IN THE

SUPREME COURT OF APPEALS OF VIRGINIA

AT RICHMOND

Record No. 1635

THE PLANTERS NATIONAL BANK OF FREDERICKSBURG, VIRGINIA, A CORPORATION,

vs.

E. G. HEFLIN COMPANY, INCORPORATED, A CORPORATION.

MOTION TO DISMISS APPEAL

Lawyers Publishing Co., Inc., 1333 E. Franklin St., Richmond, Va.

IN THE

SUPREME COURT OF APPEALS OF VIRGINIA

AT RICHMOND

Record No. 1635

THE PLANTERS NATIONAL BANK OF FREDERICKSBURG, VIRGINIA, A CORPORATION,

vs.

E. G. HEFLIN COMPANY, INCORPORATED, A CORPORATION.

MOTION TO DISMISS APPEAL

PRELIMINARY STATEMENT

Complaining of a decree against it in a suit to rescind a deed and deed of trust on the grounds of misrepresentation, failure of consideration and a conditional delivery, the Planters National Bank of Fredericksburg, Virginia, a Corporation, has appealed.

This suit grew out of a transaction between agents of the Appellant and the Appellee wherein the Appellant attempted to sell and convey a certain lot of real estate to the Appellee, during the year of 1930.

On the 2nd day of October, 1933, the Appellee instituted its suit in the Corporation Court of the City of Fredericksburg, Virginia, to rescind and cancel the deed and deed of trust which was the result of the transaction, alleging as its grounds for rescission and cancellation, misrepresentation on the part of the agents of the Appellant, a failure of consideration and that the deed and deed of trust were delivered upon certain conditions as set forth in complainant's bill. Thereafter the Appellant filed its answer and the Appellee its replication.

The pleadings having been made up the Court proceeded to hear the testimony *ore tenus* on behalf of both the Appellant and Appellee and on the testimony heard *ore tenus* and the pleadings, a final decree was entered from which this appeal was granted.

MOTION

The Appellee, The E. G. Heflin Company, Incorporated, now submits its motion to the Court to dismiss the appeal on the following grounds:

(1) Because the record discloses that no exception was taken by the Appellant to the entry of the final decree or to the entry of any other decree or order.

(2) Because the record further discloses that the evidence on which the decree was entered was heard

ore tenus and the alleged transcript of the evidence was not in any way identified or authenticated by the Trial Judge and cannot therefore, be considered by this Court, as it is not properly a part of the record.

From an examination of the record in this case it will be readily seen that pages one to twenty-two contain the Appellant's petition. Pages twenty-two to forty-six contain the pleadings, orders and exhibits.

Pages forty-seven to one hundred and two contain what purports to be a transcript of the evidence, and on page one hundred and five there appears the certificate of the Clerk of the Corporation Court of the City of Fredericksburg.

Nowhere in the record is there any certificate of the Judge of the Corporation Court as to what testimony was taken nor does the alleged transcript of the evidence bear any mark of *identification or authentication* by the Trial Judge.

It will be further noted that the record contains no notice to counsel for the Appellee, that the alleged transcript of the evidence would be presented to the Judge of the Corporation Court of the City of Fredericksburg for authentication or identification, nor does the record even show the name of the stenographer who transcribed the alleged testimony.

The final decree entered in this suit on December 11, 1934, which is set forth on page forty-five and forty-six of the record, does not identify or authenticate the alleged testimony, but on the other hand, merely sets out that the Court heard the testimony of witnesses for both the Complainant and the Respondent *ore tenus*.

It follows, therefore, that in order for the evidence so taken *ore tenus* to have become a part of the record in this case, it must have been certified or authenticated by the Trial Judge within sixty days from the entry of the final decree, and then, only after counsel for the Appellee had been given reasonable notice of the time and place of such certification or authentication.

Section 6253 (b) of the Code of Virginia, provides in part:

> "It shall be sufficient for all intents and purposes of a review by any appellate court of any action, ruling, order, judgment, or matter, arising in the course of the trial or hearing of a cause, that the *trial judge shall certify the evidence introduced at the trial or hearing of such cause when a consideration of the evidence may be necessary,* in order to a decision upon an appeal of any question involved in such review."

Section 6253 (d) provides in part:

> "In all cases to preserve of record to all the interests and purposes and exception to any action, ruling, order or judgment of the trial court, or any matter arising in the course of the trial or hearing of a cause, it shall be sufficient that the trial judge, on the application of any party, shall certify the same simply and substantially in accordance with the provisions of this section."

Section 6253 (e) provides in part:

> "The appellate court in review * * * upon an appeal from a final decree * * * any question aris-

> ing upon the record * * * shall in every instance * * * consider any exception, the evidence introduced on the * * * hearing of the cause * * * *preserved of record in such case by the certificate of the trial judge.*"

Section 6252 and 6253 therefore provide how and when rulings of the trial court and the evidence heard may be made a part of the record and these sections have been construed on many occasions by this Court. See *Kavanaugh* v. *Stevenson,* 147 Va. 625, 120 S. E. 153; *Blackwood Coal Co.* v. *James,* 107 Va. 656; *Turner* v. *Smith,* 143 Va. 206; *Pereira* v. *Moon,* 146 Va. 225; *Owen* v. *Owen,* 157 Va. 580; *Ross Cutter Co.* v. *Rutherford,* 157 Va. 674; *Amos* v. *Franklin,* 159 Va. 19; *Nethers* v. *Nethers,* 160 Va. 335.

If we carefully examine the printed record from page forty-seven to page one hundred and two we will find that nowhere does it appear that the alleged transcript has been in any way authenticated by the Trial Judge. Nor does it appear that the alleged transcript was ever filed.

In *Ross Cutter Co.* v. *Rutherford, supra,* Epes, J., in delivering the opinion of the Court at page 683 said:

> "A transcript of testimony heard *ore tenus* by the court is a very different thing from a deposition duly taken before an officer authorized to take depositions found in the papers in the cause marked filed by the Clerk or depositions filed with and made a part of the report of a Commission in Chancery in a cause. In such cases the certificate of the officer before whom the depositions were taken, authenticated the matter contained therein; and the certificate of the

> Clerk showing the filing therefore is sufficient to make them a part of the record. But where a transcript of testimony heard *ore tenus* is found in the papers in the cause, even if it be marked filed by the Clerk, there is no official authentication of the matter contained therein; and the *Judge alone is competent to make such authentication.*" (Italics ours).

Even though, opposing counsel should agree on a statement of facts it will not be considered by this Court unless such agreed statement of fact is made a part of record by certificate of the trial judge within sixty days after entry of final decree. *Owen* v. *Owen, supra.* And the authentication or certification of testimony taken *ore tenus* in Chancery causes is as necessary as in Common law cases under Sections 6252 and 6253 of the Code. *Nethers* v. *Nethers, supra.*

It is apparent that Sections 6252 and 6253 have not been compiled with in regard to certifying the evidence in this case and inasmuch as the preparation of records for appeal is governed entirely by the Sections of the Code cited herein above, nothing can become a part of a record unless it is made so in accordance with the statutory provisions.

No one save the Trial Judge may certify or identify the evidence for the purpose of making it a part of the record and it must be so identified by him as to make it appear that the evidence so identified or certified is the evidence and all of the evidence on which his decision is based. *Boggs* v. *Commonwealth,* 153 Va. 838; *Reynolds* v. *Commonwealth,* 135 Va. 722; *Dove* v. *New River Coal Company,* 150 Va. 828; *Turner* v. *Smith,* 143 Va. 206.

For the reasons stated, it is respectfully submitted that the motion to dismiss the appeal granted in this case, should be sustained.

E. G. HEFLIN CO., INC.,

By E. G. HEFLIN, Pres.

FRANK M. CHICHESTER,

S. BERNARD COLEMAN,
Counsel for Appellee.

To C. O'Conor Goolrick, Counsel of record of Appellant:

Take notice that on the 18th day of November, 1935, at ten o'clock A. M. or as soon thereafter as it may be heard, a motion in writing will be submitted to the Supreme Court of Appeals of Virginia, at Richmond, in the State Library Building, to dismiss the appeal heretofore granted in the case of *The Planters National Bank of Fredericksburg, Virginia, Inc.* v. *E. G. Heflin Company, Inc.*, for the reasons set forth in the foregoing, which is the motion to be submitted in accordance with this notice.

E. G. HEFLIN CO., INC.,

By E. G. HEFLIN, Pres.

Due and legal service of the foregoing notice and motion in writing is hereby accepted by receiving a copy of said notice and motion in writing this 8th day of November, 1935.

C. O'CONOR GOOLRICK,

Counsel for the Planters National Bank of Fredericksburg, Virginia, Incorporated.