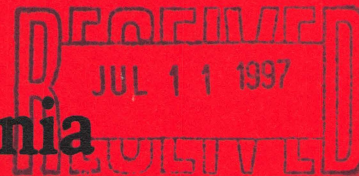


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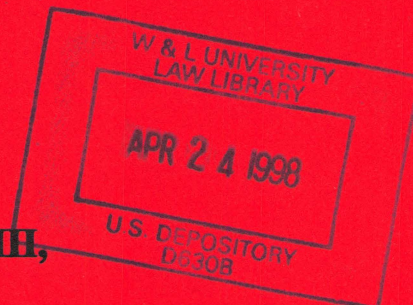
CLERK

SUPREME COURT OF VIRGINIA

IN THE  
**Supreme Court of Virginia**  
AT RICHMOND



RECORD NO. 970622



JOHN BARBOUR ORGAIN, III,

*Appellant,*

v.

NORVELL ORGAIN BUTLER,

*Appellee.*

JOINT APPENDIX

Miles Cary, Jr., Esq.  
SAUNDERS, CARY &  
PATTERSON  
9100 Arboretum Parkway  
Suite 300  
Richmond, VA 23236  
(804) 330-3350

*Counsel for Appellant*

Halford I. Hayes, Esq.  
HAYES & CARRICO, P.C.  
2727 McRae Road  
Richmond, VA 23235  
(804) 272-9922

*Counsel for Appellee*



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**VIRGINIA**

**IN THE CIRCUIT COURT FOR THE COUNTY OF CHESTERFIELD**

**NORVELL ORGAIN BUTLER**

**Plaintiff**

**vs.**

FILED  
7/26/95

**JOHN BARBOUR ORGAIN, III**

**Defendant**

**SERVE AT:**

4508 Arrowhead Road  
Richmond, Virginia 23235  
(City of Richmond)

**BILL OF COMPLAINT**

**COMES NOW THE PLAINTIFF**, by counsel, and for her Bill of Complaint states as follows:

1. The Plaintiff, Norvell Orgain Butler, ("Butler") is an individual residing in Virginia Beach, Virginia.
2. The Defendant, John Barbour Orgain, III, ("Orgain") is an individual residing in the City of Richmond, Virginia.
3. Butler and Orgain are sister and brother.
4. Butler and Orgain are the fee simple owners of three parcels of land in the Midlothian District of Chesterfield County, Virginia, known briefly as 11120 Big Oak Road

(consisting of approximately 10 acres of land - tax parcel #0090501000000-2), 11040 Huguenot Road (consisting of approximately 9.595 acres of land - tax parcel #0090601000000-3) and 10800 Huguenot Road (consisting of approximately 20.565 acres of land - tax parcel #0090601000000-4) (collectively the "Property").

5. Butler and Orgain each are seized and possessed of an undivided one-half interest in the Property.
6. Butler has repeatedly asked Orgain to join her in placing the Property for sale but Orgain has refused.
7. Orgain has represented to Butler that he is negotiating for the sale of the Property but he has steadfastly refused to divulge the nature of such negotiations, the name of the person he is negotiating with and the terms and conditions of such negotiations.
8. Butler is not able to ascertain whether or not the Property is capable of being partitioned in kind.
9. Butler is not financially able to purchase Orgain's interest in the Property and Orgain has refused to purchase Butler's interest in the Property.
10. Butler either wants the Property partitioned in kind or sold, either publicly or privately so as to obtain the highest price, considering the terms and conditions of such sale.
11. The best interests of the parties will be promoted by a partition in kind, if possible, or by a sale of the Property with a distribution of the proceeds to the parties hereto.

**WHEREFORE**, the Plaintiff prays that this Court will enter an Order appointing a Special Commission who will: (1) determine whether or not the Property can be partitioned in kind; if the Property cannot be partitioned in kind, (2) sell the Property in such a manner as to yield the best price; (3) distribute the net proceeds equally to the

Plaintiff and Defendant, after payment of all costs and expenses of this suit and the sale;  
and (4) grant such other relief as to equity may seem meet and the nature of the case  
require.

**NORVELL ORGAIN BUTLER**

BY:   
COUNSEL

Halford L. Hayes (Va. Bar No. 16603)  
Lucretia A. Carrico (Va. Bar. No. 17786)  
HAYES & CARRICO, P.C.  
2727 McRae Road  
Richmond, Virginia 23235  
(804) 272-9922

**C E R T I F I C A T E**

I hereby certify that I have mailed a true copy of the foregoing Bill of Complaint to  
John Barbour Orgain, III, the defendant, at 4508 Arrowhead Road, Richmond, VA 23235,  
on this 24th day of July, 1995.

  
Halford L. Hayes

**VIRGINIA:**

**IN THE CIRCUIT COURT OF THE COUNTY OF CHESTERFIELD**

**NORVELL ORGAIN BUTLER**

**Plaintiff**

**vs.**

**CH95-1028**

**JOHN BARBOUR ORGAIN, III**

**Defendant**

**DECREE OF REFERENCE**

This cause came on this day to be heard upon the plaintiff's bill of complaint, upon the answer of the defendant and was argued by counsel.

**UPON CONSIDERATION WHEREOF**, the Court does **ORDER, ADJUDGE** and **DECREE** that this cause be and it is hereby referred to Howard S. Marley, Commissioner In Chancery of this Court, who, after giving due notice of the time and place for executing this reference as required by law, will inquire and report as follows:

1. Whether or not the necessary and proper parties are before the Court in this suit?
2. What real estate the parties jointly own in Chesterfield County, Virginia?
3. Whether the jointly owned real estate of the parties is capable of being partitioned in kind?
4. What is the current value of the jointly owned real estate of the parties?
5. Whether either party is willing to purchase the interest of the other party in the jointly owned real estate?
6. Whether the jointly owned real estate of the parties should be sold by public or private sale?

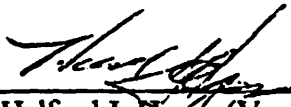
7. Any other matter not specially stated which the Commissioner may deem pertinent or which any party or his attorney may request to be so stated.

ENTER:

3 / 1 / 96

  
JUDGE

I ask for this:

  
Halford I. Hayes (Va. Bar No. 16603)  
Lucretia A. Carrico (Va. Bar. No. 17786)  
HAYES & CARRICO, P.C.  
2727 McRae Road  
Richmond, Virginia 23235  
(804) 272-9922  
Counsel for the Plaintiff

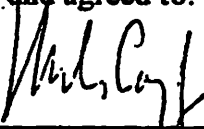
A COPY, TESTE:

JUDY L. WORTHINGTON, CLERK

BY 

DEPUTY CLERK

Seen and agreed to:

  
Miles Cary, Jr., Esquire  
SAUNDERS, CARY & PATTERSON  
9100 Arboretum Parkway, Suite 300  
P.O. Box 35651  
Richmond, Virginia 23235-0-651  
(804) 330-3350  
Counsel for the Defendant

V I R G I N I A :

IN THE CIRCUIT COURT OF THE COUNTY OF CHESTERFIELD

NORVELL ORGAIN BUTLER,

Plaintiff,

v.

CH95-1028

JOHN BARBOUR ORGAIN, III,

Defendant.

REPORT OF COMMISSIONER

This cause came to be heard on this day upon the order of reference entered on March 1, 1996, by the Honorable Timothy J. Hauler appointing Howard S. Marley, a Commissioner in Chancery of this Court, to hear evidence and make certain inquiries and report to the Court.

And on August 26, 1996, at 2:00 p.m., evidence was heard before the said Howard S. Marley at his office in Chesterfield County, Virginia. Evidence was presented and introduced by the plaintiff, through her attorney, Halford I. Hayes, and by the defendant, through his attorney, Miles Cary, Jr. The Commissioner having heard evidence and having reviewed the exhibits presented by the parties makes the following findings:

1. The necessary and proper parties are before the Court to enable the Court to effect a sale of the property in this suit by virtue of proper service on all parties as required by law.

2. The owners of the real property that is the subject of this suit are Norvell Orgain Butler and John Barbour Orgain, III, who own the property as tenants in common. The status of the title herein is as of September 3, 1996, at 8:00 a.m. The said Norvell

FJD in Court  
10/25/96



Orgain Butler and John Orgain Butler, III, are the owners of three parcels of land in Chesterfield County, Virginia, more particularly described on a Preliminary Report for File No. B96-5534, by Bon Air Title Agency, Inc., a copy of which report is attached hereto as Exhibit "A".

3. It has been agreed to by counsel for both parties to this matter and that agreement is adopted and confirmed by your Commissioner that the property that is the subject of this suit is not susceptible of being partitioned in kind.

4. The fair market value of the real estate is \$803,000.00, all as shown by an appraisal of the property performed by David G. Lester, Sr., SRA, attached hereto and made a part hereof, as Exhibit "B".

5. Neither of the owners of the property has indicated a willingness to purchase the interest of the other party in the jointly owned real estate.

6. The jointly owned real estate should be sold by a publicly marketed private sale of the property in order to obtain the highest price for the property. Your Commissioner has received an offer from Wolfolk Properties, Inc. to purchase the property for \$1,200,000.00, a copy of which offer is attached hereto as Exhibit "C". This offer is acceptable to the plaintiff, Norvell O. Butler, but it is not acceptable to the defendant, John B. Orgain, III. The concerns of the defendant are outlined in a letter to your Commissioner by counsel for the defendant dated September 3, 1996, a copy of which letter is attached to this report as Exhibit "D".

Your Commissioner has reviewed this offer, but he will not comment on the terms of the offer. It is the position of your Commissioner that he does not have the authority to recommend the approval of this offer, as the conditions in the offer are such that they can only be approved by the owners of the property. The recommendation by your Commissioner to approve this offer would be to force the parties to accept conditions to which they may or may not have agreed. The recommendation by your Commissioner to approve this offer could also possibly create obligations and liabilities on the parties to which the parties are not agreeable. It is the position of your Commissioner that a recommendation by your Commissioner to the Court to accept any submitted offer which is not agreeable to both parties is outside of the scope and the authority of your Commissioner. It is, however, the position and recommendation of your Commissioner that since the property that is the subject of this suit is unique in its nature, it should be publicly marketed through a reputable commercial real estate brokerage firm agreed to by the parties. This property is unique because it is one of the last large undeveloped parcels of real estate along Huguenot Road, in Chesterfield County, Virginia. The parties to this suit are entitled to and should receive the highest and best price for the property subject to those conditions and obligations which are acceptable and agreeable to both of them. It is the position of your Commissioner that the only way that this can be accomplished is through a public marketing of the real estate by listing the property with a reputable commercial real estate brokerage firm

acceptable to both parties.

7. Costs incurred at the instance of the Commissioner and other costs of the proceeding as follows:

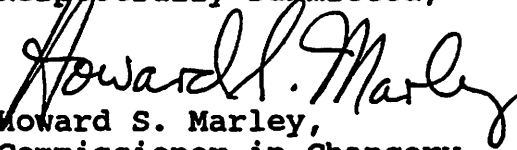
Bon Air Title Agency, Inc. for title search \$ 272.50

Lester Barber and Associates, Inc. for Appraisal \$2,500.00

Howard S. Marley, Commissioner in Chancery, for executing the Decree of Reference, for conducting the hearing and preparation of this report \$1,250.00

Your commissioner respectfully requests that these costs be apportioned equally between the parties, and the parties be directed to make payment of same.


Respectfully submitted,

  
Howard S. Marley,  
Commissioner in Chancery

Dated: 10/25/96

**CERTIFICATE**

I hereby certify a true copy of the foregoing was mailed by U.S. Mail to Halford I. Hayes, Esquire, 2727 McRae Road, Richmond, Virginia 23235, and Miles I. Cary, Esquire, P. O. Box 35651, Richmond, Virginia 23235-0651, this 25<sup>th</sup> day of October, 1996.

  
Howard S. Marley

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF CHESTERFIELD

---

NORVELL ORGAIN BUTLER

Plaintiff,

vs.

JOHN BARBOUR ORGAIN, III

Defendant.

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: Case No.  
: CH95-1028  
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Complete TRANSCRIPT of the motion and other incidents in the above, when heard on December 13th, 1996, before the Honorable Timothy J. Hauler, Judge.

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THE COURT: First of all, the commissioner's report is confirmed. There being no exceptions having been filed to the report of the commissioner, it is, at this point, confirmed by the Court.

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Despite the eloquence of all counsel, this Court has lived with this litigation and with these parties since July of 1995, and if there is any point of fact that has been well-established in the mind of this trial judge is the fact that the parties to this litigation for reasons unknown to this Court cannot agree on the right time of day while looking at the same public clock. I don't know why. I don't choose at this time to have an explanation as to why.

24

25

Quite frankly, that is the primary reason that an appropriate sale, which I agree, Mr.



1 Cary, would be a sale with a listing, would be the most  
2 appropriate; but these parties, as I sit here, I know  
3 won't even be able to agree as to who to list it with.  
4 They won't be able to agree as to what the amount of the  
5 commission should be. They won't be able to agree as to  
6 how the proceeds shall be paid. They'll be able to  
7 agree to nothing because for over one year these parties  
8 have amply demonstrated to this court that they are, for  
9 reasons unknown, incapable or incapable of negotiating  
10 with each other in good faith.

11 Now, that being the case, to order  
12 that this property be sold through a commercial listing  
13 process would be to order an exercised and absolute and  
14 total futility because I dare say the property would  
15 never get listed. That's the problem I've got with it,  
16 Mr. Cary.

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THE COURT: I've really heard all I need to hear, and I do thank you both for your concerns for your respective clients and for your thoughts.

All I've got to say is what I've already stated on numerous occasions. This does not have to be this way. It should not be this way, but because of the obstinance of these parties, and I hope it's the parties and not the lawyers, and I say it for this reason: Because if it ultimately is the obstinance of the lawyers that is causing this then one or the other of you gentlemen, and I don't know and certainly I'm not going to assess any responsibility, but one or the other of you is not representing his client to the extent to which they deserve to be represented, and I won't get into that. I won't get into that. All I've got to say is if this property is not sold to maximize the return to the respective owners of this property, there's something dramatically wrong.

Now, again, I state for the record, and, you know, Mr. Cary, I'm sure you're going to want to note an appeal on this, and I just think it's

1 important for the Supreme Court to have as a matter of  
2 record that this Court has essentially reached the end  
3 of the line and feels that there is no other viable  
4 alternative because of the demonstrated lack of ability  
5 of these parties to agree on anything that relates to  
6 this transaction. This case should never have gotten to  
7 this point, but it has. I wish I could supplement the  
8 record for the reasons or with the reasons as to why it  
9 has gotten to this point, but they are totally beyond  
10 me. I have no earthly idea, and I cannot and will not  
11 impose an order on these parties that is doomed from its  
12 inception because the parties will not cooperate. I'm  
13 therefore going to order a public sale of this property.

14 I think we need to have an order  
15 prepared because I know that Mr. Cary is going to seek  
16 injunctive relief on behalf of his client from the  
17 Supreme Court of Virginia as he feels duty bound to do.  
18 I realize that, Mr. Cary, and if the Supreme Court of  
19 this Commonwealth views it differently then gentlemen,  
20 we obviously will be bound by their assessment of the  
21 facts of this case, but I am without any other basis of  
22 referring this for sale other than by public sale by  
23 auction because these parties have on so many occasions  
24 since July of '95 demonstrated their inability to  
25 cooperate, to agree, to negotiate in good faith with one

1 another, and that being the case, this is the only  
2 option that the Court sees to be appropriate in this  
3 case. So I will enter the order for sale that has been  
4 proposed by Mr. Hayes. This has not been endorsed.

V I R G I N I A :

IN THE CIRCUIT COURT OF THE COUNTY OF CHESTERFIELD

NORVELL ORGAIN BUTLER,

Plaintiff,

v.

JOHN BARBOUR ORGAIN, III,

Defendant.

CASE NO.: CH95-1028

ORDER FOR SALE

CAME this day the parties in person and by counsel upon the Motion of the Plaintiff for a private sale of the Property and upon the Motion of the Defendant to confirm the Report of the Commissioner in Chancery, to which no exceptions have been filed by either party.

WHEREUPON the Court confirms the following from the Commissioner's Report: that all of the necessary and proper parties are before the Court; the Property is not susceptible of being partitioned in kind; that the fair market value of the Property is \$803,000.00; that neither party is willing to accept an allotment of the entire parcel and pay the other for his or her interest therein; and the interests of the parties will be promoted by a sale of the Property. The Court, however, rejects the Commissioner's finding and recommendation that the Property be placed with a licensed realtor and sold by a publicly marketed private sale. The Court finds that the parties have been unwilling to accept either of two private offers on the Property for \$1,200,000.00 from Woolfolk Properties, Inc. and/or \$803,000.00 from William W. Johnson. Considering the likelihood that the parties will be unable to



agree upon any price or method for conducting a private sale, the Court finds that the only alternative is that the Property be sold by a public auction sale.

Pursuant to § 8.01-83 of the Code of Virginia, (1950 as amended), it is therefore ORDERED that Halford I. Hayes and Miles Cary, Jr., as Special Commissioners of this Court, conduct a public sale of the Property under the following specific terms and conditions:

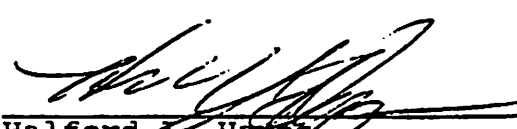
The Property shall be sold at 11:00 a.m. on January 31, 1997, with the sale to be conducted on the Property itself. The sale and its terms and conditions shall be advertised once a week for four weeks in the Richmond Times Dispatch beginning in the last week of December, 1996. All bidders must post a certified or cashier's check with the Special Commissioners in the amount of \$25,000.00 to be eligible to bid. The Commissioners shall enter into a memorandum of sale with the highest and final bidder. The Property shall be sold "as is" with no warranties. The successful bidder, on or before 5:00 p.m. of February 3, 1997, shall pay an additional deposit, which when added to the \$25,000.00 already paid, will raise the total deposit to ten percent (10%) of the successful bid. The balance of the purchase price shall be paid in cash within thirty (30) days of the date of the sale, time being of the essence. The total deposit shall be non-refundable and shall be used to defray the costs of the Sale, including the attorneys fees of the Parties and the readvertisement of the Property, if the successful bidder is unable to complete the transaction in accordance with the terms and conditions of this Order and as contained in the Memorandum of Sale. The Special Commissioners shall convey the Property by Special Warranty Deed and shall submit an Order confirming the sale prior to settlement. All costs of the sale and of this suit shall be deducted from the Purchase Price prior to disbursement of the proceeds to the Parties. Each party shall be responsible for his and her own attorney's fees, including those fees incurred while acting as Special Commissioner herein.

On motion of the defendant that the Court suspend execution of this Order of Sale pending an appeal to the Supreme Court of Virginia, this Order of Sale shall be stayed until such time that the appeal is denied or in the event a writ of error is granted, until this Order of Sale is affirmed by the Supreme Court of Virginia.

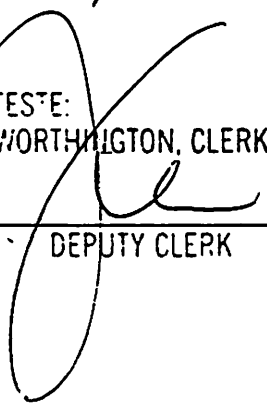
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Judge

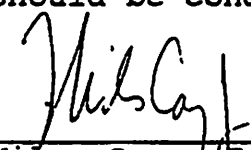
I ask for this:

  
\_\_\_\_\_  
Halford A. Hayes  
HAYES & CARRICO, P.C.  
2727 McRae Road  
Richmond, Virginia 23235

A COPY, TESTE:  
JUDY L. WORTHINGTON, CLERK  
, p.d.

BY   
\_\_\_\_\_  
DEPUTY CLERK

Seen and objected to on the grounds that there was no evidence to justify the Court's refusal to confirm that portion of the Report of the Commissioner in Chancery wherein the Commissioner made a finding and recommendation that there should be a publicly marketed private sale by listing with a real estate brokerage firm and ordering instead that a public auction sale should be conducted:

  
\_\_\_\_\_, p.d.  
Miles Cary, Jr.  
SAUNDERS, CARY & PATTERSON  
9100 Arboretum Parkway, Suite 300  
P. O. Box 35651  
Richmond, Virginia 23235-0651  
(804) 330-3350

mc\pld\orgain.ofs

**Assignment of Error:**

**The trial court erred in refusing to confirm that portion of the Report of the Commissioner in Chancery wherein the Commissioner made a finding and recommendation as to the best method for the sale of the property and that there was no evidence to justify and support the court's refusal to confirm the Commissioner's Report in its entirety.**