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SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE SUPREME COURT OF APPEALS OF VIRGINIA

AT RICHMOND

COLBERT, FREDERICK, et al

Appellants

vs. RECORD NUMBER 730306

PRIESTER, ANGUS

Appellee

APPENDIX

THOMAS P. MAINS, JR.
421 King Street, Suite 209
Alexandria, Virginia 22314

COUNSEL FOR APPELLANTS

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BILL FOR DAMAGES, INTEREST AND

ASSIGNMENT OF CURTESY AND/OR PARTITION

To the Honorable Judges of Said Court:

1. That your complainant is the widower of Beulah Virginia Priester, who departed this life intestate, on the 20th day of January, 1964, in the City of Alexandria; that said Beulah Virginia Priester was during the marriage of him and herself, seized of an estate of inheritance of real estate in the City of Alexandria, known as 1200 Princess Street, Alexandria, Virginia, and more particularly bounded and described as follows:

> BEGINNING at the Southwest intersection of Princess and Fayette Streets, in the said City and running thence Westwardly on Princess Street 16 feet more or less; thence South parallel to Fayette Street 100 feet to an alley 12 feet wide; thence East on said alley 16 feet more or less, to Fayette Street and thence North on Fayette Street 100 feet to the point of beginning, with right of way over said streets and alley.

2. Complainant further shows that on October 26, 1956, the complainant and his wife, Beulah Virginia Priester, executed a deed to Charles A. Davis, Trustee, party of the first part; and Peoples Savings and Loan Association of Alexandria, Virginia, Incorporated, party of the Third part, to secure unto the order of Peoples Savings and Loan Association of Alexandria, Virginia, Incorporated, or its

assigns, the payment, principal and interest of a certain note in the principal sum of Four Thousand Eight Hundred ($4,800.00) Dollars.

3. Complainant further shows that as an additional security for the payment of the aforementioned debt, the complainant and his wife, Beulah Virginia Priester, covenanted to keep the building on said property insured against fire and other hazards in a sum equal to their insurable value all of which said premiums were paid by complainant.

4. Complainant further shows unto this Court that he and he alone paid off the aforementioned trust on the property in question and has had the same released of record.

5. Complainant further shows unto this Court that he purchased and paid for front windows, aluminum (white), approximately 48 inches by 2 inches for the premises herein in the sum of One Hundred Fifty-six ($156.00) dollars.

6. Complainant further shows unto this Court that he and he alone has paid the real estate taxes on the premises heretofore described through the year 1970.

7. Complainant further shows that the said Beulah Virginia Priester has been now deceased for over Two (2) years and that during all of said times he has persistently demanded that his rights be recognized in the real estate in

question and he has frequently demanded of said heirs that he be assigned his curtesy in said real estate and reimbursed for all expenses incurred in maintaining the property. The said Frederick Colbert and Delores Colbert, children and heirs of Beulah Virginia Priester have refused and still refuse to recognize any rights of your complainant in the property in question and said defendants presistently refuse to make an assignment of curtesy in said real estate.

8. Complainant further states that the ordinary annual rental of said real estate is of great value, to-wit: One Thousand Two Hundred ($1,200.00) Dollars per year and that he is entitled to his curtesy reimbursement in the sum of Seven Thousand ($7,000.00) Dollars and damages of Five Thousand ($5,000.00) Dollars per year with interest thereon at the rate of Six (6%) Per Cent per annum.

In tender consideration whereof, the complainant prays that the said Frederick Colbert and Delores Colbert may be made parties defendants to this Bill, that the said defendants be required to answer the same but answer under oath is expressly waived; that proper process issue and your complainant's curtesy in the said real estate be assigned, set out and allotted to him by the decree of your Honorable Court, that the said defendants, Frederick Colbert and Delores Colbert, be required to account to him for his proper share of the rents,

profits and damages for detention of his curtesy issuing out of said real estate and if said curtesy cannot be laid off and assigned in kind, complainant petitions the Court to commute the same and order a sale pursuant to statute, that all proper orders may be made, all proper inquiries be directed and that all such other and proper and general relief be afforded your complainant as the nature of his case may require or to equity may seem meet and your complainant forever prays.

REPORT OF CHARLES A DAVIS, COMMISSIONER OF REFERENCE

Your Commissioner would respectfully report that in accordance with the terms of Decree of Reference entered in this cause on January 12, 1972, hearing was held at his office in the City of Alexandria, on June 6th, 1972, (being the date mutually agreeable to all parties concerned, postponed from originally constituted hearing date of May 23rd, 1972) at which time there were present Counsel for Complainant, Edwin C. Brown, Sr., Esq.: Counsel for Defendants, Thomas P. Mains, Jr., Esq.; Complainant, Defendants, and witnesses. Said hearing was held pursuant to due notice, copy of which is made a part hereof; testimony was duly taken, has been reduced to writing and filed as a part of this report, together with "Petitioner's Exhibits 'A' through 'M' inclusive. Provision was made before terminating this hearing for continuance if found necessary, but under date of October 12, 1972, there is filed with this report the letter from Counsel for Complainant and its enclosures therein listed; also, Letter of Counsel for Defendants dated October 19, 1972, admitting there was no objection to these items of evidence, and making no direct reply to "Statement of Counsel for Plaintiffs" dated October 13, 1972, other than to rely

upon Sections 64.1-25 and 55-269 of the Code of Virginia.

1. Under the first inquiry directed, namely:

"Who are the owners of the real property located at 1200 Princess Street, Alexandria, Virginia, and more particularly described as follows: BEGINNING at the southwest intersection of Princess and Fayette Streets, in said City and running thence westwardly on Princess Street 16 feet, more or less; thence south parallel to Fayette Street 100 feet to an alley twelve feet wide; thence east on said alley 16 feet, more or less, to Fayette Street and thence north on Fayette Street 100 feet to the point of beginning, with right of way over said streets and alley."

It would appear that the fee simple title to said property is vested in Frederick Colbert and Delores Colbert, as the sole heirs at law of decedent, Beulah Virginia Priester (who acquired title under a Will found of record in Will Book 32 page 249 of the Alexandria, Va., records) - SUBJECT to the curtesy interest of Angus Priester, her surviving husband.

2. Under the second inquiry directed, namely:

"What liens are against the property, their priority and by whom held and by whom the same are being paid and in what monthly amounts."

From the Report on Title (Item 1 with letter of October 12, 1972) furnished by Counsel for Complainants from Davis & Ruffner, Attorneys, to which Counsel for Defendants has initialed as "No Objection" it appears that the liens affecting subject property are:

a. Lien of second half 1972 taxes due City of Alexandria, Va.
b. Lien of undeclared tax of inheritance on the Estate of Beulah Virginia Priester.
c. Lien of unreleased Deed of Trust dated May 21, 1964, from Angus Priester, solely, to Denzil O. Nichols and Hugh C. Cregger, Jr., Trustees, securing one note in the amount of $2105.40 to order of Southern Season All, Inc., endorsed to Bankers Guaranty Corporation in monthly payments of $35.09 beginning July 27, 1964; recorded in Deed Book 600 page 633 of the land records of said City.

NOTE: There is filed as "Petitioner's Exhibit J" with this report what purports to be a complete stub payment record of all sixty payments under this encumbrance, BUT the lien remains unreleased as an outstanding lien upon the property.

3. Under the third inquiry directed, namely:

"What is the fee simple and annual value of the real property."

From the evidence produced at the hearing, and the subsequent additional report of Appraiser (Item #2 with letter of October 12, 1972) your commissioner would report that the approximate fee simple value of the property as of a current date, and as of date of death of decedent is $12,750.00. The monthly rental value varies from $155 at date of death to $135.00 as of current date.

4. Under the fourth inquiry directed, namely:

"Whether the property is susceptible to partition in kind amongst the owners and/or parties in interest in any of the modes prescribed by law; and if not,"

It was stipulated by counsel for all the parties to

this suit (as appears from the record) that the property is not susceptible to partition in kind, and your Commissioner is of the same opinion.

5. Under the fifth inquiry directed, namely:

"Whether any of the owners are willing to take the whole property and pay to the others such sum of money as their interest may entitle them to, and if not,"

Defendant, Delores Colbert indicated in her testimony that she would be interested in taking the property and making payment in cash to the other two entitled thereto, of their shares therein. Before any other disposition is made, it is the suggestion of Commissioner that she be given the first opportunity of complying with this request.

6. Under the sixth inquiry directed, namely:

"Whether the interest of those who are entitled to the subject or its proceeds will be promoted by the sale of the entire subject and a division of the proceeds, and if so,"

Commissioner would reply to this inquiry in the affirmative.

7. Under the seventh inquiry directed, namely:

"Whether the proper parties are before the Court in this cause to enable the Court to effect such sale."

Commissioner would reply to this inquiry in the affirmative.

8. Under the eighth inquiry directed, namely:

"Whether or not the Complainant, Angus Priester, is

entitled to curtesy as alleged in his complaint filed herein."

Commissioner would reply in the affirmative to this inquiry, and for the purpose of determining the value of such estate the evidence indicates that he was born January 1st, 1907.

9. Under the ninth inquiry directed, namely:

"Whether or not the Complainant is entitled to reimbursement for monies expended herein by virtue of his curtesy rights in said property."

By virtue of Sec. 64.1-33 of the Code, tenant by curtesy may occupy the mansion house without charge for rent, repairs, taxes and insurance. As a result your Commissioner recommends that Complainant is entitled to reimbursement for:

a. All taxes paid for the years 1964 through 1970.
b. Sixty-seven payments made to Peoples Savings & Loan Association on the Deed of Trust upon the property executed by Beulah Virginia Priester (during her lifetime) and Angus Priester. Statement from that lender shows the principal balance at time of her death to be $2,503.65, but according to the ledger filed therewith, the actual pay-off (including interest) totalled $2,949.01.
c. For those payments made by Complainant on current improvement contract for aluminum windows ($800 plus $156, which with interest and financing charges totalled 48 payments of $21.66 or $1,039.68) His payment stubs indicate 29 such payments of $21.66 each

All of these items come within the pleadings, but Commissioner is not recommending reimbursement of other items which were sought to be included in the testimony, not within the pleadings.

NOTE: It appears from the testimony that the previous

improvements had been paid in full by the Complainant, it is the belief of your Commissioner that such previous contract payment is the one evidenced by the Deed of Trust reported unreleased as Item c under Inquiry # 2. This payment matured in full June 27, 1969, but as stated above Commissioner does not recommend reimbursement to Complainant for same as it is without the scope of the pleadings.

10. Under the tenth inquiry directed, namely:

"Whether curtesy may also be assigned or recovered in the same manner and by similar proceedings provided for the recovery of dower."

By reason of Sec. 64.1-24 of the Code, Commissioner answers this inquiry in the affirmative.

11. Under the eleventh inquiry directed, namely:

"Whether a surviving spouse (husband) shall be entitled to a curtesy interest of one-third of all the real estate whereof the deceased spouse was at any time seized."

Commissioner would reply to this inquiry in the affirmative.

12. Under the twelfth inquiry directed, namely:

"Whether or not the Complainant has paid the real estate taxes as he has alleged in his complaint through the year 1970 and ascertain any and all other expenses by the complainant for the maintenance and upkeep of said property."

Commissioner would refer to the reply to Inquiry #9 which covers the information requested under this current inquiry.

13. Under the thirteenth inquiry directed, namely:

"Whether or not the Defendants, Frederick Colbert and Delores Colbert, have made any contribution to the upkeep of said property prior to the filing of this suit, and if so, in what amounts and to whom."

Commissioner would reply in the negative to this inquiry.

14. Under the fourteenth inquiry directed, namely:

"Any other matters specially stated which the Commissioner may deem pertinent or which any party may request to be so stated."

Commissioner would report the following items which should be included in the costs of this proceedings, and deducted from any sale of the property, as a primary charge on such proceeds:

a.	Dolores Stover, transcript of testimony	$136.95
	Deposit on costs of filing suit	33.50
	Davis & Ruffner, Attys., title report	75.00
	John L. Batcheller, Appraisal reports	100.00
	Death Certificate	2.00
	Commissioner of Reference report	100.00
	Total	$447.45

b. Clearance of inheritance tax (Item b under Inquiry #2)
c. Release of recorded Deed of Trust (Item c Inquiry #2)
d. Payment of balance of unpaid improvement contract (Item c Inquiry #9).

Respectfully submitted this 24th day of October, 1972.

O R D E R

THIS CAUSE came on to be heard this 22nd day of November, 1972, upon the papers formerly read and upon the report of the Special Commissioner in Chancery, and upon Exceptions taken to said report by both parties, and the parties appearing by counsel, and was argued by counsel, and it appearing to the Court from the evidence, and the report of the Special Commissioner that some time prior to her death, Beulah Virginia Priester and her husband, the Complainant, Angus Priester, installed in the house owned by her a central heating system; that the funds for such installation were borrowed from Peoples Savings and Loan Association of Alexandria, Virginia; such loan being secured by a deed of trust upon the home owned by the said Beulah Virginia Priester, and it further appearing that the parties made payments upon said obligation during the lifetime of the said Beulah Virginia Priester, there remaining upon said loan at the time of her death the sum of $2,941.01, principal and interest, out of an original principal of $4,800.00, which amount was paid pursuant to the terms of the note by her surviving husband, the Complainant, Angus Priester, and the Court being of the opinion that such payments by Angus Priester

constitute "repairs" pursuant to §64.1-33 of the 1950 Code of Virginia, as amended, and it further appearing to the Court that in the year 1969, five years following the death of the said Beulah Virginia Priester, at a time when he continued to occupy the home owned by her and her heirs, the Complainant contracted to purchase a number of aluminum storm windows and have them installed upon the house aforesaid, agreeing to pay a total price of $1,039.68 for the same, and at the time of the hearing before the Special Commissioner had paid the sum of $498.18 toward said total price, and it being the opinion of the Court that the purchase of said storm windows constitute "repairs" pursuant to the terms of §64.1-33 of the 1950 Code of Virginia, as amended, and that the Complainant should be reimbursed by the heirs for the total amount which he has paid, together with any amount which he may pay in the future, toward the total indebtedness which he undertook for the purchase of the said storm windows and it further appearing to the Court that the value of the real estate in question is $12,500.00, but that said amount should be reduced by the amount of the "repairs" undertaken by either Beulah Virginia Priester and Angus Priester during the lifetime of Beulah Virginia Priester, or Angus Priester alone, to a total value of $8,511.31, and it appearing that the present value of one-third of said amount,

computed in accordance with the widower's expectancy of life under the mortality tables amounts to the sum of $1,049.48, and the Court being of the further opinion that the cost, including appraiser's fee, commissioner's fee, stenographer's fee, title report, and filing fee, be shared equally between the parties, and it further appearing to the Court that the Complainant Angus Priester has paid the sum of $848.38 by way of taxes upon the house in question subsequent to the date of the death of Beulah Virginia Priester, and that he should be reimbursed therefor, upon consideration whereof, it is

ADJUDGED, ORDERED and DECREED that the Exceptions taken by the parties to the report of the Special Commissioner filed herein, be, and the same hereby are, overruled, and it is further

ADJUDGED, ORDERED and DECREED, that the Complainant shall receive as the computed value of his life estate in the subject property, the sum of $1,064.38 by way of allottment; the sum of $3,988.69 by way of reimbursement for repairs; the sum of $848.38 by way of reimbursement for taxes advanced, together with one-half his costs expended, and it is further

ADJUDGED, ORDERED and DECREED that the Defendants, Frederick Colbert and Delores Colbert, shall have sixty (60)

days from the date of entry of this order, within which to finance said property for the purpose of paying the Complainant, Angus Priester, the aforementioned sum, unless within which time, as permitted by the applicable rules of Court, said Defendants shall have filed with this Court, their notice of appeal and assignments of error to this order, wherein the effect of this order shall be suspended to permit such appeal to be effected, and suspended thereafter until such action upon said appeal as the Supreme Court of Appeals shall deem proper, and it is further

ADJUDGED, ORDERED and DECREED that the Defendants pay to the Complainant 6 percent interest on his computed payoff from the date of entry of this order until the said is paid, subject to the foregoing, and it is further

ADJUDGED, ORDERED and DECREED that if the Defendants, Frederick Colbert and Delores Colbert, have not succeeded in obtaining financing within sixty days of the entry of this decree or that they have not filed with the Clerk of The Court a notice of appeal and assignments of error, that Edwin C. Brown, Sr., Esq., be, and he hereby is, appointed Commissioner of Sale for the purpose of selling the property herein, and from the proceeds thereof pay to the Complainant,

Angus Priester, all amounts due him pursuant to this decree, with the balance thereof being paid to the Defendants less appropriate fees, costs and commissiones, to all of which action of the Court the Defendants duly note their exception.

ENTERED this ___ day of _____, 197 .

ASSIGNMENT OF ERRORS

1. The Court erred in declaring the payments made by the Complainant to retire a deed of trust and note executed prior to the death of Complainant's wife to be made for "repairs", and ordering the Complainant to be reimbursed therefor.

2. The Court erred in declaring that payments made by Complainant upon a contract for the purchase of aluminum siding and payments yet to be made in the future are or were for "repairs" entitling the Complainant to reimbursement for those payments already made and yet to be made for such aluminum siding from the Defendants.

3. The Court erred in holding under the facts of this case that Complainant had a remedy other than that set forth in Code §64.1-25.