginia, and generally known as Bunker Hill Farm and that the deed had been recorded in Deed Book GG at Page 261 in the office of the Clerk of the Circuit Court of Northumberland County, Virginia. The original deed was identified by George Hinton, and he stated that it described the land in question and that the plat attached to the deed was a plat of the land in question. The deed was then introduced into evidence on behalf of the

Complainant and was marked by the Court as Complainant's Exhibit No. 1, without objection.

The deed provided in part:

"WITNESSETH: That for and in consideration of the sum of ten dollars ($10.00), cash in hand, paid at and before the signing, sealing and delivery of this deed, receipt where is hereby acknowledged, and further in consideration of their parental love for her as their daughter, the said parties of the First Part have bargained, sold and released, and they do now herein and hereby bargain, sell, release, convey and deliver, with General Warranty titles, unto the said party of the Second Part, and confirm to her her natural lifetime and then to the natural heirs of her body forever—to her as long as she may live, then at her death to the natural heirs of her body, if any of her children of her body may then be living; and if no natural heir or heirs of her body may survive her, then at her death to the nearest heirs of her body or blood relatives; all that certain tract, piece, lot or parcel of land lying and being situate in Northumberland County, Heathsville District, at or near Miskimon, Virginia, and known as the Bunker Hill Farm....."

page 19 } ". . . . . to have and to hold and defend unto her, the aforesaid Mrs. Emma M. Hinton, party of the second part, her natural lifetime, then to the children of her body, if any survive her, if no child of her body survives her, then and in that case at her death to her nearest blood relatives, as above, forever."

E. J. Marsh died in the year 1944.

Mrs. Emma Hinton had two sons, George O. Hinton, who was born on August 22, 1922, and J. W. Hinton, Jr., who was born on April 18, 1920. Her husband, J. W. Hinton, predeceased her.

He further testified that his mother, Mrs. Emma Hinton, died on August 6, 1966, and was survived by one child, a son, George O. Hinton, age 44, and two grandchildren, Harvey Albert Hinton, age 21, and J. Warner Hinton, III, age 23.

He further testified that J. W. Hinton, Jr., the other son of Mrs. Emma Hinton, died in the year 1957 and that J. W. Hinton, Jr., had the following children: Harvey Albert Hinton and J. Warner Hinton, III.

The foregoing Statement of Facts was agreed upon by all parties, as evidenced by the signatures of counsel, and is made a part of the record herein.

Tendered: July 14, 1967.

Date Signed: July 14, 1967.

DANIEL WEYMOUTH, Judge

Filed in Clerk's Office July 14, 1967.

EMELINE A. HALL, Clerk
Circuit Court of Northumberland
County, Virginia

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

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