

# Record No. 3664

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In the  
Supreme Court of Appeals of Virginia  
at Richmond

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**WILLIAM RUDOLPH ROSE, ET ALS.**

v.

**MARY W. ROSE, ET ALS.**

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FROM THE CIRCUIT COURT OF SUSSEX COUNTY

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## 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.

M. B. WATTS, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

191 VA 171



## RULE 5:12—BRIEFS

**\$1. Form and Contents of Appellant's Brief.** The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall be to the official Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned, and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

**\$2. Form and Contents of Appellee's Brief.** The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate references to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this Court, giving his address.

**\$3. Reply Brief.** The reply brief (if any) of the appellant shall contain all the authorities relied on by him not referred to in his opening brief. In other respects it shall conform to the requirements for appellee's brief.

**\$4. Time of Filing.** As soon as the estimated cost of printing the record is paid by the appellant, the clerk shall forthwith proceed to have printed a sufficient number of copies of the record or the designated parts. Upon receipt of the printed copies or of the substituted copies allowed in lieu of printed copies under Rule 5:2, the clerk shall forthwith mark the filing date on each copy and transmit three copies of the printed record to each counsel of record, or notify each counsel of record of the filing date of the substituted copies.

(a) The opening brief of the appellant shall be filed in the clerk's office within twenty-one days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. The brief of the appellee shall be filed in the clerk's office not less than twenty-one days, and the reply brief of the appellant not less than two days, before the first day of the session at which the case is to be heard.

(b) Unless the appellant's brief is filed at least forty-two days before the beginning of the next session of the Court, the case, in the absence of stipulation of counsel, will not be called at that session of the Court; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

(c) Counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

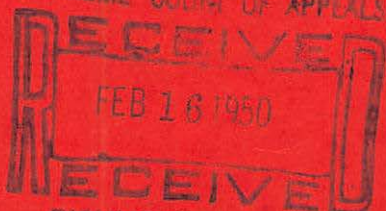
**\$5. Number of Copies.** Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

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**\$7. Effect of Noncompliance.** If neither party has filed a brief in compliance with the requirements of this rule, the Court will not hear oral argument. If one party has but the other has not filed such a brief, the party in default will not be heard orally.



CLERK  
SUPREME COURT OF APPEALS



RICHMOND, VIRGINIA

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

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**Record No. 3664**

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WILLIAM RUDOLPH ROSE, ROSALIND ROSE NEBLETT, F. M. NEBLETT AND GATEWOOD SIMMONS, AND MARY JANE ROSE SIMMONS, GEORGE PARHAM ROSE, NANCY MARGARET ROSE, RALPH LEE DUNN, JR., MILTON DUNN, HOWARD WACHSMANN; JEAN WACHSMANN, MARVIN WACHSMANN AND MARGARET WACHSMANN, THE LAST NINE OF WHOM ARE INFANTS, BY KINSEY SPOTSWOOD, GUARDIAN *AD LITEM*; AND KINSEY SPOTSWOOD, GUARDIAN *AD LITEM* FOR THE SAID INFANT DEFENDANTS, Appellants;

*versus*

MARY W. ROSE, OTTO WACHSMANN; MARGARET F. WACHSMANN, RALPH LEE DUNN, THERESA DUNN, MADONNA JONES, JOHN JONES, RUDOLPH WACHSMANN AND REBECCA WACHSMANN, Appellees.

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PETITION FOR APPEAL

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*To the Honorable Chief Justice and Justices of the Supreme Court of Appeals of Virginia:*

Your petitioners; William Rudolph Rose, Rosalind Rose Neblett, F. M. Neblett and Gatewood Simmons, and Mary Jane Rose Simmons, George Parham Rose, Nancy Mar-

garet Rose, Ralph Lee Dunn, Jr., Milton Dunn, Howard Wachsmann, Jean Wachsmann, Marvin Wachsmann and Margaret Wachsmann, the last nine of whom are infants by Kinsey Spotswood, their guardian *ad litem*, and Kinsey Spotswood guardian *ad litem* for the said infant defendants, respectfully represent that they are aggrieved by a final decree of the Circuit Court of Sussex County, Virginia, entered on the 27th day of April, 1949, in a certain suit in chancery  
 2\* pending \*in the said Court, in which your petitioner, William Rudolph Rose, was one of the complainants and your remaining petitioners were defendants, and Mary W. Rose was a complainant and Otto Wachsmann, Margaret F. Wachsmann, Ralph Lee Dunn, Theresa Dunn, Madonna Jones, John Jones, Rudolph Wachsmann and Rebecca Wachsmann were defendants.

#### MATERIAL PROCEEDINGS IN THE LOWER COURT.

This suit was begun by the issuance of process returnable to second February Rules, 1949, and the bill of complaint was duly filed at those Rules. The primary relief sought by the bill, insofar as this appeal is concerned, is the construction of a certain deed dated March 1, 1915, by which R. Wachsmann and Rebecca Wachsmann, his wife, conveyed two tracts of land located in Sussex County, Virginia, to "Otto R. Wachsmann (the person named in this suit as "Otto Wachsmann") and his children and their children". The complainant, Mary W. Rose, is one of four children of Otto Wachsmann, and the complainant, William Rudolph Rose, is one of five children of Mary W. Rose. The defendants are Otto Wachsmann and his children and their children (with the exception of the complainants) and the husbands and wives of such of the said defendants as are married. The defendants, F. M. Neblett, Rosalind Rose Neblett and Gatewood Simmons, who are among the petitioners herein, filed an answer wherein they concurred in the allegations and prayer of the bill of complaint and in which they prayed that the relief therein sought be granted insofar as the same affected the interests of the said defendants. The defendants, Otto Wachsmann, Margaret F. Wachsmann, Rudolph Wachsmann, Rebecca  
 3\* Wachsmann, Madonna Jones, John Jones, \*Ralph Lee Dunn and Theresa Dunn filed a joint answer, wherein they denied the conclusion made in the bill of complaint that the effect of the above-mentioned deed was to vest in William Rudolph Rose and the other grandchildren of Otto R. Wachsmann interests in the real estate described in the bill of complaint. Kinsey Spotswood, guardian *ad litem* for

all of the nine infant defendants, filed an answer on behalf of the said infant defendants. The defendants, Otto Wachsmann and Margaret F. Wachsmann, filed a demurrer to the bill of complaint. All of the said answers and the said demurrer were filed by orders of the lower court.

The sole issue involved in this appeal is that raised by the fourth ground of the demurrer, which is as follows: "The bill of complaint, insofar as the same relates to the claim of William Rudolph Rose that he has an interest in the real estate in the bill and proceedings described, shows on its face that the said William Rudolph Rose has no interest in the said real estate." After hearing argument on the demurrer, the lower court, on the 27th day of April, 1949, entered an order sustaining the said fourth ground of the demurrer and dismissing the bill of complaint "insofar as the same relates to the claim of William Rudolph Rose that he and the other grandchildren of Otto R. Wachsmann, born or to be born to the children of the said Otto R. Wachsmann, have an interest in the real estate in the bill and proceedings described \* \* \*. Your petitioners are William Rudolph Rose, one of the complainants, all of the infant defendants, Kinsey Spotswood, guardian *ad litem* for the said infant defendants, and the defendants, Rosalind Rose Neblett, F. M. Neblett and Gatewood Simmons, the said petitioners being all of the grand-children of Otto Wachsmann and the husbands of two of the said 4\* \*grandchildren who are married.

#### ASSIGNMENT OF ERROR.

Your petitioners aver that the lower court erred in the following particulars:

In sustaining the fourth ground of the demurrer filed by the defendants, Otto Wachsmann and Margaret F. Wachsmann, and, for that reason, dismissing the bill of complaint as to your petitioners, the effect of which ruling was to hold that your petitioners have no interest in the property described in the bill of complaint.

#### QUESTIONS INVOLVED IN APPEAL.

The sole question involved in this appeal is as to the nature of the estate created by the aforesaid deed dated March 1, 1915, by which R. Wachsmann and Elizabeth Wachsmann, his wife, conveyed certain tracts of land to "Otto R. Wachsmann and his children and their children", it being the contention

of the petitioners that the effect of the said deed was to vest in Otto Wachsmann a life estate in the said property, with a joint remainder in fee to his children and their children.

### STATEMENT OF FACTS.

The facts of this case are the facts alleged in the bill of complaint, including the three deeds filed with the said bill of complaint, as Exhibits "A", "B" and "C", and the facts stipulated by counsel as hereinafter set forth.

By deed dated March 1, 1915, and recorded in the Clerk's Office of the Circuit Court of Sussex County, in Deed Book 23, at page 324, R. Wachsmann and Elizabeth Wachsmann, his wife, conveyed certain property located in the county of 5\* Sussex, Virginia, in the \*language following:

"\* \* \* for and in consideration of \$5.00 Five Dollars, and love we have for our son Otto, The first party sells to the second party the said Otto R. Wachsmann and his children and their children with general warranty the two farms known as Robinson and Mount Airy, containing 1513 acres of land, more or less, Bounded on East by the Nottoway River, South by the land of L. P. Hargrave, West by Chappell and the County Road, and North by the land of L. I. Dobie and Dobie Estate.

"The party of the second part, Otto R. Wachsmann, has the right to sell the timber on the said property and mortgage same to the amount of \$2000.00 if Otto R. Wachsmann finds it necessary."

Subsequently, the grantors in the aforesaid deed executed another deed, which is dated June 8, 1917, and which is recorded in the Clerk's Office aforesaid, in Deed Book 24, at page 560, which said deed, insofar as material here, is in the words and figures following:

"WITNESSETH: That whereas, on the 1st day of March, 1915, R. Wachsmann and Elizabeth Wachsmann, his wife, undertook to sell and convey to O. R. Wachsmann and his children the property hereinafter conveyed by a deed which is duly recorded in the Clerk's Office in D. B. No. 23, at page 324, and whereas the said instrument of writing did not properly convey said property therein mentioned and it is the intention and object of this deed to properly grant and convey the said property which was intended to be conveyed therein, and to further cancel and declare null and void the said instrument of writing, dated on March 1st, 1915, and to execute the following deed;



"NOW THEREFORE, for and in consideration of the sum of five (\$5.00) dollars and natural love and affection they the said R. Wachsman and his wife have for their son Otto R. Wachsman they the said parties of the first part do hereby bargain, sell, grant and convey unto the said Otto R. Wachsman and his children with general warranty of title the two farms known as Robertson and Mount Airy containing fifteen hundred and thirteen (1513) acres, more or less, bounded on the east by the Nottoway river, south by the land of L. P. Hargrave, west by the land of Chappell and the County road and on the north by the land of L. I. Dobie and the Dobie estate.

6\* "It is distinctly understood and agreed by and between the party hereto that the said Otto R Wachsman party of the second part has the right to sell all of the timber on the said property, and to further mortgage the said property to the amount of two thousand (\$2000.00) dollars as the said Otto R. Wachsman deems it necessary so to do."

The only children who have been born to the defendant, Otto Wachsmann, whose wife is the defendant Margaret F. Wachsmann, are Mary W. Rose, one of the complainants, whose husband is the defendant George W. Rose, and the defendant, Rudolph Wachsmann, whose wife is the defendant Rebecca Wachsmann, Theresa Dunn, whose husband is the defendant Ralph Lee Dunn, and Madonna Jones, whose husband is the defendant John Jones. The only children who have been born to the said Mary W. Rose are William Rudolph Rose, one of the complainants, and the defendants, Rosalind Rose Neblett, whose husband is the defendant F. M. Neblett, Mary Jane Rose Simmons, an infant, whose husband is the defendant Gatewood Simmons, and George Parham Rose and Nancy Margaret Rose, the last two of whom are infants. The only children who have been born to the defendant, Theresa Dunn, are Ralph Lee Dunn, Jr., and Milton Dunn, infants. The only children who have been born to the defendant, Rudolph Wachsmann, are the defendants, Howard Wachsmann, Jean Wachsmann, Marvin Wachsmann and Margaret Wachsmann, all of whom are infants. No children have been born to the defendant Madonna Jones.

As appears from the decree entered by the lower court, on the 27th day of April, 1949, it was stipulated between counsel that the court in its consideration of the demurrer aforesaid should take into consideration as a fact that on March 1, 1915, the date of the execution of the first deed from R.

7\* Wachsmann and Elizabeth Wachsmann, his wife, described in Paragraph 1 of the bill of complaint, and on

June 2, 1917, the date of the execution of the second deed from R. Wachsmann and wife, described in Paragraph 2 of the bill of complaint, Otto R. Wachsmann had four children living and no grandchildren living and that no children were born to any of the children of Otto R. Wachsmann until the year 1924''.

By a deed dated July 22, 1940, Mary W. Rose (as Mary Elizabeth Rose) and George W. Rose, her husband, and the defendants, Theresa Dunn (as Theresa Wachsmann, unmarried), Madonna Jones (as Madonna Wachsmann Jones) and J. W. Jones, her husband, conveyed to Rudolph Wachsmann, with General Warranty, all of their right, title and interest, "now and hereafter"; in and to the aforesaid "Robertson" and "Mount Airy" farms containing 1513 acres, more or less, and by deed dated January 28, 1941, the defendants, Otto R. Wachsmann and Margäret F. Wachsmann, his wife, conveyed to the defendant, Rudolph Wachsmann, all of their right, title and interest, vested or contingent, in and to the aforesaid "Robertson" and "Mount Airy", which farms are referred to in the said deed as the "same land in all respects that was conveyed to Otto R. Wachsmann and children by deed from R. Wachsmann and wife, dated March 1, 1915, and recorded as aforesaid in said Clerk's Office in Deed Book 23, page 324; and which was later attempted to be strengthened and reaffirmed by deed dated June 8, 1917, and recorded in said Clerk's Office in Deed Book 24, page 560, reference to all of which is here made''.

### ARGUMENT.

Since no case has been found which can be said to be on all fours with the present case, it is believed that the proper approach to the solution of the question presented here will be to eliminate all possibilities except the one contended for by the petitioners, *viz.*, that the grant to "Otto R. Wachsmann and his children and their children" creates a life estate in Otto, with a joint remainder in fee to his children and their children—the children of Otto and their being a class which was subject to being opened up to admit new members as they came into being.

The first possibility to be eliminated is that the deed does not create a fee simple estate in Otto. This possibility is suggested by the line of cases beginning with *Wallace v. Dold*, 3 Leigh 278, holding that a gift to a mother and her children,

under certain circumstances, vests a fee simple estate in the mother. Regarding this doctrine, this court said, in the case of *Payne v. Kennay*, 151 Va. 472, at page 476:

“The late Judge Burks (the elder), in his excellent note to the opinion in *Nye v. Lovitt* (92 Va. 710, 24 S. E. 345), 2 Va. Law. Reg. 38, referring to the class of cases beginning with *Wallace v. Dold*, *supra*, shows that in no one of them is the decision, that the children took no interest, rested alone on the language that the gift is to ‘the mother and her children’, but that ‘the intention to give exclusively to the woman is deduced from the context and the language of the instrument taken as a whole’, and in conclusion he says: ‘The decisions only show that when the gift is to the woman and her child or children, or is in trust for them, or like phraseology is used, the children are excluded only when it appears from the context or the whole instrument taken together, that it was the intention to exclude them’. See also *Vaughan v. Vaughan*, 97 Va. 322 (33 S. E. 603).

“Whether construing a deed or a will, the object is to discover the intention, which is to be gathered in every case from the general purpose and scope of the instrument in the light of the surrounding circumstances.

“It has been sometimes said, without qualification (*Seibel v. Rapp*, 85 Va. 30, 6 S. E. 478), that a gift to the wife and her children is a gift to the wife, the reference to the children indicating the motive for the gift; but this is too broad a statement. The children are excluded only when it appears from the context of the whole instrument that it was the intention to exclude them.

9\* \*It is apparent that there is nothing in the deed involved in this case to indicate an intention on the part of the grantor to create a fee simple estate in Otto. In fact, a contrary intention is obvious from the provisions of the deed conferring upon Otto certain powers to mortgage and cut timber—powers that the owner of the fee would clearly have anyway. It is thus apparent that R. Wachsmann intended to vest in the children of Otto and their children an estate of some kind, the exact nature of which will be discussed later.

Normally, a devise or grant to a parent and children will vest a joint estate in the parent and children. There is an extensive treatment of gifts of this type in an annotation in 161 A. L. R., at page 612, and particular attention is called to the discussion therein of the rule in Virginia, which is referred

to as the "motive rule" (see p. 665).

From the foregoing, it is apparent that the deed in question does not create a fee simple estate in Otto.

It should be equally apparent that the deed does not have the effect of creating a joint fee in Otto and his children and their children. The fact that Otto is given limited rights with respect to the disposition of the property conveyed (he could only sell the timber and mortgage same to the extent of \$2,000) is inconsistent with the idea of a joint fee in Otto and his children or a joint fee in Otto and his children and their children. Had it been the intention of the grantors to give Otto a fee simple interest jointly with others, he, along with his co-tenants, would have had the right to sell not only the timber and mortgage the land without restraint, but he 10\* would have had the right, along with his \*co-tenants, to dispose of all interests in the property. It is not unusual, however, that a life tenant be given certain powers of disposition, even to the extent of complete power of alienation. Such powers are valid, while an attempt to restrain alienation by an owner of the fee is void. *Hall v. Hoak*, 184 Va. 821. Since the deed should be so construed as to give effect to all of its provisions, so long as no rule of law is violated, it should be held that Otto took a life estate to which was annexed certain powers not ordinarily incidental to life estates.

It may, therefore, be concluded at this point that Otto acquired a life estate under the deed of 1915, and not a fee simple interest as a joint tenant. The nature of the interests acquired by the children of Otto and their children will be discussed later.

The deed of 1915 did not create a fee tail in Otto which, under §5150 of the Code of Virginia, would have been converted into a fee simple estate. It is essential to the creation of a fee tail by a deed that words of inheritance be used. In 1 Minor on Real Property (Ribble Edition), at page 235, it is said:

"At common law, in the creation of estates tail as of other estates of inheritance, the word 'heirs' was indispensable (qualified in the case of the fee tail by other words such as 'of the body', showing from whom the heirs are to spring). But no particular words of *procreation* are requisite, that is, words showing of *whose body* the issue is to be gotten. It is enough if it appears with reasonable certainty from whom the issue is to spring.

"Thus, a conveyance 'to A and his heirs, namely, the heirs



of his body', or 'to A and his heirs, of himself lawfully  
11\* issuing or begotten', or 'of his \*wife begotten'—all these suffice to create an estate tail.

"But, as in other instances of inheritances created at common law *by deed*, no synonym or circumlocution can in general supply the place of the word 'heirs'. Without that word, the conveyance will usually create a *life estate only*, though other words be used having the same meaning as 'heirs of the body. Thus, the phrase 'to A and the issue of his body,' or 'to A and his offspring' will at common law create only a life estate in A, if used *in a deed*."

The following statement of the law on the same subject is found in 19 Am. Jur., at page 511:

"The authorities have generally held that in order to create an estate tail, words of inheritance as well as words of procreation are necessary. A deed to a woman for and during her natural life, and at her death to her children which may be begotten of her present husband, creates in her a life estate with remainder to her children so begotten. It lacks the operative word 'heirs' to make it a fee tail. The words '*de corpore suo*', however, are not necessary, but may be supplied by equivalent words plainly designating or pointing out the body from whom the heirs inheritable are to issue or descend. So the words 'lawful issue', 'heirs of his body', and 'issue of his body', as words of limitation, necessarily designate the heirs intended to inherit and convert the fee simple into a fee tail; for the grantee could not have issue or lawful issue except of his body. A deed to one and her 'natural heirs' produces the same estate."

Since counsel for the respondents argued in the lower court that the deed of 1915 created an estate tail, it is anticipated that the same argument will be made in this court. It  
12\* was \*contended that the language: to "Otto R. Wachsmann and his children and their children" evidences an intention on the part of the grantors to entail the property to Otto and the heirs of his body in indefinite succession. But, as has been observed, estates tail can be created in *deeds* only by the use of words of inheritance. As is observed by Minor in the statement quoted above, even such language in a deed as to "A and his offspring" will, at common law, not suffice to create a fee tail. But, as Minor further observed:

"In the creation of an estate tail by devise, as in the creation of a fee simply by the same means, the intention of the testator is looked to rather than any technical form of words. Hence, if that intention be clearly expressed or necessarily

implied to create an estate tail, such will be the effect, though the formal words of inheritance be absent." *Minor op. cit. supra*, at page 236.

An example of the creation of an estate tail by implication in a will under the Rule in Wild's case is found in the case of *Larew, 3rd v. Larew, 2nd*, 146 Va. 134. In that case there was a devise to the testator's wife "during her life; at her death to go" to his son, "and his children; and if he should die without surviving heirs, then" to the children of the testator's brothers and sisters then living. Since it was apparent that the testator did not use the word "heirs" as meaning heirs at law, the will was construed as creating an estate tail in the testator's son and the heirs of his body, which, by statute, is converted into a fee simple. It is clear from the language of the court in this case that it regards the Rule in Wild's case as applicable only to *devises*. Moreover, there is nothing in this case to indicate that even a *devise* to a person and "his children and their children" would be construed as  
13\* creating a fee tail, when there is no \*qualifying language indicating that "children and their children" are intended to mean "heirs of his body" or "issue" in indefinite succession.

In the present case the deed not only does not use words of inheritance, but it is apparent from the fact that the grantor gave Otto certain limited rights with respect to the sale of timber and mortgaging the "same" that there was no intention to create an estate tail.

It is possible to imagine that the effect of the deed of 1915 was to create estates or interests of a character different from those suggested above, but none of these seem to be worthy of serious discussion. Thus, it might be suggested that the deed vested a life estate in Otto, with a remainder for life to his children, and the remainder in fee to their children. Or, it might be contended that the grantor intended to give Otto a life estate, with the remainder to his children or to the children of such of his children as might be dead at the time of the death of Otto.

It seems, however, that the only tenable approach to a solution of the problem is this. It may be definitely said that Otto acquired a life estate under the deed. What, then, is the nature of the estates conferred upon the children of Otto and their children? This much is apparent: The grantors grouped the children of Otto and their children together in a single class without any attempt to make a differentiation based upon the difference between the generations of the members of the class. It is to be observed, first, that it is not necessary that

all members of a class of remaindermen actually be in being at the time of the creation of a remainder; indeed, none  
 14\* of them need be. Even in Virginia, where the "motive" \*rule is applied, a gift to a parent and children, without more, vests a joint fee simple estate in the parent and children in equal proportions. It should not materially alter the result if it happens that the estate given to a parent and children is preceded by a life estate, as is the case here. Upon the termination of the life estate, the grant may be viewed just as it would have been had there been no preceding life estate. Thus viewed, we find here a conveyance to a parent, or more precisely to *several* parents, and to *their* children. The fact that there are several parents should not vary the legal situation.

In discussing remainders to a class, it is noted in 1 Minor on Real Property (Ribble edition), at page 944 (footnote):

"There is a material difference between the popular and legal signification of a 'class.' Popularly, a class of persons means a number of persons who can all be designated by one general name, e. g., children, nephews, etc. But in law a gift to a class is a gift of an aggregate sum to a body of persons, who are all to take in equal or some other definite proportions, so that the amount to be received by any one donee cannot be ascertained until all the persons who are to take and the ultimate proportions in which they are to take, have been finally determined. Jarman on Wills (6th Ed.), 232; Page, Wills §540; L. R. A. 1918B, 239, note. The nature of a gift, whether to a class or distributively within the terms of the description used, depends, of course, upon the intent of the testator or grantor. *Saunders v. Saunders*, 109 Va. 191, 63 S. E. 410. Prima facie, a gift to persons who are included under some general description and bear some relation to the grantor or testator, or have some common relation to each other is a class gift. L. R. A. 1918B, 234, note. A class, however, may be composed of persons who are grouped as such by the testator, even though they do not comprise a natural group or come under any common description. Thus in *Saunders v. Saunders*, *supra*, a testator devised all his property to his wife for life, with remainder to his ward and to the children of his brother, share and share alike. By codicil the devise to the ward was revoked. The brother left five children all of whom were living at the date of the execution of the will, but one died before the testator, leaving issue. It was claimed by the heirs of the testator that he died intestate as to the share which would have gone to the ward but for  
 15\* the \*codicil revoking her share. It was held that the effect of the revocation was to take the ward out of the

class originally made by the will, and to leave the entire residuum to go to the brother's children.

"The intention of the testator or grantor should control as to when the class is to be determined and the remainders vested, provided his intention does not contravene some positive rule of law. In accordance with the principle that the law favors vested estates, the instrument will normally be construed to determine the class at the time the instrument takes effect."

Thus, it is apparent that the fact that the remaindermen in this case are of two distinct generations does not render them any less a "class" than would be the case if they were all of the same generation. As applied here, we have a class, some of whom were living at the time of the grant and some of whom were subsequently born. Here we have a vested remainder subject to being opened up to admit subsequently born members of the class. This subject is treated as follows in 1 Minor on Real Property (Ribble edition), §719:

"Upon a devise or conveyance to A for life, remainder to A's children, or remainder to the children of B (or in the place of *children*, read nephews, brothers, brothers and sisters, or remainder to B's issue, descendants, etc., or any designated class of persons), such a remainder would seem at first glance to be contingent by reason of the uncertainty as to what persons will constitute the class mentioned at the expiration of the particular estate. And in fact it is contingent, so long as there *are none* of the class in existence, for the remainder is then to *persons not in being*.

"But it is established that in gifts to a class of persons, all members of the class living at the testator's death or at the time of the conveyance take vested remainders, subject to open up and let in others who are subsequently born *before the termination of the particular estate*, the shares of the others being in such case proportionately diminished though until one of such class comes into being, the remainder is contingent. But at common law, no member of the class not coming into existence *before the termination of the particular estate* could take, as that would be to permit a gap between the preceding estate and the remainder, and would violate the common law rule that the remainder must take effect 16\* during \*the continuance of the particular estate or at the very moment of its termination. But in Virginia by statute it is provided no remainder shall fail for the want of a particular estate to support it, so that it is believed the vested remainder in those members of a class who are in being is in Virginia liable to open up and let in others of the



class who come into being after the termination of the particular estate as well as those born *before* that time. It is true that there is a line of Virginia decisions in which it is stated broadly that, upon a devise "to A for life, remainder to his *children*", the remainder is a *vested* remainder belonging to the *children living at the testator's death*, from which it might perhaps be inferred that the vested remainder is confined to such children and is not liable to open up and let in others subsequently born. But all these are cases where *no children were subsequently born*, but where some had *died* since the death of the testator and during the continuance of the particular estate, and the question for decision was whether the remainders were *contingent* in such of the children only as might survive the life tenant or *vested* in the whole class in existence at the testator's death, the court uniformly holding the latter view."

As applied to this case, the foregoing rules would mean that, upon the death of the life tenant, Otto, the remainder would vest in the children of Otto and their children then living, but would be subject to being opened up to admit others who might subsequently come into being. It is assumed that it will be argued that this construction of the deed is objectionable because it will be impossible to determine the extent of the interests of the remaindermen until after the death of the last of the four children of Otto. It is true that the law favors the early vesting of estates, but this rule should not be applied to defeat the lawful intent of the grantor as expressed in his deed. See *Roberts v. Scythers*, 128 Va. 85.

As an alternative to the construction suggested above, it might very well be held that, upon the death of Otto, the remainder will vest absolutely in the children of Otto, and their children, living at the time of Otto's death, and would not open up to admit children born later to Otto's children.

17\* This construction is \*based upon a presumption that the grantor in the deed of 1915 desired the children of Otto to have the full enjoyment of their interests during their lifetimes—a situation that would not be possible if those interests were subject to being diminished as long as the possibility existed that other children might be born to Otto or to any of Otto's children.

It should be too clear for argument that the deed of June 8, 1917, could not possibly have the effect of varying in any way the character of the estates created by the deed of 1915. The subsequent deed recites that the first deed "did not properly convey said property therein mentioned and it is the intention and object of this deed to properly grant and

convey the said property which was intended to be conveyed therein and to further cancel and declare null and void the said instrument of writing, dated March 1st, 1915, and to execute the following deed;”.

The first deed purports to convey all interests in the property described therein to “Otto R. Wachsman and his children and their children”. The later deed *erroneously* recites that by the former deed the grantors, “R. Wachsman and Elizabeth Wachsman, his wife, undertook to sell and convey to O. R. Wachsman and his children [the words “and their children” being omitted from the recital] the property hereinafter conveyed”, and the grantors then proceed to convey to their son “Otto R. Wachsman and his children” the two farms known as “Robertson” and “Mount Airy”. The obvious intent of the deed of 1917 was to destroy the interests created for the benefit of the unborn children of Otto’s children. Since the law recognizes that interests in real estate

may be created for the benefit of persons who, when they 18\* come into being, will actually \*acquire the interests created for their benefit before their birth, it should be obvious that no one, not even the creator of such interests, can destroy them. Therefore, if, as your petitioners contend, interests were created by the first deed for the benefit of the unborn children of Otto’s children, the grantors attempt by the later deed to destroy those interests was of no effect whatsoever. The second deed cannot even be looked to as evidence that the grantors intended in the first deed to convey the property to Otto and his children only. Any such alleged intention is absolutely at variance with the plain words of the deed describing the grantees as “Otto R. Wachsman and his children and their children”. There is no ambiguity in this language. No question of construction arises. *Williams v. Miller*, 184 Va. 274. Certainly, a conveyance to A, B and C cannot be construed as a conveyance to A and B only. It should be equally certain that, if the first deed created interests that were to become vested in the children of Otto’s children as they came into being, the grantors were without power to destroy those interests by a subsequent deed by which they attempt to say that they did not intend to do the thing that they in fact did.

Anticipating the argument made in the lower court that the word “sells” in the granting clause of the deed of 1915 was inadequate to effect a conveyance of the property, reference is made to the case of *Albert v. Holt*, 137 Va. 5. In that case, it was contended that the words “give, bargain and sell” are not words of conveyance, but the court said:

"It is claimed by the plaintiff in error that the words "give, bargain and sell" are not words of conveyance and cannot be made to operate as such. The instrument is in all other respects in the form of a deed, and contains a covenant 19\* of warranty, was \*acknowledged and admitted to record as a deed, and was based upon a consideration of \$1,300 paid for the land. We are of the opinion that the instrument is a valid conveyance of the land therein mentioned from the grantor to the grantee.

"Section 5146 of the Code declares that all real estate, as regards the immediate freehold, shall be deemed to lie in grant as well as in livery, thereby dispensing with livery of seisin, and section 5162 declares that a deed *may* be made in the following form, or to the same effect, but we have no statute fixing an invariable form for deeds of conveyance of land. The form given in section 5162 used the word "grant," but that is not an indispensable requisite. As said of a similar statute in South Dakota, "While our statute uses the term 'grant,' and in the form given uses that term, yet to constitute a grant it is not indispensable that technical words be used. Any words that manifest the same will be sufficient." *Evensen v. Webster*, 3 So. Dak. 382, 388, 53 N. W. 747, 749, 44 Am. St. Rep. 802, 807.

"Courts are liberal in construing written contracts including deeds, in order to give effect to the intention of the parties, where that is manifest, if not restrained by some inexorable rule of law. The law on this subject is well stated in 8 R. C. L. 1049, supported by numerous authorities as follows: 'The general rule is that a deed must be upheld if possible. Indeed, it has been said to be an elementary principle that every deed must, if possible, be made operative, and that the law desires to sustain the validity of this class of instruments wherever it can. The true principle, and one entirely in accordance with modern jurisprudence, is, that all instruments shall be so construed as to pass an estate, when such was the intention, and it will be presumed from the making of a deed that the grantor intended to convey some property by it. The courts are, therefore, liberal in construing deeds so as to give them effect and a deed untechnical, ungrammatical, and totally at variance with all the recognized rules of orthography, may be valid if there are sufficient words to declare clearly and legally the maker's meaning, nor is it necessary that the grammatical sense of words be adhered to, where a contrary intent is apparent from the whole instrument.' See also *Evenson v. Webster*, *supra*, *Berridge v. Glassey*, 112 Pa. St. 442, 3 Atl. 583, 56 Am. Rep. 322; *Flagg v. Eames*, 40 Vt. 16, 94 Am. Dec. 363; Note 31 Am. St. Rep. 24.

"In the case at bar, the intention to "grant" is so manifest on the face of the instrument that no other construction could be put upon it, and it would be a miscarriage of justice and a perversion of the intention of the parties to hold otherwise."

20\* "In the present case, the instrument in question is in the form of a deed. It begins with the words "This Deed \* \* \*". The consideration is recited to be five dollars, and "love we have for our son Otto". It contained a covenant of general warranty. It is an instrument under the seals of the grantors and it was duly acknowledged and admitted to record as a deed. As was said in the *Albert* case, *supra*, "the intention to 'grant' is so manifest on the face of the instrument that no other construction could be put upon it \* \* \*".

In conclusion, we wish to emphasize that the primary function of the court in this case is to ascertain the intention of the grantors in the deed of 1915 and to give effect to that intention. This court, in the case of *Horne v. Horne*, 181 Va. 685, said (at page 691):

"The same rules applicable to the construction of wills are equally applicable to the construction of deeds. *Lindsey v. Eckles*, 99 Va. 668, 671, 40 S. E. 23 (1901). As was there said: "Whether construing a deed or a will, the object is to discover the *intention*, which is to be gathered in every case from the general purpose and scope of the instrument, in the light of the surrounding circumstances. *Stace v. Bumgardner*, 89 Va. 418; Pom. Eq. Jur. (2nd ed.) sec. 1012."

"Technical rules of construction are not to be invoked to defeat the intention of the maker of the instrument, when his or her intention clearly appears by giving to the words used their natural and ordinary import."

"The inquiry is, therefore, what did the grantor intend by the language he employed in the creation of the remainders in "The Grove", after the expiration of the life estate reserved and created by the clause which disposed of that farm? "The intention of the grantor must be gathered from the language he has seen fit to employ". *Wilson v. Langhorne*, 102 Va. 631, 637 (1904)."

Your petitioners are children of the children of Otto. It is manifest that the grantors intended that they should 21\* have an interest in the property. Modern statutes have had the effect of abolishing many of the artificial restraints placed upon the alienation of real estate by deed. Section 5147 of the Code of Virginia (Michie 1942) permits any interest in or claim to real estate, even contingent interests, to



be disposed of by will or deed and otherwise liberalizes the law with respect to conveyances by deed. Section 5153 of the Code provides that a contingent remainder shall in no case fail for want of a particular estate to support it. The reasons behind the common law requirements that the vesting of remainders be hastened and that contingent remainders be cut off entirely in many cases no longer exist because of the statute (Code of Virginia §5161) permitting the sale of contingent interests and providing for the protection of the interests of "unborn persons". Because of these and other statutes, the courts are no longer compelled by archaic principles of the common law to frustrate the intention of grantors in deeds. Usually, no more is necessary than to ascertain and give effect to the intention of the grantor.

While your petitioners have taken the position that the deed of 1915 should be construed as granting a life estate to Otto R. Wachsman, with the remainder in fee jointly to his children and their children, their primary concern is that it be determined that they have an interest in the property as remaindermen. As has already been suggested, the court might, instead of holding that the remainder is to remain open until the death of the last of Otto's children, very properly find that the remainder will close entirely upon the death of Otto

and will then vest in the children of Otto and their children who may be alive at the time of Otto's death. An-

other possibility is that the deed be held to have vested a joint life estate in Otto and his children, with the remainder to the grandchildren of Otto. This view finds support in the principle that a gift to a parent and his children, without more, vests a joint fee simple estate in the parent and children—that is, the parent and children are given estates of equal dignity. Hence, when it happens, as in this case, that the parent, Otto, is obviously given a life estate, it may well be said that the grantors intended that Otto's children should have an estate of the same dignity, a life estate, jointly with Otto. Under this construction, upon the death of the last of Otto's children, or upon Otto's death if all of his children should predecease him, the fee would vest jointly in Otto's grandchildren.

In support of the construction passing a life estate to Otto and his then living children, it was held in the famous *Wild's* case that:

"If a man devises land to A and to his children or issue, and he then have issue of his body, there his express intent may take effect, according to the rule of the common law, and no manifest and certain intent appears in the will to the con-

trary. And therefore in such case, they shall have but a joint estate for life." 1 Minor on Real Property (Ribble) 2nd Edition, footnote, page 239.

Furthermore, it has been held by numerous authorities that children in existence at the time of the deed will take to the exclusion of after-born children. *Cullens v. Cullens*, 161 N. C. 344; *Loyless v. Blacksheer*, 43 Ga. 327; *Moore v. Lee*, 105 Ala. 435.

In breaking down the granting clause "to Otto and his children and their children" into two groups: (1) "to Otto and his children" constituting one group in which all are in being and determined at the time of the deed; (2) "and their 23\* children", none of whom were \*in being at the time of the deed and logically would form a separate group or class, and keeping in mind that the intention of the parties controls, it would appear that the grantor conveyed an estate to Otto and this grantor's grandchildren, all of whom he knew at the time. Now, the second grouping "and their children" would in actuality be the grantor's grandchildren, and it is apparent that the grantor intended to create an estate for this unborn group. The fact that this group was not in being at the time of the deed does not preclude them from taking an estate.

It is set forth in Section 5153 of the Code of Virginia 1942 that: "A contingent remainder shall in no case fail or want of a particular estate to support it."

By transposition and analogy, placing "and their children" (the grandchildren of Otto) in the same position as "and his children", it would follow that the grandchildren take the remainder in fee by way of executory limitation. "Under a conveyance to A and his children, where no children are living the children, if any are subsequently born, take by way of executory limitation, the intent being that all shall take." 1 Minor on Real Property (Ribble) 2nd Edition, footnote, page 239. In support of this construction, it was held in a conveyance to A and her children, A took a life estate and the remainder to the children. The word "children" was used as a word of purchase and as there were *no* children *living* at the time of the deed, A took a life estate with remainder to the children. *Fales v. Currier*, 55 N. H. 392.

It is to be noted that there is a sharp line of distinction in the construction of "to A and his children" when (1) there are children living at the time of the deed, and (2) when 24\* there are \*no children in being and are subsequently born. In the former a joint estate is created either in fee or for life, depending upon the surrounding circumstances,

while in the latter A takes a life estate with remainder in fee to the children. Therefore, the deed of 1915 "to Otto and his children and their children" is, in effect, passing only a life estate to Otto and his *living* children, with certain provisions and qualifications on Otto's interest and the remainder in fee to the grandchildren.

For the reasons assigned herein, your petitioners pray that an appeal be allowed from the aforesaid decree of the Circuit Court of Sussex County, Virginia; that the said decree be reviewed and reversed; that a final decree be entered in favor of your petitioners, establishing their rights in the property involved in this proceeding; and that your petitioners may have such other further relief as the nature of their case may require.

This petition is to be filed in the Office of the Clerk of the Supreme Court of Appeals of Virginia, at Richmond, Virginia.

Your petitioners adopt this petition as their opening brief.

Counsel for the petitioners do not desire to state orally their reasons for reviewing the decree aforesaid.

A copy of this petition was delivered, in person, to opposing counsel in the trial court on the 24th day of August, 1949.

Respectfully submitted,

WILLIAM RUDOLPH ROSE, ROSALIND  
ROSE NEBLETT, F. M. NEBLETT AND  
GATEWOOD SIMMONS.

By: BOHANNAN, BOHANNAN & KINSEY  
Their Attorneys

By: WILLIS W. BOHANNAN.

25\*

\*MARY JANE ROSE SIMMONS,  
GEORGE PARHAM ROSE,  
NANCY MARGARET ROSE,  
RALPH LEE DUNN, JR.,  
MILTON DUNN,  
HOWARD WACHSMANN,  
JEAN WACHSMANN,  
MARVIN WACHSMANN and  
MARGARET WACHSMANN,  
infants

By: KINSEY SPOTSWOOD  
Their Guardian *ad Litem*.

Petersburg, Virginia.

I, Benjamin T. Kinsey, Jr., of Petersburg, Virginia, an attorney duly qualified to practice in the Supreme Court of Appeals of Virginia, do certify that, in my opinion, the decree complained of in the foregoing petition ought to be reviewed.

BENJAMIN T. KINSEY, JR.

Received August 26, 1949.

M. B. WATTS, Clerk.

Oct. 10, 1949—Appeal awarded by the court. Bond \$300.

M. B. W.

## RECORD

### VIRGINIA:

Pleas before the Circuit Court of Sussex County at the Courthouse thereof, on the 7th day of February, 1949:

Be it remembered, that heretofore, to-wit: In the Clerk's Office of said Court, on the 7th day of February, 1949, came Mary W. Rose and William Rudolph Rose, Complainant by their attorney's and filed their Bill of Complaint for judgment against Rudolph Wachsmann, Rebecca Wachsmann, Otto Wachsmann, Margaret F. Wachsmann, F. M. Neblett, Rosalind Rose Neblett, Gatewood Simmons, Ralph Lee Dunn, Theresa Dunn, George W. Rose, Madonna Jones and John Jones, and Mary Jane Rose Simmons, George Parham Rose, Nancy Margaret Rose, Ralph Lee Dunn, Jr., Milton Dunn, Howard Wachsmann, Jean Wachsmann, Marvin Wachsmann and Margaret Wachsmann, the last nine of whom are infants, Defendants, in the words and figures following:

### Virginia:

In the Circuit Court of Sussex County.

Mary W. Rose and William Rudolph Rose

*v.*

Rudolph Wachsmann, Rebecca Wachsmann, Otto Wachsmann,  
Margaret F. Wachsmann, F. M. Neblett, Rosalind  
page 2 } Rose Neblett, Gatewood Simmons, Ralph Lee Dunn,  
Theresa Dunn, George W. Rose, Madonna Jones  
and John Jones, and Mary Jane Rose Simmons, George

Parham Rose, Nancy Margaret Rose, Ralph Lee Dunn, Jr., Milton Dunn, Howard Wachsmann, Jean Wachsmann, Marvin Wachsmann and Margaret Wachsmann, the last nine of whom are infants.

### BILL OF COMPLAINT.

To the Honorable J. J. Temple, Judge of said Court.

Your complainants, Mary W. Rose and William Rudolph Rose respectfully represent unto your Honor the following case:

1. That, by deed dated March 1, 1915, and recorded in the Clerk's Office of the Circuit Court of Sussex County, in Deed Book 23, at page 324, R. Wachsmann and Elizabeth Wachsmann, his wife, conveyed certain property, located in the county of Sussex, Virginia, in the language following:

“ for and in consideration of \$5.00 Five Dollars, and love we have for our son Otto, The first party sells to the second party the said Otto R. Wachsman and his children and their children with general warranty the two farms known as Robinson and Mount Airy, containing 1513 acres of land, more or less, Bounded on East by the Nottoway River, South by the land of L. P. Hargrave, West by Chappell and the County Road, and North by the land of L. I. Dobie and Dobie Estate.

“The party of the second part, Otto R. Wachsman, has the right to sell the timber on the said property and *morgage* same to the amount of \$2,000.00 if Otto R. Wachsman finds it necessary.”

page 3 } (A copy of the said deed, marked Complainants' Exhibit “A”, is filed herewith and is prayed to be taken and read as a part of this bill of complaint.)

2. That, subsequently, the grantors in the said deed to-wit: R. Wachsman and Elizabeth Wachsman, his wife, executed another deed which is dated June 8, 1917, and which is recorded in the Clerk's Office aforesaid, in Deed Book 24, at page 560, the said deed being in the words and figures following, to-wit:

“WITNESSETH: That whereas, on the 1st day of March, 1915, R. Wachsman and Elizabeth Wachsman, his wife, un-

dertook to sell and convey to O. R. Wachsman and his children the property hereinafter conveyed by a deed which is duly recorded in the clerk's office in D. B. No. 23, at page 324. and whereas the said instrument of writing did not properly convey said property therein mentioned and it is the intention and object of this deed to properly grant and convey the said property which was intended to be conveyed therein, and to further cancel and declare null and void the said instrument of writing, dated on March 1st, 1915, and to execute the following deed;

“NOW, THEREFORE, for and in consideration of the sum of five (5.00) dollars and natural love and affection they the said R. Wachsman and his wife have for their son Otto R. Wachsman they the said parties of the first part do hereby bargain, sell, grant, and convey unto the said Otto  
page 4 } R. Wachsman and his children with general warranty of title the two farms known as Robertson and Mount Airy containing fifteen hundred and thirteen (1513) acres, more or less, bounded on the east by the Nottoway River, south by the land of L. P. Hargrave, west by the land of Chappell and the County road and on the north by the land of L I Dobie and the Dobie estate.

“It is distinctly understood and agreed by and between the party hereto that the said Otto R. Wachsman party of the second part has the right to sell all of the timber on the said property, and to further mortgage the said property to the amount of two thousand (2000.00) dollars as the said Otto R. Wachsman deems it necessary so to do.”

3. That your complainant, Mary W. Rose (whose husband is George W. Rose), and the defendants, Rudolph Wachsman (whose wife is Rebecca Wachsmann), Theresa Dunn (whose husband is Ralph Lee Dunn), and Madonna Jones (whose husband is John Jones) are the only children who have been born to the defendant, Otto Wachsmann (whose wife is Margaret F. Wachsmann).

4. (a) That the complainant, William Rudolph Rose, and the defendants, Rosalind Rose Neblett (whose husband is F. M. Neblett), Mary Jane Rose Simmons, an infant (whose husband is Gatewood Simmons), and George Parham Rose and Nancy Margaret Rose, the last two of whom are in-  
page 5 } fants under the age of fourteen years, are the only children who *have been to* your complainant, Mary W. Rose.

(b) That Ralph Lee Dunn, Jr., and Milton Dunn, infants under the age of fourteen years, are the only children who have been born to the defendant, Theresa Dunn.

(c) That the defendants, Howard Wachsmann, Jean Wachsmann, Marvin Wachsmann and Margaret Wachsmann, all of whom are infants under the age of fourteen years, are the only children who have been born to the defendant, Rudolph Wachsmann, and that no children have been born to the defendant, Madonna Jones.

5. Your complainants are advised, and therefore aver, that the rights and interest of Otto Wachsmann "and his children and their children", the grantees in the aforesaid deed from R. Wachsmann, dated March 1, 1915, in and to the property described in the said deed, are fully defined and established in that deed and that the attempt made by the said R. Wachsmann in the subsequent deed dated June 8, 1917, to extinguish the said rights and interests of the children of the said Otto Wachsmann in and to the said property *in* null and void and of no effect whatsoever, as is the attempt by the said R. Wachsmann in the said subsequent deed to "further cancel and declare null and void" the aforesaid prior deed of March 1, 1915.

6. Your complainants are advised, and therefore further aver, that the language of the last paragraph of the page 6 } aforesaid deed of March 1, 1915, to-wit: "The party of the second part, Otto R. Wachsmann, has the right to sell the timber on the said property and *morgage* same to the amount of \$2000.00 if Otto R. Wachsmann finds it necessary," should be construed as conferring upon the said Otto R. Wachsmann the right to sell timber from the property aforesaid, having a value not exceeding \$2000.00, if the said Otto R. Wachsmann should find it necessary to do so; but, notwithstanding, the limitation imposed, as aforesaid, upon the right of the said Otto R. Wachsmann to sell the said timber, the said Otto R. Wachsmann and the defendant, Rudolph Wachsmann, have, from time to time, sold and permitted the cutting of timber from the property aforesaid having a value far in excess of the said sum of \$2000.00.

7. That, by a deed dated July 22, 1940, and duly recorded in the Clerk's Office aforesaid, your complainant, Mary W. Rose (as Mary Elizabeth Rose) and George W. Rose, her husband, and the defendants, Theresa Dunn (as Theresa Wachsmann, unmarried), Madonna Jones (as Madonna Wachsmann Jones) and J. W. Jones, her husband, conveyed to Rudolph Wachsmann, with General Warranty, all of their right, title and interest, "now and hereafter", in and to the aforesaid "Robertson" and "Mount Airy" farms containing 1513 acres, more or less, and that by deed dated January page 7 } 28, 1941, the defendants, Otto R. Wachsmann and Margaret F. Wachsmann, his wife, conveyed to the



defendant, Rudolph Wachsmann, all of their right, title and interest, vested or contingent, in and to the aforesaid "Robertson" and "Mount Airy", which farms are referred to in the said deed as the "same land in all respects that was conveyed to Otto R. Wachsmann and children by deed from R. Wachsmann and wife, dated March 1, 1915, and recorded as aforesaid in said Clerk's Office in Deed Book 23, page 324; and which was later attempted to be strengthened and reaffirmed by deed dated June 8, 1917, and recorded in said Clerk's Office in deed book 24, page 560, reference to all of which is here made".

8. That, at the time that she and her husband signed and executed the said deed, the defendants, Otto R. Wachsmann, who was acting on behalf of himself and/or the defendant, Rudolph Wachsmann, promised and represented unto your said complainant that he or the defendant, Rudolph Wachsmann, would give or transfer to your complainant, Mary W. Rose, property or sums of money, the values or amounts of which your said complainant understood would be commensurate with the value of the rights and interest conveyed by her as aforesaid to the said Rudolph Wachsmann, and particularly your said complainant was given assurances and promises by the said Otto R. Wachsmann, who was acting on behalf of himself and/or the defendant, Rudolph Wachsmann that, upon the sale of timber from the said farms, or page 8 } either of them, substantial sums would be paid to your said complainant from the proceeds of such sale or sales as a consideration, or a part of the consideration, for the conveyance by your said complainant of her property rights and interest aforesaid to the said Rudolph Wachsmann; that, immediately after the signing and execution of the deed aforesaid by your complainant, the defendant, Otto R. Wachsmann, purchased and caused to be conveyed to your said complainant a farm in Sussex County, Virginia, known as the "Roland" place, containing 270 acres, more or less, having a value of approximately \$2,700.00, which farm, your said complainant understood, was to constitute a part of the consideration for the conveyance of the property rights and interest aforesaid by your said complainant to the defendant, Rudolph Wachsmann, but your complainant has received no other property or money from either the defendant, Otto R. Wachsmann, or the defendant, Rudolph Wachsmann, which constitute a part of the consideration aforesaid; that your complainant at no time intended to convey to the said Rudolph Wachsmann any of the said property or interest therein except upon the condition that she receive in return therefor property or money equal in value or amount to the value of

the property or the interest conveyed by her as aforesaid to the defendant, Rudolph Wachsmann; that, if the said Otto R.

Wachsmann and the said Rudolph Wachsmann did page 9 } not understand that they, or one of them, were to compensate your complainant for the value of her said property and interest which were conveyed as aforesaid, there was no meeting of the minds between the said defendants and your complainants and that there was a mistake as between the said defendants on the one hand and your complainant on the other as to the nature and character of the transaction involving the conveyance of the property and interest aforesaid by your complainant and as to the facts and circumstances surrounding the same; that, notwithstanding the fact that the defendant, Rudolph Wachsmann, acting on his own behalf or at the instance of the defendant, Otto R. Wachsmann, has sold timber from the property aforesaid, your complainant has received no part of the consideration which was paid therefor:

IN TENDER CONSIDERATION WHEREOF, and forasmuch as your complainants are remediless in the premises save in a court of equity where matters of this kind are only and properly cognizable, your complainants pray that Rudolph Wachsmann, Rebecca Wachsmann, Otto Wachsmann, Margaret F. Wachsmann, F. M. Neblett, Rosalind Rose Neblett, Gatewood Simmons, Ralph Lee Dunn, Theresa Dunn, George W. Rose, Madonna Jones and John Jones, and Mary Jane Rose Simmons, George Parham Rose, Nancy Margaret Rose, Ralph Lee Dunn, Jr., Milton Dunn, Howard Wachsmann, Jean Wachsmann, Marvin Wachsmann and Margaret

Wachsmann, the last nine of whom are infants, page 10 } may be made parties defendant to this bill and required to answer the same but not under oath, save as to such of the said defendants as are by law required to answer under oath; that a competent and discreet attorney at law be appointed *guardian ad litem* to represent the interests of the said defendants in this proceedings, who, as well as such of the infant defendants as are over fourteen years of age, shall be required to answer this bill under oath in proper person; that the aforesaid deed of June 8, 1917, be set aside and declared null and void, or that the same be declared ineffectual to change or alter in any way the rights and interests of the parties thereto as defined and established by the said deed; that the aforesaid deed of March 1, 1915, be construed, and that the rights and interests of the defendant, Otto Wachsmann, and his children and their children in and to the property conveyed by the said deed be determined; that

it be determined that the right of the defendant, Otto Wachsmann, to sell timber from the said property was limited to timber having a value not exceeding \$2,000.00; that the aforesaid deed of July 22, 1940, be set aside and declared null and void as to your complainant, Mary W. Rose; that, if the said deed should be found by the court to be valid, the defendants be required to comply with their promise to transfer or pay to your complainant, Mary W. Rose, property or sums of money equivalent in value or amount to the value  
 page 11 } of the property and interest conveyed in the said deed by your complainant; that the defendants, Otto Wachsmann and Rudolph Wachsmann, be required to account for all sums received by them at any time or times on account of rents and profits and timber sold from the property aforesaid; that the said defendants, Otto Wachsmann and Rudolph Wachsmann, be enjoined and restrained from making further sales of timber and from cutting or permitting the cutting of timber from the said property; that all other necessary and proper proceedings may be had and taken for accomplishing the prayers of this bill, and for such other relief, both general and special, as to equity may seem meet and the nature of the case may require.

And your complainants will every pray, etc.

MARY W. ROSE  
 WILLIAM RUDOLPH ROSE  
 By Counsel.

BOHANNAN, BOHANNAN & KINSEY  
 For Complainant.

page 12 }

EXHIBIT "A"

THIS DEED, made this first day of March, 1915, by and between R. Wachsmann and Elizabeth his wife of the first *party*, and Otto R. Wachsmann, of the second *party*, all of Sussex County, State of Virginia.

WITNESSETH: that for and in consideration of \$5.00 Five Dollars, and love we have for our son Otto, The first *party* sells to the second *party* the said Otto R. Wachsmann and his children and their children with general warranty the two farms known as Robinson and Mount Airy, containing 1513 acres of land, more or less, Bounded on East by Nottoway River, South by the land of L. P. Hargrave, West by

Chappell and the County Road, and North by the land of L. I. Dobie and Dobie Estate.

The party of the second part, Otto R. Wachsman, has the right to sell the timber on the said property and *morgage* same to the amount of \$2000.00 if Otto R. Wachsman finds it necessary.

Witness the following signatures and seals—

R. WACHSMAN (Seal)  
ELIZABETH WACHSMAN (Seal)

State of Virginia, County of Sussex, to-wit:

I, L. H. Wrenn, Deputy Clerk for R. D. Norris Clerk of the Circuit Court for the County aforesaid, in the State of Virginia, do hereby certify that R. Wachsman and Elizabeth Wachsman, whose names are signed to the foregoing writing, bearing date on the first day of March, in the year 1915, have the said R. Wachsman and Elizabeth Wachsman acknowledged the same before me in my County aforesaid.

Given under my hand this 9th day of March, in the year 1915.

L. H. WRENN  
Deputy Clerk.

Virginia:

In the Clerk's Office of Sussex Circuit Court, March 9, 1915.

This Deed of Gift from R. Wachsman and wife to O. R. Wachsman, was this day lodged in the said office, and with the certificate annexed, admitted to record at 1 o'clock P. M. 3.00 Int. Reve. stamps affixed and cancelled.

Teste:

R. D. NORRIS, Clerk.

A Copy Teste:

JESSE HARGRAVE, Clerk.

Recorded in D. B. 23 P. 324.

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## EXHIBIT "B"

THIS DEED, made this 8th day of June, 1917, between R. Wachsman and Elizabeth Wachsman, his wife, parties of the first part, and Otto R. Wachsman, party of the second part all of the County of Sussex, State of Virginia.

WITNESSETH: That whereas, on the 1st day of March, 1915, R. Wachsman and Elizabeth Wachsman, his wife, understood to sell and convey to O. R. Wachsman and his children the property hereinafter conveyed by a deed which is duly recorded in the Clerk's office in D B No. 23, at page 324, and whereas the said instrument of writing did not properly convey said property therein mentioned and it is the intention and object of this deed to properly grant and convey the said property which was intended to be conveyed therein, and to further cancel and declare null and void the said instrument of writing, dated on March 1, 1915, and to execute the following deed;

NOW, THEREFORE, for and in consideration of the sum of five (\$5.00) dollars and natural love and affection they the said R. Wachsman and his wife have for their son Otto R. Wachsman they the said parties of the first part do hereby bargain, sell, grant, and convey unto the said Otto  
page 15 } H. Wachsman and his children with general warranty of title the two farms known as Robertson and Mount Airy containing fifteen hundred and thirteen (1513) acres, more or less, bounded on the east by Nottoway River, south by the land of L. P. Hargrave, west by the land of Chappell and the county Road and on the north by the land of L I Dobie and the Dobie estate.

It is distinctly understood and agreed by and between the party hereto that the said Otto R. Wachsman party of the second part has the right to sell all of the timber on the said property, and to further mortgage the said property to the amount of two thousand (2,000) dollars as the said Otto R. Wachsman deems it necessary so to do.

Witness the following signatures and seals:

R. WACHSMAN (Seal)

ELIZABETH WACHSMAN (Seal)

State of Virginia,  
County of Sussex, to-wit:

I, W. E. Norris, a Notary Public in and for the County of Sussex, State of Virginia, do hereby certify that R. Wachsmann, and Elizabeth Wachsmann, his wife, whose names are signed to the foregoing and deed bearing date on the 8th day of June, 1917, have each acknowledged the same page 16 } before me in my county aforesaid.

Given under my hand this the 22nd day of June, 1917.

My commission expires October 18th, 1920.

W. E. NORRIS,  
Notary Public.

Virginia:

In the Clerk's Office of Sussex Circuit Court June 27th, 1917.

This deed of gift from R. Wachsmann & wife to Otto R. Wachsmann was this day lodged in the said office and with the certificate annexed admitted to record at 3 o'clock P. M.

Teste:

R. D. NORRIS, Clerk.

A Copy Teste:

JESSE HARGRAVE, Clerk.

Recorded in Deed Book  
No. 24 Page 560.

#### EXHIBIT "C"

This deed, made this 22nd day of July, 1940, by and between Mary Elizabeth Rose and George W. Rose, her husband, Theresa Wachsmann, unmarried, Madonna Wachsmann Jones and J. W. Jones, her husband, parties of the page 17 } first part, and, Rudolph Wachsmann, party of the second part:

WITNESSETH: That for and in consideration of the sum of Three Dollars (\$3.00) cash in hand paid to the parties of the first part, by the party of the second part, at and before the ensealing and delivery of these presents, the receipt whereof is hereby severally acknowledged, and, in the further consideration of the mutual love and affection the parties hereto bear toward each other, the said parties of the first part, do

hereby grant and convey, with general warranty, unto the said Rudolph Wachsmann, all their right, title and interest, now and hereafter, in and to that certain property which was heretofore conveyed to O. R. and his children by deed from R. Wachsmann and wife, dated June 8, 1917, and recorded in the Circuit Court Clerk's Office of Sussex County, Virginia, in Deed Book 24, page 560, which is therein described as follows:

'two farms known as "Robertson" and "Mount Airy" containing fifteen hundred and thirteen (1513) acres, more or less, bounded on the east by the Nottoway River, south by the land of L. P. Hargrave, west by the land of Chappell page 18 } and the county road, and north by the land of L. L. Dobie and Dobie Estate'

The said grantors expressly give unto the said Rudolph Wachsmann, for and during his lifetime, the right to sell the timber from the two farms herein conveyed, and the proceeds therefrom shall be his separate estate.

Witness the following signatures and seals.

MARY ELIZABETH ROSE	(Seal)
GEORGE W. ROSE	(Seal)
THERESA WACHSMANN	(Seal)
MADONNA WACHSMANN JONES	(Seal)

State of Virginia,

County of Sussex, to-wit:

I, Jesse Hargrave, Clerk in and for the County and State aforesaid, do hereby certify that Theresa Wachsmann, unmarried, Madonna Wachsmann Jones and J. W. Jones, her husband, whose names are signed to the hereto-annexed writing dated July 22, 1940, personally appeared and severally acknowledged the same before me in my county and state aforesaid.

Given under my hand this 23rd day of July, 1940.

JESSE HARGRAVE,  
Clerk Sussex County, Va.

State of Virginia,

County of Sussex, to-wit:

I, Jesse Hargrave, Clerk in and for the County and State aforesaid do hereby certify that Mary Elizabeth page 19 } Rose and George W. Rose, her husband, whose names are signed to the foregoing hereto-annexed



William Rudolph Rose, et als., v. Mary W. Rose, et als. 31

writing dated July 22, 1940, personally appeared before me in my County and State aforesaid and acknowledged the same. Given under my hand this 8th day of August, 1940.

JESSE HARGRAVE,  
Clerk Sussex County, Virginia.

Virginia:

In the Clerk's Office of Sussex Circuit Court August 8, 1940.

This Deed of Gift and Quit Claim from Mary Elizabeth Rose et als. to Rudolph Wachsmann was this day lodged in the said office, and with the certificate annexed, admitted to record at 8 o'clock P. M. and indexed as required by law.

Teste:

JESSE HARGRAVE, Clerk.

page 20 } And afterwards, to-wit: In the said Clerk's Office on the 21st day of February, 1949, came Otto R. Wachsmann and Margaret F. Wachsmann, Defendants, by their attorneys, and filed their demurrer in the words and figures following:

Virginia:

In the Circuit Court of Sussex County.

Mary W. Rose, et al.

v.  
Rudolph Wachsmann, et al.

### DEMURRER.

The defendants Otto R. Wachsmann and Margaret F. Wachsmann, by their attorneys, come and say that the bill of complaint in this cause is not sufficient in law and set forth the grounds of their demurrer to be as follows:

1. The bill is multifarious in that a suit by William Rudolph Rose to establish his alleged claim and title to the real estate in the bill and proceedings described is improperly joined with a suit by Mary W. Rose *against* Otto R. Wachsmann and Rudolph Wachsmann for an undetermined sum of money, there being no connection between the two claims.

2. The bill of complaint insofar as it relates to the petition of Mary W. Rose for additional sums of money out of the pro-

ceeds of the sale of timber sets up a state of facts which shows on its face that said Mary W. Rose has an adequate remedy at law, this being an action for money.

page 21 } 3. The bill of complaint, insofar as the same relates to the claim of Mary W. Rose *against* Rudolph Wachsmann setting up a possible mutual mistake of facts, does not state facts that would entitle the said Mary W. Rose to relief in equity on the ground of mutual mistake.

4. The bill of complaint, insofar as the same relates to the claim of William Rudolph Rose that he has an interest in the real estate in the bill and proceedings described, shows on its face that the said William Rudolph Rose has no interest in such real estate.

OLIVER A. POLLARD  
WM. EARLE WHITE.

And afterwards, to-wit: In the said Clerk's Office on the 21st day of February, 1949.

Virginia:

In the Circuit Court of Sussex County.

Mary W. Rose and William Rudolph Rose

v.

Rudolph Wachsmann, Rebecca Wachsmann, Otto Wachsmann, Margaret F. Wachsmann, F. M. Neblett, Rosalind Rose Neblett, Gatewood Simmons, Ralph Lee Dunn, Theresa Dunn, George W. Rose, Madonna Jones and John Jones, and Mary Jane Rose Simmons, George Parham Rose, Nancy Margaret Rose, Ralph Lee Dunn, Jr., Milton Dunn,  
page 22 } Howard Wachsmann, Jean Wachsmann, Marvin Wachsmann and Margaret Wachsmann, the last nine of whom are infants.

### ANSWER.

The answer of Otto Wachsmann, Margaret F. Wachsmann, Rudolph Wachsmann, Rebecca Wachsmann, Madonna Jones, John Jones, Theresa Dunn and Ralph Lee Dunn to a certain bill of complaint filed against them and others in the Circuit Court of Sussex County, Virginia by Mary W. Rose and William Rudolph Rose. These respondents, saving and reserving unto themselves all just exceptions to said bill of complaint, for answer thereto, or to so much thereof as they are advised it is material or necessary that they should answer, answer and say:

1. The allegations of Paragraph 1 of the bill of complaint are hereby admitted to be true.

2. The allegations of Paragraph 2 of the bill of complaint are hereby admitted to be true.

3. The allegations of Paragraph 3 of the bill of complaint are hereby admitted to be true.

4. The allegations of Paragraph 4(a), 4(b) and 4(c) are hereby admitted to be true.

5. For answer to the allegations of Paragraph 5, these respondents aver that if the deed from R. Wachsmann and wife to Otto R. Wachsmann dated March 1, 1915, copy of which is filed as Exhibit A with the bill of complaint, is construed to create a life estate in Otto R. Wachsmann and a further life estate in his children, with the remainder to their

page 23 } children, then such deed is void; and the deed dated June 8, 1917, filed as Exhibit B with the bill of complaint is the only deed that defines the rights of the grantee therein. If the deed dated March 1, 1915, filed as Exhibit A with the bill of complaint be construed to grant fee simple title to the said Otto R. Wachsmann, then the deed dated June 8, 1917 could have no effect because the fee simple title was already vested in the grantee named in said deed.

In the deed dated March 1, 1915 filed as Exhibit A with the bill of complaint, be construed as vesting fee simple title in Otto R. Wachsmann and his children, then living, then the effect of the deed dated March 1, 1915 would be the same as the effect of the deed dated June 8, 1917, because these respondents say that on March 1, 1915 and on June 8, 1917 no grandchildren had been born to the said Otto R. Wachsmann and his wife, Elizabeth Wachsmann.

These respondents therefore say that in no event does the complainant William Rudolph Rose, nor do any of the defendants who are grandchildren of the said Otto R. Wachsmann and Elizabeth Wachsmann have any interest in the real estate described in the two aforesaid deeds.

6. In answer to the allegations of Paragraph 6 of the bill of complaint, these respondents say that a true construction of the language of the deed of March 1, 1915, as well as the language of the deed dated June 8, 1917, clearly gives the defendant Otto R. Wachsmann the right to sell all the timber from the property. In any event, the present complainants have no right to complain with regard to any timber cut from the property, as neither of them have any interest in the property.

7. The allegations of Paragraph 7 of the bill of complaint are admitted to be true.

8. The allegations of Paragraph 8 of the bill of complaint are hereby denied, except the allegation that the defendant, Otto R. Wachsmann did purchase and cause to be conveyed to the complainant, Mary W. Rose, the farm known as the Roland Place, which has a value of not less than \$10,000.00 instead of \$2,700.00. The said complainant fails to mention that the defendant Otto R. Wachsmann has also given to the complainant Mary W. Rose other property, both real and personal, in consideration of love and affection. For further answer to the said Paragraph 8 these respondents say that the said Mary W. Rose and defendant George W. Rose sought legal advice before signing the said deed dated July 22, 1940, and only signed said deed after having been advised as to their rights in the matter.

For further answer to said bill of complaint, your respondents Theresa Dunn and Madonna Jones say that no promise was made to them that they should share in the page 25 } proceeds of sale of the timber from the said farms, and that they know of no promises made to the complainant Mary W. Rose at that time.

And now having fully answered, these respondents pray that they be hence dismissed together with their reasonable costs in this behalf expended.

OTTO WACHSMANN,  
MARGARET R. WACHSMANN,  
RUDOLPH WACHSMANN,  
REBECCA WACHSMANN,  
MADONNA JONES,  
JOHN JONES,  
THERESA DUNN and  
RALPH LEE DUNN  
By Counsel.

OLIVER A. POLLARD  
WM. EARLE WHITE f. d.

And afterwards, to-wit: In the said Clerk's Office on the 1st day of April, 1949.

Virginia:

In the Circuit Court of Sussex County.

Mary W. Rose, et al.

v.

Rudolph Wachsmann, et al.

ORDER.

On motion of the complainants and the adult defendants in this cause, by their attorneys, it is ORDERED that Kinsey Spotswood, a competent and discreet attorney at law, be, and he is hereby, appointed guardian *ad litem* to the page 26 } infant defendants Mary Jane Rose Simmons, George Parham Rose, Nancy Margaret Rose, Ralph Lee Dunn, Jr., Milton Dunn, Howard Wachsmann, Jean Wachsmann, Marvin Wachsmann and Margaret Wachsmann.

And afterwards, to-wit: In the said Clerk's Office on the 27th day of April, 1949.

Virginia:

In the Circuit Court of Sussex County.

Mary W. Rose, et al.

v.

Rudolph Wachsmann, et als.

ANSWER.

THE ANSWER OF F. M. NEBLETT, ROSALIND ROSE NEBLETT AND GATEWOOD SIMMONS TO A CERTAIN BILL OF COMPLAINT FILED AGAINST THEM AND OTHERS IN THE CIRCUIT COURT OF SUSSEX COUNTY, VIRGINIA, BY MARY W. ROSE AND WILLIAM RUDOLPH ROSE.

These respondents, saving and reserving unto themselves all just exceptions to the said bill of complaint, for answer thereto, or to so much thereof as they are advised it is material and necessary that they answer, answer and say:

That they concur in the allegations and prayer of the said bill of complaint and pray that the relief therein page 27 } sought be granted insofar as the same effects the interests of these respondents.

And now, having fully answered, these respondents pray that they be hence dismissed together with their reasonable costs in this behalf expended.

F. M. NEBLETT  
ROSALIND ROSE NEBLETT and  
GATEWOOD SIMMONS  
By Counsel.

WILLIS W. BOHANNAN f. d.

And afterwards, to-wit: In the said Clerk's Office on the 27th day of April, 1949:

Virginia:

In the Circuit Court of Sussex County.

Mary W. Rose and William Rudolph Rose

v.

Rudolph Wachsmann, Rebecca Wachsmann, Otto Wachsmann, Margaret F. Wachsmann, F. M. Neblett, Rosalind Rose Neblett, Gatewood Simmons, Ralph Lee Dunn, Theresa Dunn, George W. Rose, Madonna Jones and John Jones, and Mary Jane Rose Simmons, George Parham Rose, Nancy Margaret Rose, Ralph Lee Dunn, Jr., Milton Dunn, Howard Wachsmann, Jean Wachsmann, Marvin Wachsmann and Margaret Wachsmann, the last nine of whom are infants.

page 28 } And afterwards, to-wit: In the said Clerk's Office on the 27th day of April, 1949:

Virginia:

In the Circuit Court of Sussex County.

Mary W. Rose, et al.

v.

Rudolph Wachsmann, et als.

THE ANSWER OF KINSEY SPOTSWOOD, GUARDIAN *AD LITEM* APPOINTED TO DEFEND MARY JANE ROSE SIMMONS, ET ALS., INFANTS IN THIS SUIT, IN PROPER PERSON, TO A BILL OF COMPLAINT FILED AGAINST THEM AND OTHERS BY MARY W. ROSE, ET AL.

This respondent, reserving to himself the benefit of all just exceptions to the said bill of complaint, for answer thereto, answers and says:

That he is guardian *ad litem* appointed to defend the said Mary Jane Rose Simmons, George Parham Rose, Nancy Margaret Rose, Ralph Lee Dunn, Jr., Milton Dunn, Howard Wachsmann, Jean Wachsmann, Marvin Wachsmann and Margaret Wachsmann, infants, in this suit; that he knows nothing of the truth or falsity of the statements made in the

said bill of complaint, and he prays for the protection of the court for the said infant defendants.

And now, having fully answered the bill of complaint, this respondent prays to be hence dismissed with his reasonable costs by him in this behalf expended.

KINSEY SPOTSWOOD

Guardian *ad litem* of the  
named infant defendants.

page 29 } This cause, which has been regularly matured  
at rules, came on this day to be heard upon the bill  
of complaint and the exhibits therewith filed, upon the demurrer of Otto R. Wachsmann and Margaret F. Wachsmann to said bill of complaint, upon the joint and separate answers of Rudolph Wachsmann, Rebecca Wachsmann, Otto Wachsmann, Margaret F. Wachsmann, Theresa Dunn, George W. Dunn, Madonna Jones and John Jones, filed at rules, upon the separate answers of Rosalind Rose Neblett and F. M. Neblett, her husband, and Gatewood Simmons, husband of Mary Jane Rose Simmons, this day filed by leave of court, upon the answer of Kinsey Spotswood, guardian *ad litem* of the infant defendants, Mary Jane Rose Simmons, George Parham Rose, Nancy Margaret Rose, Ralph Lee Dunn, Jr., Milton Dunn, Howard Wachsmann, Jean Wachsmann, Marvin Wachsmann and Margaret Wachsmann, and upon the answer of said defendants by their guardian *ad litem* this day filed by leave of court, upon the stipulation of counsel that the court in its consideration of the demurrer aforesaid should take into consideration as a fact that on March 1, 1915, the date of the execution of the first deed from R. Wachsmann and Elizabeth Wachsmann, his wife, described in  
page 30 } Paragraph 1 of the bill of complaint, and on June 2, 1917, the date of the execution of the second deed from R. Wachsmann and wife, described in Paragraph 2 of the bill of complaint, Otto R. Wachsmann had four children living and no grandchildren living and that no children were born to any of the children of Otto R. Wachsmann until the year 1924, and was argued by counsel:

UPON CONSIDERATION WHEREOF, the Court reserving for further argument the question raised by grounds 1, 2 and 3 of the demurrer filed as aforesaid, but being of opinion to sustain the fourth ground of demurrer to said bill of complaint, namely, "That the bill of complaint insofar as the same relates to the claim of William Rudolph Rose that he



has an interest in the real estate in the bill and proceedings described shows on its face that the same William Rudolph Rose has no interest in such real estate," the court being of opinion that none of the unborn grandchildren of Otto R. Wachsmann took any interest in the real estate conveyed either by the deed dated March 1, 1915, from R. Wachsmann and wife or the deed dated June 2, 1917, from R. Wachsmann and wife, hereinabove referred to, the court doth accordingly adjudge, order and decree that the fourth ground of the demurrer filed as aforesaid be, and the same is hereby, sustained, and that the bill of complaint insofar as the same relates to the claim of William Rudolph Rose that page 31 } he and the other grandchildren of Otto R. Wachsmann, born or to be born to the children of the said Otto R. Wachsmann, have an interest in the real estate in the bill and proceedings described, be, and the same is hereby, dismissed.

It is further ordered that this cause be continued for a further hearing on May 2, 1949, on the other three grounds of demurrer which relate to the claim of Mary W. Rose, set forth in Paragraph 8 of the bill of complaint.

It is further ordered that the complainants do pay to Kinsey Spotswood, guardian *ad litem* of the infant defendants, a fee of \$25.00, which the court doth award him for his services in this cause.

page 32 } CLERK'S CERTIFICATE.

I, William B. Cocke, Jr., Clerk of the Circuit Court of Sussex County, Virginia, do certify that the foregoing is a true transcript of the record in the case of Mary W. Rose, et als. v. Rudolph Wachsmann, et als., lately pending in said Court.

I further certify that the same was not made up and completed and delivered until the opposing parties had received due notice thereof and of the intention of the parties appealing to apply to the Supreme Court of Appeals for an appeal to the judgment therein.

Given under my hand this 28 day of June, 1949.

W. B. COCKE, JR.,  
Clerk.

A Copy—Teste:

M. B. WATTS, C. C.

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