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Record No. 4802

In the
Supreme Court of Appeals of Virginia
at Richmond

WILLIAM H. BURRUSS, III,
ET AL., ETC.

v.

B. C. BALDWIN, JR., ET AL.,
ETC., ET AL.

FROM THE CIRCUIT COURT OF THE CITY OF LYNCHBURG

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.

HOWARD G. TURNER, Clerk.

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

199 VA 883

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 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) If the petition for appeal is adopted as the opening brief, the brief of the appellee shall be filed in the clerk's office within thirty-five 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. If the petition for appeal is not so adopted, the opening brief of the appellant shall be filed in the clerk's office within thirty-five days after the date printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office, and the brief of the appellee shall be filed in the clerk's office within thirty-five days after the opening brief of the appellant is filed in the clerk's office.

(b) Within fourteen days after the brief of the appellee is filed in the clerk's office, the appellant may file a reply brief in the clerk's office. The case will be called at a session of the Court commencing after the expiration of the fourteen days unless counsel agree that it be called at a session of the Court commencing at an earlier time; 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) With the consent of the Chief Justice or the Court, 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.

§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.

§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.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 4802

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 14th day of October, 1957.

WILLIAM H. BURRUSS, III, ET AL., ETC., Appellants,
against

B. C. BALDWIN, JR., ET AL., ETC., ET AL., Appellees.

From the Circuit Court of the City of Lynchburg

Upon the petition of William H. Burruss, III, Henry A. Dennis, Jr., and W. H. Clements, III, infants, and all other grandchildren of William H. Burruss, deceased, who at the institution of this proceeding were born and unborn, by their Guardian *ad litem*, William L. Wilson, an appeal and *superseas* is awarded them from a decree entered by the Circuit Court of the City of Lynchburg on the 28th day of May, 1957, in a certain proceeding then therein depending wherein B. C. Baldwin, Jr., and William H. Burruss, Jr., Executors etc., and another were plaintiffs and Sarah B. Dennis, the petitioners and others were defendants; no bond being required.

Supreme Court of Appeals of

Mrs. Allie M. Daniel

MRD

page 54 }

MRS.

DANIEL,

follows:

having been examined by the Court, deposes and says as

DIRECT EXAMINATION.

By Mr. Graves:

Q. Please state your name and address.

A. Mrs. Allie M. Daniel, 205 Pennsylvania Avenue, Lynchburg, Virginia.

Q. Where do you work, Mrs. Daniel?

A. I work for Burruss Land and Lumber Company, Incorporated.

Q. How long have you been working for this company and with other businesses that Mr. William Burruss, the testator, was interested in or controlled?

A. Since September 1, 1939.

Q. What was your position with the concern?

A. Well, I did stenographic work and general office work and was personal secretary for Mr. Burruss.

Q. What was the nature of the relations between you and Mr. Burruss?

A. Well, we were mighty good friends. It was a close relationship.

Q. Did he discuss confidential matters with you?

A. Yes, sir.

Q. Did you ever have any discussion with Mr. Burruss generally about his will or the necessity he felt for making a will?

A. Yes.

Q. Do you remember approximately over what period of time these discussions took place?

A. Well, after the settlement with Mrs. Burruss page 55 } he said that he thought he ought to write a new will.

Q. In his discussions of his will with you generally what did he have particularly on his mind?

A. Well, it seemed that the thing that was uppermost in his mind was that Burruss Land and Lumber Company would be headed up by Bill and that he would have controlling stock in the company so he would be able to run it without

Allie M. Daniel.

interfere would not say "interference," but that Bill would have full say.

Q. Did he have any other part in it?

A. Yes, there was nothing seemed to bother him an awful lot. He wanted his children to have as many children as they could. He believed in large families and he wanted to share and share alike.

Q. By "them" do you mean his children or his grandchildren?

A. His grandchildren.

* * * * *

Now, what did Mr. Burruss have in mind, per capita distribution or per *stirpes* distribution?

A. He wanted each grandchild to share alike.

page 56 } Q. No matter how many grandchildren there were?

A. Yes. He said he thought Florence might have about ten.

Q. Aside from these general discussions Mr. Burruss had with you did he ever discuss with you particularly his holographic will?

A. Yes, sir.

Q. Do you remember the occasion?

A. It was on December 12th, the day before his death on the 13th.

Q. Do you recall who was present?

A. Mr. Burruss told me that he wanted to talk with me about his will while everyone was at lunch and, in fact, he called me in there before they left for lunch and they left about 12:00 or 12:30, and then he continued to talk with me. We were talking and so to speak just thinking out loud, you might say.

Q. Just the two of you present?

A. Yes. It looked like he was just trying to express these things that were on his mind.

Q. Did anybody come in later?

A. Yes, sir, Mr. J. M. Gilley came in later and joined in the discussion after about forty-five minutes.

Q. Well, will you state what happened at that time?

A. Well, he read from his will which he took out of his checkbook, out of the back of his checkbook. He read the whole will through to me and then he went back over it and discussed several points.

Q. Which points did he discuss?

Mrs. Allie M. Daniel.

A. Well, the first thing that he brought up was the leaving of the controlling stock in the Burruss Land and page 57 } Lumber Company to Bill out of his holdings, and he said that he would pay for it out of his earnings, out of the company's earnings.

Q. By "he" you mean Bill, Jr.?

A. Yes, Bill, Jr., out of the earnings, and he also stated he wanted it to be set up so that it wouldn't be a burden to him and a millstone around his neck; that he wanted him to enjoy himself and didn't want him to feel like he was burdened with that; and he first thought ten years time to pay for the stock and then he said twenty years "but I don't even know whether that is enough. I just want to be sure that I have done the right thing about it." He wanted him to enjoy his youth.

Q. Did I understand you to say that he wanted him to enjoy his youth?

A. Yes, sir, said he didn't want the payments to be so large that he would be burdened with it; that it would be a burden to him. He said he felt like in running the company he would have enough trouble.

Q. Did he mention the source from which he thought Bill Jr. could pay for the stock?

A. Out of the earnings of the stock in the company, he said. He specifically said that.

Q. Did he mention any other provisions of his will and discuss it with you?

A. Yes. He brought up the subject of the grandchildren. He dwelt on that.

Q. At that time do you know how many grandchildren he had?

A. Three. Each one of his married children had a child.

Q. What was the state of Mr. Burruss' health at that time?

A. He was feeling very badly.

Q. Do you know whether or not he had been stay-page 58 } ing in a hospital?

A. Yes, sir. In fact he left before he had finished his discussion. He wanted to continue to discuss his will that day and Mr. Gillev and I both insisted that he go back to the hospital because he looked so tired.

Q. Then when he spoke of his grandchildren what did he have to say?

A. He told me that he wanted each of the grandchildren to share and share alike and wanted them all to get an education

J. M. Gilley.

out of the proceeds of the fund he had set up. He said he wanted each one to share and share alike regardless of how many children each of his children had.

Q. You say at that time his three married children each had one child?

A. Yes, sir.

Q. Did he speak about the possibility that there would be more grandchildren in the future?

A. Yes, that is right. He had in mind there would be more and he was hoping there would be more.

Q. Did he mention any of the children particularly?

A. Yes, he said he thought Florence was a right good bet.

* * * * *

page 60 }

* * * * *

Q. That was with reference to the figures on the slip of paper?

A. Yes, sir.

Q. Then what did he say?

A. He said "That is 350 shares and that will leave 4,360," and he didn't talk to me about these other figures but he did mention that ten years because he said, "First I thought ten years about the payment of that stock."

Q. Payment by Bill, Jr.?

A. Yes, and then he said "I have changed it to
page 61 } twenty years and I don't even know if that is
sufficient." That was the thing that he was
pondering in his mind.

* * * * *

page 65 }

J. M. GILLEY,

having been first duly sworn, deposes and says as follows:

DIRECT EXAMINATION.

* * * * *

Q. What was the nature of your duties with these various

J. M. Gilley.

concerns, including the Burruss Land and Lumber Company?

A. My primary duty was looking after the accounting and tax matters and incidental to those I advised in financial matters and occasionally in legal matters.

Q. I believe in addition to being an accountant you are a lawyer.

A. I am.

Q. What was the nature in general of the relationship between you and Mr. Burruss?

A. He consulted with me frequently about things that he had in mind concerning his personal affairs and concerning business affairs. My time was freer than most of the other people in the office and because of my background he would choose me to discuss these things he was thinking about.

* * * * *

page 66 } Q. At the time of the execution of his will of
November 30, 1949 he was married to Mrs. Helen
C. Burruss?

A. That is right.

Q. And then they were divorced in 1953?

A. That is right.

* * * * *

Q. After that time did Mr. Burruss make any remarks to you about the necessity of his making a will?

A. Yes. Because of the change in his circumstances he knew that he should make a new will because certain properties that had been mentioned in his old will were no longer in his possession and on one occasion in the spring of 1953 he was reviewing some of his papers in his files that he kept in the safe and pulled out what I believed at the time to be his will and he looked through it briefly and tore it up and threw it in the waste basket and said, "That's that, and now I haven't got a will." I knew that it was important for him to have a will and on a number of occasions I suggested to him that he make one. He was touchy on the subject of making a will. I think it was partially because he didn't know exactly what he wanted to do, and I frequently told him that the most important thing that a will would do would be to let the people know what he wanted done.

J. M. Gilley.

Q. Did he speak freely about his will when the subject was brought up?

A. Generally he brought it up. I knew he was page 67 } touchy on the subject and it upset him quite often when he did discuss it so I did not bring it up but he would on occasions bring it up and admit to himself the necessity of doing something about it but actually wouldn't dwell on it very long before he would change the subject.

Q. Was he like a lot of people, would shy away from making a will?

A. That is right.

Q. When he would bring up the question of the necessity of his making a will what would appear to be most on his mind from time to time?

A. Well, primarily his largest investment interest was in Burruss Land and Lumber Company and he wanted it to be a strong organization and his prime concern was what to do with that particular item of his investment. His other investments were things that other people managed more than he did. He might participate as a Director or something like that but as far as his direct management of the Burruss Land and Lumber Company that was his prime concern and his prime business interest.

Q. And was that particularly on his mind when the thought of a will would be brought up?

A. Yes, that was constantly in his mind about what to do about that investment.

Q. Did he from time to time indicate what solution he wanted to make of that problem?

A. We discussed a number of possibilities of ways he could leave the properties, leave the investment so it could be managed, and he always indicated that he wanted Bill to run the company. I think that was pride in Bill and pride in the business too. He loved the business and he wanted it to continue and prosper and wanted Bill to be able to page 68 } run it.

Q. Do you know whether Bill Burruss, Jr. was working for the company during the period that you are talking about?

A. Yes, he was.

Q. How long had he been working for the company altogether?

A. I believe about ten years.

Q. What sort of work did Mr. Burruss have him do in the company?

J. M. Gilley.

A. He had Bill do almost everything in the field. He would send him to first one plant and then to another so he could become familiar with the operations of the individual plants. I think he made Bill stack lumber to begin with. He wanted him to be familiar with the whole business right from the ground up.

Q. And where in the company is Bill Burruss, Jr. working now?

A. In the office in Lynchburg, Virginia. That is the base of his operation but he continues to go around to all of the plants.

Q. How long has he been working in and out of that office?

A. According to my best recollection about 1953 Bill came back to Lynchburg for his home base.

Q. You have testified previously, I believe, Mr. Gilley, about the holographic will executed by Mr. Burruss and which has been admitted to probate. Do you recall approximately when you first saw this holographic will?

A. Approximately December 5th or 6th of 1955.

Q. Had anything happened prior to that date that fixes the time particularly in your memory?

A. Well, his very good friend, Carter Glass, Jr., died on December 1, 1955, and he had, let's say, a very friendly feeling for Mr. Glass and it brought to his mind, the
page 69 } suddenness of Mr. Glass' death, the realization
that it could happen to him.

Q. Will you describe the occasion when you first saw the holographic will and state, as best you can, what took place at that time?

A. I went into his office either on December 5th or 6th and he reached in his desk drawer and pulled out his check-book and pulled out this sheet of paper and he indicated to me that it was his will and indicated some of the things he was thinking about the will.

* * * * *

Q. State whether or not later on he did discuss the will with you again.

Q. Yes, he discussed it with me again, I believe later that same week, and actually gave it to me to read and I read the whole thing from beginning to end and we did discuss several provisions that were in the will.

Q. Did you make any suggestion to him at that time about

J. M. Gilley.

the will with respect to the form of it or anything of that sort?

A. I can't recall whether I did at that time or page 70 } at a later time. He asked me whether or not this will was a good will, and having read it and knowing that a holographic will in Virginia was acceptable I told him it was a good will but I would suggest that he make some additions to it such as reciting in the will that he revoked any previous wills and making it more conform to the generally accepted will.

Q. And what was his reaction?

A. He turned it over on the desk and patted it and said, "That's Good."

Q. What did he do with the will?

A. Stuck it back in the checkbook and put it back in the desk. He was satisfied with it in his own mind. He added that he was satisfied with it as to it being sufficient to be a will.

* * * * *

Q. In Item Third of the will there is a provision that the testator's son is to be sold at par value enough stock to give him a majority of all Burruss Land and Lumber Company Inc. stock. Would you state, if you know, what the stock in this company consists of?

A. There is authorized 8,000 shares of voting stock, Class A. There are authorized 2,000 shares of non-voting stock, all Class B. There are outstanding, and were outstanding at that time, 6,994 shares of voting stock and 1,000 page 71 } shares of non-voting stock.

Q. Do you know how many shares of each class of stock Bill Burruss, Jr. now owns?

A. He owns 310 shares of Class A voting stock and 250 shares of Class B, non-voting stock.

Q. In discussing his will with you from time to time did the testator discuss any of his particular wishes with you?

A. Well, with regard to his interest in Burruss Land and Lumber Company he expressed his desire for some arrangements being made for Bill to become owner of sufficient stock for him to control the company. We had gone through several business organization changes and Mr. Bill Burruss realized that it was more difficult to try to operate a company without control than it was one within which control was held in one hand. As a general rule management needs to have

J. M. Gilley.

the power to do what he thinks is right. Somebody has to make the decisions and he wanted to put Bill in position of making the decisions finally, certainly with advice, but to have the final say in what the policies would be.

Q. Do you know whether or not he knew how many shares of the voting stock Bill, Jr. had?

A. Yes, he was familiar with that.

Q. And did he know how many shares that Bill, Jr. would have to acquire in order to have a controlling interest?

A. We made some calculations on one or another occasion of about how many shares Bill would have to acquire in order to have that control.

Q. At that time did he comment on Bill, Jr.'s. ability to acquire the stock?

A. Well, yes. Knowing that Bill did not have personal assets sufficient to buy the stock outright it was
page 72 } understood that he would buy it and be given time
to pay for it that was within his capacity to pay
for on a time basis.

Q. Did he make to you any remarks similar to those which Mrs. Daniel testified that he didn't want the purchase to be a burden to him or a millstone around his neck or anything of the sort?

A. Yes, he did. He referred to that several times; that he didn't want this to be so heavy a burden that Bill couldn't carry it. In other words, he wanted to leave it within his grasp. He wanted it to be something Bill would have to work for but not something he couldn't attain.

Q. Did he ever discuss with you the wish to benefit his grandchildren?

A. Yes, he discussed that on a number of occasions and said that he wanted them all to have equal opportunities without regard to how many there were in any particular family.

Q. Of course, you are aware of the meaning of the legal phrases "*per stirpes*" and "*per capita*."

A. I am.

Q. And what did he have in mind as between those two?

A. He had a *per capita* idea in mind when speaking of his grandchildren sharing in whatever provisions he made for them.

Q. Did he discuss this phase of his wishes with you shortly before his death?

A. We discussed this on December 12th. It was the date of a Board Directors' meeting which he attended.

J. M. Gilley.

Q. That was the day before his death?

A. That was the day before his death.

Q. At that time what was the state of Mr. Burruss' health?

A. Well, of course, he had not been completely
page 73 } well for a considerable period of time and on that
particular day he looked a little more tired than
usual and we suggested that he go back to the hospital and
rest up a little.

Q. Do you know whether he was suffering from any particular illness at that time?

A. He had a multiplicity of illnesses, high blood pressure, diabetes and asthma.

Q. Did he have any heart trouble?

A. Yes, he did.

Q. At that time in December, 1955 do you know what grandchildren he had?

A. He had three grandchildren.

Q. Could you identify those?

A. A son of Mr. and Mrs. H. H. Dennis, a son of Mr. and Mrs. W. H. Clements, Jr. and a son of Mr. and Mrs. W. H. Burruss, Jr.

Q. Did the testator at that time envision having additional grandchildren?

A. He hoped for them.

Q. Did he make any particular remarks that you remember?

A. Right at that time I can't recall what remark he made but I had heard him say that he expected Florence to be the one that would provide him with a lot of grandchildren.

Q. What was his reason, if he expressed any, for per capita rather than per *stirpes* distribution?

A. He had a strong feeling that he wanted all of the children to have available an education without regard to how many children there might be in a family, and other than that I don't know. It's awfully hard to understand what somebody's thinking is and I don't know what really caused him to want to think that way.

page 74 } Q. Did he ever use an expression like he didn't
want to penalize any of his grandchildren because
their parents had more children than some of his other
children?

A. He had used that expression.

Q. That he didn't want any of his grandchildren penalized because they were members of a large family rather than a small family. Is that correct?

A. That is correct.

W. H. Burruss, Jr.

Q. I believe you testified that Bill Burruss, Jr. has been working for the company about ten years. While you were there was there ever any indication of any lack of interest in the company on the part of Bill Burruss, Jr.?

A. None at all.

* * * * *

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* * * * *

W. H. BURRUSS, JR.,
having been first duly sworn, deposes and says as follows:

DIRECT EXAMINATION.

By Mr. Graves:

Q. Please state your name and address.

A. W. H. Burruss, Jr., 1522 Clayton Avenue, Lynchburg, Virginia.

Q. You are the son of William H. Burruss, deceased, the testator?

A. That is right.

Q. Will you please give us the names and ages of the children and grandchildren of the testator who were living at the time of his death?

A. I will give the names of the children first. Sarah Burruss Dennis, born April 21, 1922.

Q. Please also give the names and ages of any husband or wife of the children.

A. H. H. Dennis, the husband of Sarah Burruss Dennis, was born June 22, 1922. They have one son named H. H. Dennis, Jr. who was born January 22, 1951.

I have a single sister, Miss Helen C. Burruss,
page 78 } born June 1, 1923.

I have a married sister, Florence Burruss Clements, born February 20th, 1932. Her husband is W. H. Clements, Jr., and they have one son, W. H. Clements, III, born December 28th, 1954.

Q. What is the age of Mr. W. H. Clements, Jr.?

A. He was born March 11, 1930.

Q. Proceed.

A. Myself, W. H. Burruss, Jr., born September 10, 1927, married to Mary Jo Wester Burruss who was born Novem-

W. H. Burruss, Jr.

ber 17, 1926. We have one son, W. H. Burruss, III, born October 22, 1953.

Q. I believe that you have qualified as one of the executors of your father's estate and have entered upon your duties as such.

A. That is correct.

Q. Will you please state what was the total appraised value of all of the assets of your father's estate?

A. \$1,279,490.38.

Q. From time to time during his life did your father make gifts to his four children?

A. He did.

Q. Will you state what gifts of a substantial nature he made to each child?

A. Stock given Mrs. Sarah Burruss Dennis, Blue Ridge Frozen Foods, 250 shares of preferred stock at \$10.00 a share.

Q. Is that par value, \$10.00 per share?

A. That is right.

Q. Do you have a date of that gift?

A. October 20th, 1949.

Q. Did he make any other gifts to Mrs. Dennis?

A. He did. Old Dominion Broadcasting Corporation, 25 shares at \$100.00 par. That was June 6th, 1952. Also the lumber was given for the house they presently live in valued at \$2,500.00. That home is at 3608 Sherwood Place. She also acquired at book value 250 shares—I don't mean "acquired," I mean "bought," don't I?

Q. I will ask you about that later.

A. 250 shares of Class A voting stock at \$100.00 par, and 250 shares Class B non-voting stock at \$100.00 par. That was on October 7, 1953.

Q. Was the stock last mentioned—that is, 250 shares of non-voting stock and 250 shares of voting stock, in the Burruss Land and Lumber Company, Incorporated?

A. Yes.

Q. You say Mrs. Dennis acquired this stock. Did she acquire it by way of gift from Mr. Burruss or by purchase?

A. It was by purchase.

Q. Would you summarize the gifts made to his other children?

A. He also gave Helen C. Burruss stock in the Blue Ridge Frozen Foods amounting to 250 shares at \$10.00 par, preferred stock. That was on October 20, 1949. He also

W. H. Burruss, Jr.

gave her 150 shares of Lynchburg Hotel Corporation common stock at \$1.00 par. That was March 14th, 1951. He also gave her property at Willow Lake which consisted of a two-story log cabin valued at \$10,000.00. That was on April 18, 1953.

Q. Did Helen Burruss acquire by purchase or gift any stock in the Burruss Land and Lumber Company?

A. She did. She acquired by purchase in the same amount as Mrs. Sarah Burruss Dennis.

Q. Do you know when she acquired that stock?

A. October 7th, 1953.

page 80 } Q. Would you summarize the property given to you by your father?

A. 250 shares of Blue Ridge Frozen Foods preferred stock at \$10.00 par on October 20, 1949. 25 shares of Old Dominion Broadcasting Corporation stock at \$100.00 par on June 6, 1952. Then \$10,000.00 down payment on residence at 1522 Clayton Avenue.

Q. Did you also purchase any stock in Burruss Land and Lumber Company?

A. I did. I purchased as much as the two preceding sisters and was given 60 shares September 10, 1948.

Q. Was that 60 shares of voting or non-voting stock?

A. It was voting stock. It was 30 shares of Burruss Company Products which was later exchanged for 60 shares of Burruss Land and Lumber Company, Inc. stock.

Q. Will you summarize any property given to Florence Burruss Clements by your father?

A. 250 shares of Blue Ridge Frozen Foods preferred stock at \$10.00 par on October 20, 1949. 150 shares, \$1.00 par, common stock of Lynchburg Hotel Corporation on March 14, 1951; \$5,000.00 down payment on a house at Timberlake.

Q. Did Florence acquire by purchase any shares of stock in Burruss Land and Lumber Company?

A. She did. She acquired as much as Miss Helen C. Burruss and Mrs. Sarah Burruss Dennis.

Q. The date you gave for the purchase by each of you of 250 shares of voting and non-voting stock in Burruss Land and Lumber Company, Inc. was given by you as October 7, 1953. Was that the date when the stock was issued or the date when it was purchased? Do you know?

A. That was the date the stock was issued.

page 81 } Q. Do you know when the stock was actually purchased?

A. September 1, 1953.

W. H. Burruss, Jr.

Q. You have referred to the Burruss Land and Lumber Company, Incorporated. Was that the company which was largely owned by your father with which he was connected and which comprises a large part of the estate?

A. It was.

Q. Did your father make other presents to his children from time to time?

A. He did.

Q. What kind of presents would he give them on their birthdays?

A. A dollar a year for how old they were.

Q. And at Christmastime did he give them Christmas presents?

A. Yes, sir, a \$25.00 War Savings Bond apiece.

Q. How many years have you been working for the Burruss Land and Lumber Company or any concerns in which your father was interested?

A. About ten years.

* * * * *

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CROSS EXAMINATION.

By Mr. Wilson:

Q. Prior to his death did your father ever discuss with you about leaving you a controlling interest in the Burruss Land and Lumber Company, Incorporated?

A. Well, he mentioned it on several occasions, said that he wanted me to at sometime manage the business and hoped that I was capable and he discussed the possibility of my buying stock in order to maintain control but as far as ever reaching any understanding that was satisfactory to him or to myself I was most uncooperative in that matter because I didn't want to be in the position of putting words in his mouth, so to speak.

Q. Did he ever discuss with you that he might possibly make some arrangements by which you would be given an opportunity to purchase a controlling interest in the stock?

A. Offhand I wouldn't know. I wouldn't remember.

Q. Did he ever suggest some plan whereby he would provide you with an opportunity to acquire a controlling interest in the stock and be given a long period of time to pay for it?

A. As I said before, he brought the proposition up on a number of occasions about writing a will toward the last few

Sarah Burruss Dennis—Florence Burruss Clements.

months of his life but we never got down to anything concrete and I more or less evaded the question.

Q. The will that he left gives you the opportunity to buy a majority of stock at its par value and allow twenty years for you to pay for the stock. Do you have any idea, gathered from your conversations with your father, as to how that payment was to be made?

A. No, I do not.

* * * * *

page 84 } SARAH BURRUSS DENNIS,
having been first duly sworn, deposes and says
as follows:

DIRECT EXAMINATION.

By Mr. Graves:

* * * * *

In other words, he wanted all of his grandchildren to share and share alike.

Q. Did he want that regardless of how many brothers and sisters each grandchild had?

A. That is right.

Q. Did he ever use that expression with you that he didn't want any of his grandchildren penalized because of how many children their parents had?

A. Yes, he did.

* * * * *

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* * * * *

FLORENCE BURRUSS CLEMENTS,
having been first duly sworn, deposes and says as follows:

DIRECT EXAMINATION.

By Mr. Graves:

* * * * *

J. M. Gilley.

page 86 } Q. Did your father know definitely before he
died that you were pregnant?

A. Yes, he did.

* * * * *

page 90 }

* * * * *

ARTICLE IV: My Executors are hereby authorized and directed to offer, in writing, to sell the interest of my estate in the assets of the partnership known as Burruss Land and Lumber Company, including real estate standing in the name of W. H. Burruss and R. S. Burruss, Jr., or in these names as partners trading as Burruss Land and Lumber Company, to William H. Burruss, Jr. at a price equal to the book value of my interest in said partnership as of January 1st of the calendar year in which I died, unadjusted for profits, losses, withdrawals, contributions or for any circumstances which may have arisen between January 1st and the date of my death. The purchase price shall be evidenced by non-interest bearing notes of the said William H. Burruss, Jr., payable to Bearer in annual installments aggregating Seventy-five Hundred Dollars (\$7,500.00) each without interest and providing for the right of anticipation. The offer shall state that it will remain in effect for sixty (60) days. If the said William H. Burruss, Jr. accepts the offer, he shall forthwith deliver his notes for the purchase price to my Executors and the same shall pass as hereinafter provided.

* * * * *

page 105 }

J. M. GILLEY,

having been first duly sworn, deposes and says
as follows:

By Mr. Graves:

Q. In connection with Mr. Burruss' desire that William H. Burruss, Jr. purchase a controlling interest in the Burruss Land & Lumber Company, I want to ask you some additional questions Mr. Gilley. Please state the par value of the stock in the Company, both voting and non-voting; that is, both Class A and Class B.

J. M. Gilley.

A. Both Class A, voting, and Class B, non-voting, have a par of \$100.00.

Q. How many shares of voting stock did the testator own at the time of his death?

A. 4710.

Q. What salary was Mr. Burruss, Sr. paid by the Company in 1954 and 1955?

A. He was paid in 1954 a salary of \$12,000 and no bonus. In 1955 he was paid a salary of \$12,000 and a bonus of \$12,000, for a total of \$24,000.

Q. Was there any set pattern for calculating the bonus paid by the Company?

A. The pattern was established each year by Mr. Burruss.

Q. What salary did Mr. Burruss, Jr. receive from the Company in the years 1954, 1955 and 1956?

A. In 1954, Mr. Burruss, Jr. received a salary of \$7,600.00 and a bonus of \$5,333.33, for a total of \$12,933.33. page 106 } In 1955, he received a salary of \$7,200.00 and a bonus of \$5,405.40, for a total of \$12,605.40. In 1956, he received a salary of \$8,400.00 and a bonus of \$5,714.29, for a total of \$14,114.29.

Q. What dividends have been paid on the stock of the Company, both Class A and Class B, since its issuance?

A. In 1954, a dividend of \$6.00 a share was paid; in 1955, a dividend of \$6.00 was paid; and in 1956, a dividend of \$6.00 a share was paid. These dividends were paid both to the Class A voting stock and to the Class B non-voting stock.

Q. How many shares of stock must Mr. Burruss, Jr. own in order to have a controlling interest in the Company?

A. There are outstanding 6994 shares of Class A voting stock. In order to have a majority he would need 3498 shares of voting stock.

Q. Does the Class B non-voting stock carry the right to vote under any circumstances?

A. It does not.

Q. Was Mr. Burruss, Sr. aware of all of the above facts?

A. He was aware of all of the above facts with the exception of the dividends paid in 1956 and of the salary paid to Mr. Burruss, Jr. in 1956.

Q. State, if you know, whether or not Mr. Burruss, Sr. borrowed any large sum or sums of money in the last years of his life.

A. In 1953, he borrowed \$225,000.00. page 107 }

Q. Do you know whether he had paid all of this loan before his death?

J. M. Gilley.

A. \$150,000.00 of it had not been paid as of the time of his death.

Q. Do you know what rate of interest he paid on this loan?

A. The last renewals of the notes on which he had borrowed the money was at the rate of $3\frac{1}{2}\%$ and that was made on October 25, 1955.

Q. Was Mr. Burruss, Sr. aware of the impact of income taxes?

A. He was very much aware of income taxes and the impact on earnings.

Q. Turning to another subject, I believe that Florence B. Clements has testified that she was pregnant to the testator's knowledge prior to his death, but lost this baby. Do you know whether since Mr. Burruss' death Mrs. Clements has had a child?

A. She had a child—a daughter—born on January 16, 1957.

Q. State if you know what value has been placed on the stock of the Company for estate tax purposes.

A. The stock of Burruss Land & Lumber Company, Incorporated, has been valued at \$100 a share for the estate and inheritance tax returns.

Q. That is both classes of stock?

A. Well, only one class was owned by Mr. Burruss, Sr. and that was the voting stock.

* * * * *

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* * * * *

Enter 5-28-57.

C. E. B.

NOTE FOR DECREE.

This cause, which has been regularly matured, set for hearing and docketed, came on this day to be heard upon the bill of complaint and exhibits filed therewith, taken for confessed as to A. F. Durham, Jr., J. M. Gilley, Mrs. Allie M. Daniel, H. H. Dennis, W. R. Seay, Mrs. D'Alma Hoffarth, and The Lynchburg National Bank and Trust Company,

resident respondents who have been regularly served with process, 21 days having elapsed since service and they and all of them still failing to appear, plead, answer or demur; upon the separate answers of Sarah B. Dennis, Helen C. Burruss, Florence B. Clements and Helen C. Burruss, Sr.; upon the joint answers of William H. Burruss, III, Henry H. Dennis, Jr., W. H. Clements, III, and any unborn grandchildren of William H. Burruss, deceased, who are unknown, infant respondents, by William L. Wilson, their
 page 112 } guardian *ad litem*; upon proper proof of the due execution of the order of publication against the respondents sued by the general description of "Parties unknown," ten days having elapsed since the completion thereof, and they still failing to appear; upon the depositions of the complainants duly and legally taken in the presence of the guardian *ad litem* on the 22nd day of December, 1956, and on the 7th day of March, 1957, and the exhibits filed with the same, all of which were returned to and filed in the Clerk's Office of this Court; and argued by counsel.

Upon consideration whereof, and it appearing to the Court that the respondents, Sarah B. Dennis, Helen C. Burruss, Florence B. Clements, Helen C. Burruss, Sr., A. F. Durham, Jr., J. M. Gilley, Mrs. Allie M. Daniel, H. H. Dennis, W. R. Seay, Mrs. D'Alma Hoffarth and The Lynchburg National Bank and Trust Company have each been duly and legally served with notice of this suit, with a copy of the Bill of complaint thereto attached; that an order of publication has been duly and legally published and posted in the manner and for the length of time required by law as to the unknown grandchildren of William H. Burruss, testator, and unknown beneficiaries under the will of said William H. Burruss; that William L. Wilson, a discreet and competent attorney at law has been duly and legally appointed as guardian *ad litem* for
 the infant respondents, William H. Burruss, III,
 page 113 } Henry H. Dennis, Jr., W. H. Clements, III, and the unknown grandchildren of William H. Burruss; that all of the aforesaid respondents are now properly before this court and that this suit is now duly matured and by the consent of all parties on the docket of this court, the court doth now set this cause for hearing.

Upon consideration whereof and the court being of opinion that William H. Burruss died testate in the City of Lynchburg, Virginia, on December 13, 1955, and that by order of this court of January 13, 1956, there were duly admitted to probate by the Circuit Court for the City of Lynchburg, as his last will and testament, two paper writings, one dated November 30, 1949, and the other being undated but executed in

December, 1955; that B. C. Baldwin, Jr. and William H. Burruss, Jr. are the duly qualified acting executors under the will of William H. Burruss, deceased; and that this suit was instituted for the purpose of obtaining the aid, guidance, and instruction of the court as to the interpretation of various of the provisions of the said will as well as the validity thereof, the court doth so ADJUDGE, ORDER and DECREE.

In further consideration of all of which the Court, being of opinion for reasons set forth in a written memorandum filed herewith and made a part hereof, doth ADJUDGE, ORDER and DECREE as follows:

1. That the order of this Court entered on January 13, 1956, established that the second will did not re-
page 114 } voke Article VII of the will of November 30, 1949;
that the question was not decided in what other respects the second will revoked the provisions of the first will; that the action of the said William H. Burruss, testator, in destroying a conformed copy of the will of November 30, 1949, was insufficient to revoke said will; that the testator subsequently, in the first part of December, 1955, executed the undated will with intent to revoke the dispositive provisions of said first will; that the second will contained a disposition of substantially all of the testator's property inconsistent with that made by the first will; that the testator intended to leave in effect only said Article VII of said first will, appointing fiduciaries and providing powers of administration; that the second will revoked all provisions of the first will except said Article VII thereof; and that the last will and testament of the said William H. Burruss consists of said second will and said Article VII of said first will.

2. That by Article 2nd of said second will of December, 1955, the testator provided a gift of fifty shares of Class A common stock in the Burruss Land & Lumber Co., Inc., to each of the following respondents and to nobody else: A. F. Durham, Jr., J. M. Gilley, Mrs. Allie M. Daniel, H. H. Dennis, W. R. Seay, Mrs. D'Alma Hoffarth, and Helen C. Burruss.

3. That by Article 3rd of said second will, the said testator authorized the sale to his son, one of the com-
page 115 } plainants, William H. Burruss, Jr., at the par value of \$100 per share, of enough shares of Class A common stock of Burruss Land & Lumber Co., Inc. so that, with the shares of such stock already owned by him, he would own a majority of the shares of such stock issued and outstanding; that the purchase price of \$100 per share, if such offer be accepted, is to be paid, without interest, in

twenty equal annual installments, the first installment being payable on the date of the delivery of the stock to him, duly transferred, and subsequent installments on the ensuing anniversary dates; that such offer be made to the said William H. Burruss, Jr.; and that he be given a reasonable time, after the entry of this decree, to decide whether he will accept said offer;

4. That Articles 4th and 5th of said second will of December, 1955, were intended to be effective only in the event that the said William H. Burruss, Jr. predeceased the testator; that William H. Burruss, Jr. survived the testator; and that said Articles 4th and 5th consequently are of no effect, and the estate is to be administered as if the said Articles were not contained in the testator's will.

5. That Articles 6th and 7th of said second will of December, 1955, in and of themselves and considered in relation to other provisions of the will, are null and void and of no effect: first, because they violate the Rule against perpetuities; second, they are too vague and indefinite and uncertain—all for reasons set forth in the memorandum opinion herewith filed.

page 116 } 6. That Articles 6th and 7th of said second will of December, 1955, being of no effect, the property sought to be disposed of thereby shall, at the completion of administration of the estate, be distributed to the heirs at law and distributees of the testator, his children, to-wit: William H. Burruss, Jr., Sarah B. Dennis, Helen C. Burruss and Florence B. Clements, in equal shares.

7. That all costs of this proceeding including a fee of \$1,000.00 to William L. Wilson, guardian *ad litem*, be paid by the complainants out of the assets of the estate.

To the foregoing decree of this Court the infant respondents, William H. Burruss, III, Henry H. Dennis, Jr., W. H. Clements, III, and the unknown grandchildren of William H. Burruss, by their guardian *ad litem*, William L. Wilson, excepted.

And the infant respondents, William H. Burruss, III, Henry H. Dennis, Jr., W. H. Clements, III, and the unknown grandchildren of William H. Burruss, by their guardian *ad litem*, William L. Wilson, intimating an intention to apply to the Supreme Court of Appeals for appeal and *supersedeas* from this decree, the Court doth further order that execution of the same be suspended for a period of sixty days from the date of entry hereof without bond in that such appeal is proper to protect the estate of an infant, in accordance with

the provisions of Section 8-477 of the Code of
page 117 } Virginia.

And this cause is retained on the docket of this
court for the entry of such further orders and decrees as may
appear advisable.

* * * * *

page 118 } MEMORANDUM OPINION.

Chas. E. Burks, Judge
May 22, 1957.

Filed with decree May 28, 1957.

HUBERT H. MARTIN, Clerk.

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MEMORANDUM OPINION.

The objects of this suit are to determine what constitutes
the will of William H. Burruss, deceased, to construe various
provisions of the same, and to determine the validity there-
of.

The facts may be briefly summarized as follows:

The testator, who was President and majority stockholder
of Burruss Land & Lumber Company, Inc., and who was
active in the affairs of this company and various other oc-
cupations up to the time of his death, died on December 13,
1955. On November 30, 1949, he had executed a will pre-
pared for him by his attorney, the original of which was kept
by the attorney and a conformed copy of which was given
to him. In the early part of December, 1955, he executed an
undated holographic will, set out herein in its entirety:

page 120 } "1st All personal debts to be paid.

& women

"2nd Each of the office men to be paid given
50 shares of stock in the B. L. & L. Co. Inc.

"3rd My son W. H. B. Jr. to be sold at par value enough
stock to give him a majority of all Burruss Land & Lumber

Inc. stock, twenty years time shall be given him to pay for said stock.

WHB Jr's death

"4th In case of his death H. H. Dennis J. M. Gilley & A. F. Durham to have the management of the business and they to receive salaries to compensate for the liquidation of the business which shall not exceed two years.

"5th When the business is liquidated then the money or an appraised value placed by the managers of all plants and the office manager acting together may divide equally moneys or property as they see fit between my heirs.

"6th My interest in Ralso Stores Otter Hill Farms, Burruss Farms, Connelly & Burruss Farms, The Bondurant Farm, the Pamplin Farm, The Pamplin House, and the Brookneal House to be sold and the proceeds to be placed in a fund from which my grandchildren are to receive an education as high as their abilities may acquire.

"7th All stocks and bonds and life insurance are to remain invested as they are after using whatever is necessary from same to pay my taxes. In other words my bank stocks are to continue invested in bank stocks; my B L & L stocks to pay for my taxes and the proceeds from the other stocks are to go in the fund created for my grandchildren. Each of whom a.e to share alike."

page 121 } The first will was executed at a time when the testator was married to the defendant, Helen C. Burruss (Sr.), and was so drafted as to take full advantage of the maximum marital deduction. At the time of the execution of this will, the testator operated his business in the form of a partnership. On January 6, 1953, the testator was divorced from his wife, and a property settlement was agreed upon and carried into effect. In the same year the testator's business was reorganized by the formation of a corporation. Subsequently, in the spring or summer of 1953, in looking through some files, he came across the conformed copy of his 1949 will, destroyed the same, and remarked that he no longer had a will. From then on he would occasionally mention the necessity of his making a will. He never, however, destroyed the original of the 1949 will, nor as is apparent therefrom, did the second will contain an express revocation of the earlier will.

In January, 1956, a proceeding was instituted under Sec. 64-81 of the Code of Virginia in which both documents were offered for probate. By an order entered January 13, 1956, both of the wills were admitted to probate as together constituting the last will and testament of the testator, and two

of the three executors named in the first will were permitted to qualify, the third having indicated his desire not to serve. In this proceeding no attempt was made to construe the will or to determine to what extent the provisions of the first will were revoked by the second, these and other questions being left for determination in a proceeding subsequently to be instituted, with the exception that, since the second will contained no provisions for the appointment of fiduciaries or for the administration of the estate, it was at that time determined that Article VII of the first will, nominating executors and providing for powers of administration, page 122 } was not revoked by the second will but remained in effect. This was obviously to the interest of all concerned since the necessity for surety on the executors' bond was waived and a substantial savings to the estate will be thereby effected; and since the powers in said Article VII will be helpful to the executors in the administration of his estate.

The instant proceeding is the one which was contemplated at the time the order of January 13, 1956, was entered.

The testator left an estate of slightly over a million and a quarter dollars and all of the property was mentioned in the second will with the exception of his tangible personal property and other items aggregating in value less than 1% of the total value of his estate.

With reference to article 2nd of the holographic will, the principal office of the Burruss Land & Lumber Company was located in the Allied Arts Building in the City of Lynchburg, although there were offices in various plants operated by the company in different locations. At the time of the second will and of the testator's death, there were the following persons who worked in the office: the defendants, A. F. Durham, Jr., J. M. Gilley, Mrs. Allie M. Daniel, H. H. Dennis, W. R. Seay, Mrs. D'alma Hoffarth, and Miss Helen C. Burruss. The testator's son, William H. Burruss, Jr., also used the office as headquarters, but his duties at times took him out of the office. He went to work for the company in the year 1946 or 1947, when he was approximately 20 years old, and was given various duties in the company which would familiarize him with all of its operations. The testator had previously given his son 60 shares of stock in the company.

At the time of the testator's death, there were issued and outstanding 6994 shares of Class A Voting Common Stock of the company of the par value of \$100 a share. page 123 } (There were also issued and outstanding shares of Class B, non-voting stock, but testator owned

none of this stock at the time of his death) . Of these 6994 shares, the testator owned 4710. In connection with articles 3rd, 4th and 5th of the second will, it will be noted that the testator's son needs to have 3498 shares of Class A stock and, in addition to the shares which he already holds and will receive in the event articles 6th and 7th of the second will are held invalid, would need to purchase approximately 2098 shares from the estate. The stock paid a dividend of \$6 a share in 1954 and 1955. The testator was paid a salary of \$12,000 in 1954 and a salary and bonus of \$24,000 in 1955. William H. Burruss, Jr. received salary and bonus of slightly less than \$13,000 in 1954 and approximately \$12,500 in 1955. In Article IV of the first will, the testator provided an option for his son to purchase his interest in his business, and expressly stated that no interest was to be charged on the unpaid purchase price.

With particular reference to articles 6th and 7th of the second will, the testator was survived by four children, namely, Sarah B. Dennis, Helen C. Burruss, William H. Burruss, Jr. and Florence B. Clements, Jr. All of the children were married except Helen C. Burruss; and their ages and the ages of their spouses ranged from 33 to 23 years. He was also survived by his widow, the defendant, Helen C. Burruss (Sr.), who has disclaimed any interest in his estate. He was also survived by three grandchildren, namely: Henry H. Dennis, Jr., son of Sarah B. Dennis, born January 22, 1951; William H. Burruss, III, son of William H. Burruss, Jr., born October 22, 1953; and W. H. Clements, III, son of Florence B. Clements, born December 28, 1954. As the testator knew, his daughter Florence was again pregnant at the time of his death. This baby, however, was not born, having been lost after the testator's death. Subsequently, Mrs. Clements had a daughter who was born on January 16, 1957. There is evidence that the testator hoped for and contemplated the birth of additional grandchildren; and there he preferred a *per capita* rather than a *per stirpes* distribution.

There is no evidence that the testator had any
page 124 } particular interest in any of his living grand-
children to the exclusion of those which might be
born afterwards, but the evidence is to the contrary.

The first question for determination is the extent to which the second will revoked the first. While it was held in the probate proceeding that Article VII of the first will was not revoked by the second will, the question was left open to what extent otherwise the second will revoked the first.

The Virginia statute concerned with the revocation of wills is Section 64-59 of the Code, which reads as follows:

"No will or codicil, or any part thereof, shall be revoked, unless under the preceding section, or by a subsequent will or codicil, or by some writing declaring an intention to revoke the same, executed in the manner in which a will is required to be executed, or by the testator, or some person in his presence and by his direction, cutting, tearing, burning, obliterating, canceling or destroying the same, or the signature thereto, with the intent to revoke."

It seems to be well settled that the destruction by the testator of a conformed copy of a will is not sufficient to revoke the will, even though it is evidence of an intention to revoke; and the Court so holds. All the authorities found are to the same effect. In *Re: D'Agastino's Will*, 9 N. J. Super. 230, 75 A(2d) 913 (1950); In *Re: Wehr's Will*, 247 Wis 98, 18 N. W. (2d) 709 (1945); 1 Page on Wills (3rd Ed. 1942) Sec. 437. Revocation in this case is consequently limited to revocation by the subsequent inconsistent document.

It is well settled in Virginia and elsewhere that where the testor leaves two unrevoked testamentary documents, both constitute his last will; and that insofar as is reasonably possible both documents will be given full effect and the second will be held to revoke the first only to the extent to which it is inconsistent with the first. *Bradshaw v. Bangley*, 194 Va. 794, 75 S. E. (2d) 609 (1953); In *Re: Bentley's Will*, 175 Va. 456, 9 S. E. (2d) 308 (1940); *Schultz v. Schultz*, 10 Gratt. (51 Va.) 358, 373 (1853); 20 *Michie's Jr., Wills*, Sec. 24; 57 Am. Jur., Wills, Sec. 228.

It will be recalled that the second will contained no provisions for the appointment of fiduciaries or for the administration of the estate, except limited directions as to how taxes were to be paid and the residuum invested. The Court's holding that Article VII of the first will was not revoked but constituted a part of the testator's last will is in accord with other authorities on the subject. In *Re: Salmonski's Estate*, 38 Cal. (2d) 199, 238 P(2d) 966 (1951); *Newcombe v. Webster*, 113 N. Y. 191, 21 N. E. 77 (1889); *Geanes v. Price*, 3 Swa. & Tr., 71, 164 Eng. Rep. 1197 (1863).

In addition to failing to provide for the administration of his estate in the second will, the testator also failed thereby to mention some of his property aggregating less than 1% of the value of his gross estate. The Court is satisfied, however, that the testator intended to revoke all of the dispositive provisions of his first will. His circumstances had changed, particularly in his being divorced from his wife and in his

reorganization of his business; and the dispositive plan of the second will is almost entirely inconsistent with that of the first will. In the determination of the question of revocation by a subsequent document as well as all other questions of construction of a will, the testator's intention must control. *Gardner v. McNeal*, 117 Md. 27, 82 Atl. 988, 40 L. R. A. (N. S.) 553 (1911); In *Re: Marques Will*,—Misc.—, 123 N. Y. S. (2d) 877 (1953); In *Re: McClure's Estate*, 309 Pa. 370, 165 Atl. 24 (1933); 57 Am. Jur. Wills, Sec. 476 (p. 533); note 51 A. L. R. 652, 668; *Adams v. Cowan*, 160 Va. 1, 167 S. E. 750 (1933).

The Court therefore holds that except for Article VII, the first will was revoked in its entirety by the second will.

This conclusion is not affected in this case by the doctrine of dependent relative revocation, here pertinent page 126 } because of the conclusion that articles 6th and 7th of the second will are ineffective. This doctrine briefly stated is that if a subsequent will is intended by the testator to revoke a prior will only if the subsequent document is valid in its entirety, then the prior will is revoked only to the extent of the valid inconsistent provisions of the subsequent document. *Bell v. Timmins*, 190 Va. 648, 58 S. E. (2d) 55 (1950); *Adams v. Cowan*, *supra*. When, however, the testator intends a revocation of the prior document irrespective of the validity of the second, then his intention is carried into effect. *Adams v. Cowan*, *supra*; *Blakeman v. Sears*, 74 Conn. 516, 51 Atl. 517 (1902); *Succession of Ryan*, 228 La. 447, 82 So. (2d) 759 (1955); *Mort v. Baker University*, 229 Mo. App. 632, 78 S. W. (2d) 498 (1935); *Central Hanover Bank v. Hutchison*, 22 N. J. Super. 78, 91 A. (2d) 654 (1952); *American Nat. Bank v. Morgenweck*, 114 N. J. Eq. 286, 168 Atl. 598 (1933); In *Re: Wuppermann's Estate*, 164 Misc. 900, 300 N. Y. S. 344 (1937); *Carpenter v. Miller*, 3 W. Va. 174, 100 Am. Dec. (1869); *Tupper v. Tupper*, 1 K. & J. 665, 69 Eng. Rep. 627 (1868).

So holding, it is necessary for the Court to ascertain what the testator intended by the various provisions of his second will, all of which, with the exception of the first article, are somewhat vague and ambiguous. It is relevant that the Court shall consider the facts and circumstances existing at the time the will was executed and at the time of the testator's death, and, indeed the Court must do so. *Baptist Home for Women v. Mizell*, 197 Va. 399, 89 S. E. (2d) 332 (1955); *Coffman v. Coffman's Administrator*, 131 Va. 456, 109 S. E. 454 (1921); 4 Page on Wills, Sec. 1622; 94 A. L. R. 241.

It is the Court's conclusion that article 2nd of the holographic will providing a gift of 50 shares of stock of Burruss

Land & Lumber Company to the "office men and women" was intended to provide a legacy of 50 shares of the Class A stock of that company to each of the following defendants: A. F. Durham, Jr., J. M. Gilley, Mrs. Allie M. Daniel, H. H. Dennis, W. R. Seay, Mrs. D'alma Hoffarth, and Miss Helen

C. Burruss. The subject of the gift is confined to page 127 } the Class A stock since this is the only class of stock that the testator owned at the time of his death. The gift is confined to the men and women working in the principal office of the company since the testator used the word "office" to refer to the principal office rather than to the various offices contained in the plants of the company. The testator's son is excluded from the benefits of this article because he did not occupy the same status as the others working in the principal office of the company, but worked in a supervisory capacity throughout the operations of the company and used the principal office as his headquarters. In addition, the testator had given him 60 shares of stock prior to the execution of the second will. Moreover, the evidence shows that when the testator was discussing his will with Mrs. Daniel he made a list of those whom he intended as the office men and women. While direct statements of the testator's intent may be resorted to only in the case of an equivocation, it appears that the phrase constituted an equivocation and direct statements of his intention are admissible to ascertain his meaning. *Coffman v. Coffman's Administrator*, *supra*; *Money v. Money*, 235 Ala. 15, 176 So. 817 (1937); *Rule v. First National Bank*, 182 Va. 227, p. 234 (1944); *Mann v. Land*, 177 Va. 509, p. 516 (1941).

Articles 3rd, 4th and 5th of the second will are more difficult to construe. Preliminarily, reading these articles in connection with articles 6th and 7th, it appears that the testator intended to dispose of his stock in the Burruss Land & Lumber Company in two entirely different ways. If articles 3rd, 4th and 5th are read without considering articles 6th and 7th, the testator intended either a sale of a substantial part of his stock to his son or a liquidation of the company with a distribution of the proceeds of his stock among his children. The alternative was dependent upon the death of William H. Burruss, Jr. When, however, articles 6th and 7th are read, it appears that the testator did not have in mind the prior provisions for the disposition of his Burruss Land & Lumber Company stock. In the first sentence of article 7th, he provided that this and other stocks and bonds page 128 } and life insurance are to remain invested as they are after using whatever is necessary to pay his taxes. In the second sentence he provided that his Burruss

Land & Lumber Company stocks are to pay for his taxes. If a major portion of this stock had been sold to his son, with payments to be made over a 20-year period, the testator would not have had enough left to pay his taxes. If the company were dissolved and the proceeds of the stock distributed among his children, then none of this stock would be available for the payment of his taxes.

Construing articles 3rd, 4th and 5th without reference to articles 6th and 7th, it appears to the Court that the testator contemplated that his son should be sold enough stock in the Burruss Land & Lumber Company to give him control of that company only in the event that the son survived the father. Mr. Burruss had taken his son into the company and had obviously groomed him as his successor. He realized the difficulty of operating a company without control. He was apparently counting on his son's taking his place as the operator of the company. Of course, if the son predeceased him this desire could not be realized.

The point has been made in various answers filed in this proceeding that the testator intended that the company be dissolved whenever his son died. Such an interpretation would render the provision for the purchase of a majority interest by the son quite impractical; and would prevent the son from being able to attempt to provide a similar opportunity for W. H. Burruss, III or any other child he might have. The persons named by the testator to liquidate the company were all older than the son and in all likelihood would predecease him.

It is possible that the testator had in mind a third possibility, namely, that the company should be dissolved if the son died prior to his completing payment for the stock to be purchased by him. Here again, it would be most impractical to operate the company and to arrange for its
page 129 } dissolution.

The Court therefore interprets the intention of the testator, as he attempted to express it in articles 3rd, 4th and 5th, to be that the son was to be sold a sufficient number of shares of Class A stock in the company to give him control if he survived the testator and desired to make the purchase; and did not intend for the company to be liquidated unless the son predeceased him or was unwilling to buy the stock.

The second sentence of article 3rd, reading "Twenty years time shall be given him to pay for the said stock," the Court interprets as meaning that the son should pay for the stock purchased in twenty equal annual installments without interest. In so holding, the Court has taken into consideration the impracticability of his son's paying interest on the de-

ferred purchase money of the stock, and has also been influenced by a similar provision (Article IV) in the testator's former will. In providing in that will for his son's purchasing his interest in his business, the testator specified that the purchase price should be payable without interest in annual installments of \$7,500.00. As to the propriety of a consideration of the former will in the interpretation of a similar provision of a later will, see *Griffin v. Central National Bank*, 194 Va. 485, 489 (1953).

It is possible that the testator meant that his son could wait for twenty years without making any payments on the stock in one lump sum. Payment in equal annual installments, however, seems to be more equitable and more in line with the testator's intention.

As to articles 6th and 7th, providing for the creation of a fund to be used for the education of the testator's grandchildren, it is the Court's duty first to attempt to ascertain the testator's intention as expressed in these articles and then to determine whether or not they may be carried out under the provisions of law and public policy. As the Virginia Court of Appeals has recently said, with respect to the application of the Rule against Perpetuities to a gift:

page 130 } "We now turn to the language of the will for
from its context the testator's intent is to be
derived. Its interpretation must be free from and unin-
fluenced by the unyielding rule against perpetuities. Yet,
when the testator's intent is ascertained, if it is found to be
in contravention of the rule, the will, in that particular, must
be declared invalid.

"Our first duty is to construe the will; and this we must
do, exactly in the same way as if the rule against perpetuities
had never been established, or were repealed when the will
was made; not varying the construction in order to avoid
the effect of that rule, but interpreting the words of the
testator wholly without reference to it.

"The Rule against Perpetuities is not a rule of construc-
tion, but a peremptory command of law. It is not, like a rule
of construction, a test, more or less artificial (sic), to deter-
mine intention. Its object is to defeat intention, therefore,
every provision in a will or settlement is to be construed as
if the Rule did not exist, and then to the provision so con-
strued the Rule is to be remorselessly applied.' Gray's Rule
Against Perpetuities, sec. 629. Of like effect are 41 Am.
Jr., sec. 13, page 58, and *Rose v. Rose*, 191 Va. 171, 174, 60
S. E. (2d) 45."

Shenandoah National Bank v. Taylor, 192 Va. 135, 141-2, 63 S. E. (2d) 986 (1951).

Aside from any statements of intention of the testator, it appears that he intended by these provisions to create a trust fund, the income from which, and the principal, if necessary, to be used for the education of his grandchildren, born and to be born, with whatever was left to be distributed to his grandchildren living at the time of distribution, *per capita*. The testator left an estate of over a million and a quarter dollars. After the payment of administration costs and taxes and the distribution of 350 shares of Burruss Land & Lumber Company stock, pursuant to the provisions of article page 131 } 2nd of the holographic will, there will remain a fund which has been estimated at around \$800,000.00, which would be subject to the provisions of articles 6th and 7th. This fund should be ample to educate a large number of grandchildren with considerable left over for ultimate distribution. It is hardly likely that the testator meant to confine it to the education of the three grandchildren living at the time of his death.

There is no indication other wise in the record that he intended to confine the gift to the grandchildren living at his death.

The authorities are convincing that the use of a class description, such as the word "grandchildren" or "children," creates a class gift which includes all of those who answer the description at the time of distribution, whether they are in being at the testator's death or not. *Nichols v. Nichols*, 126 Va. 49, 100 S. E. 826 (1919); *Roberts v. Scuppers*, 128 Va. 85, 104 S. E. 698 (1920); *Driskill v. Carwile*, 145 Va. 116, 133 S. E. 773 (1926); *Harris v. Harris*, 166 Va. 351 (1936); *Laughlin v. Elliott*, 202 Ky. 433, 259 S. W. 1931 (1924); *Hall v. Hall*, 123 Mass. 120 (1877); *Fosdick v. Fosdick*, 88 Mass. 41 (1862); *Barker v. Barker*, 143 Ky. 66, 135 S. W. 396 (1911); *Caywood v. Jones*, 32 Ky. Law Rep. 1302, 108 S. E. 888 (1908); *Lynn v. Hall*, 101 Ky. 738, 43 S. W. 402 (1897). To be distinguished are cases such as *Allison v. Allison*, 101 Va. 537, where the gift is to the heirs of the testator, either at his death or at some period in the future, and it is held that such a limitation does not create a class gift but, because of the rule of early vesting, is a gift to those individuals who constitute the testator's heirs at law as of the date of his death. *Roberts v. Scuppers, supra*, points out this distinction. In addition, it appears that the word "grandchildren" in the testator's will constitutes an equivocation since conceivably it could refer to two different sets of beneficiaries: that is, either grandchildren living at

the date of his death, or these and those who are born subsequently. Under such circumstances the declarations of intent by the testator are admissible. *Coffman v. Coffman's Administrator, supra*; *Money v. Money, supra*; *Rule v. First National Bank, supra*; *Mann v. Land, supra*. The page 132 } evidence is clear that the testator meant for his grandchildren born and to be born to be beneficiaries of the gift.

Further analyzing the articles, and especially article 7th, the testator provided that the grandchildren were to receive an education as high as their abilities might acquire. The last sentence of the will is "Each of whom are to share alike." Construing these provisions together, as the Court must do, it appears that the last sentence refers to the ultimate distribution to the grandchildren then living, *per capita*. Since individual capacities for education vary, it is not probable that the testator could have intended that each grandchild was to receive the same education. If meaning is given to both phrases, the first would describe the type of education each grandchild was to receive; and the second would be confined to the manner of ultimate distribution.

So interpreting the provisions, the Court would decree that the residue of the testator's estate should be invested, and the income and corpus, if necessary, used for the education of his grandchildren born and to be born. At the time of the testator's death none of his grandchildren were old enough to begin their education even assuming that the testator meant for the costs of preparatory school, as well as college education, to be paid out of the fund. The income would have to be accumulated until the oldest grandchild started to school, when such part of the income as was equal to the expenses of his education should be expended for this purpose. As other grandchildren reach the age to be educated, similar expenditures would be made. As the grandchildren terminated or suspended their education, no payments would be made for their benefit. It is possible, of course, that one or more of the grandchildren might, having stopped their education, subsequently resume it. Doubtless some of the grandchildren, entering a profession, would go to school for longer periods of time than others. Although it is not likely in view of the size of the fund, it is possible that page 133 } entire fund and all accumulations of income would be exhausted for the education of some of the grandchildren and that none would be left to educate those thereafter qualifying, let alone for ultimate distribution.

It is, of course, possible that some of the grandchildren may

be so afflicted as to be rendered incapable for some period of receiving an education.

The testator apparently contemplated that a time would arrive when all of the living grandchildren would have received an education as high as their abilities might acquire and that there would be at least a portion of the fund still available for distribution. Otherwise, the Court might be precluded from ordering the distribution of the fund until all had died, since it is not at all unknown for people to resume or begin their education quite late in life. Since, however, the testator intended a distribution at some reasonable time when the last grandchild had finished his education, the Court would be faced with the necessity of determining when that period was.

No distribution of the fund could be made consistently with the testator's intent, however, until all the grandchildren had received an education as high as their abilities might acquire. There are two reasons for this. The first is that this, as the Court construes the will, is what the testator instructed. The second is that no one could know either how much the fund would shrink or how much would be required for the education of any grandchild until he had completed this process; consequently, the fund would have to be kept intact from a practical standpoint until the time of distribution to all had arrived.

It is not difficult to foresee that many problems of administration would be involved. There would be a possibility of a substantial number of suits for further guidance of the court being brought as different grandchildren demanded different kinds of education or their parents did so for them. In the event that some of the grandchildren entered the teaching profession, for example, it would be quite
page 134 } difficult to decide when their need and capacity for further education had terminated.

Reading the will in its entirety, however, and giving effect to the testator's intention, the above sort of administration of the fund would have to be undertaken.

It is obvious that during this administration there have already been, and may possibly be in the future, times when nobody is entitled to any of the benefits from the fund. There will be, then, gaps between the testator's death and ultimate distribution. The testator consequently created a springing executory limitation. Graves, Notes on Real Property, Secs. 206 ff, especially Sec. 210.

Mr. Gray, in his volume on The Rule Against Perpetuities (1886 Ed.) Sec. 201, states the rule as follows:

“No interest subject to a condition precedent is good, unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest.”

See Graves Notes on Real Property (1912), Sec. 219.

Minor on Real Property (2d Ed.) Vol. I, Sec. 809, states the Rule as follows:

“Hence the canon established on this subject as it exists in modern times, is that every executory limitation, in order to be valid, shall be so limited that it must necessarily vest, if at all, within a life or lives in being, ten months and twenty-one years thereafter, the period of gestation being allowed only in those cases in which it is a factor.”

In considering whether or not an interest vests at a time too remote under the Rule against Perpetuities, neither actualities nor probabilities are taken into account; but every possibility that the interest will not vest within lives in being, twenty-one years, and the period or periods of gestation, where applicable, must be negated. *Brownell v. Edmunds* (D. Ct., W. D. Va., 1953), 110 F. Supp. 828; aff'd 209 F (2d) 349 (CA, 4th, 1953); *Claiborne v. Wilson*, 168 Va. 469, 192 S. E. 585 (1937); *Skeen v. Clinchfield Coal Corp.*, 137 Va. 397, 119 S. E. 89 (1923); Graves on Real Property, sec. 215 (p. 256); 1 Minor on Real Property (2d Ed., 1928), Sec. 811. Living persons, further, are presumed to be capable of bearing children. Gray, Rule Against Perpetuities, sec. 376.

Taking the possibilities, then, into account, it is clearly apparent that no interests may vest under articles 6th and 7th until a period too remote under the Rule against Perpetuities. It is possible that all of the children and grandchildren living at the testator's death might die, and there be in existence only grandchildren who were not born prior to the testator's death. The loss by Mrs. Clements of the child with whom she was *pregnant* at the testator's death and the birth of a daughter to her conceived after his death illustrate this possibility. None of these grandchildren born after his death may begin their education until more than twenty-one years after the determination of all lives in being at the testator's death. In this event all of the fund and the income accruing would have kept and accumulated until one of the unborn grandchildren began his education. The distribution of the fund would then have to be postponed until the completion of the education of persons not in being

at the testator's death. It is true that all of the potential beneficiaries of the fund would have to be born within lives in being at the testator's death (his own children). The will does not, however, provide for benefits to be paid to the grandchildren upon birth, benefits are to be paid only when they undertake their education.

It is possible (but not probable) that all of the children and all of the grandchildren of the testator on account of some disaster may die within the next month except the youngest grandchild born to Mrs. Clements on January 16, 1957, who would survive; and it might be further possible that said grandchild would not begin its education nor receive an education as high as its abilities might acquire within 22 or 23 years from the time of the deaths of the children and grandchildren mentioned above. This possibility would constitute a clear violation of the Rule against Perpetuities.

It is clear, therefore, that no interest may, by possibility, vest until after the expiration of the period of the Rule against Perpetuities; and it follows from this that ultimate distribution may by possibility be postponed beyond the period of the Rule.

page 136 } As the Court reads the authorities and understands the application of the Rule against Perpetuities, there is no substantial authority, either in reported cases or in the commentaries, that would sustain the validity of the gift here in question under the Rule against Perpetuities. In the first place, the gift is a springing executory gift to a class. While one may speak of an executory interest as being "vested," for purpose of the Rule against Perpetuities executory limitations are not vested until the time fixed for ultimate distribution has arrived. *Gray, The Rule Against Perpetuities*, 4th Ed. Sec. 114 (pp. 107-108); *Leach, Perpetuities in a Nutshell* (1938); 51 *Harv. L. Rev.* 638, 648 (1938); *Shenandoah National Bank v. Taylor, supra*; *Skenn v. Clinchfield Coal Corp., supra*; *Claiborne v. Wilson, supra*; *Brownell v. Edmunds, supra*; *Hall v. Hall, supra*; *Moore v. Moore*, 6 Jones Eq. 132, 59 N. C. 109 (1860); *American Natl. Bank v. Morgenweck, supra*; *Closset v. Burtchael*,—Ore.—, 230 *Pac.* 554 (1924); *Beverlin v. First Nat. Bank*, 151 *Kan.* 307, 98 *P* (2d) 200 (1940).

The guardian *al litem* for the grandchildren has cited cases, none of them dealing with the Rule against Perpetuities, which are concerned with an estate for years or for life, with a reminder to a class or to individuals; and has argued that one may avoid the application of the Rule against Perpetuities by holding all of these interests vested. A case much relied on in this connection by him is *Bayly v. Curlette*, 117 *Va.*

253 (1915). *Bayly v. Curllette* is different from this case in that there the testatrix made a present gift to her grandchildren; the language under consideration in that case can hardly be compared with the language used by the testator in the instant case. Even so, articles 6th and 7th of the testator's will cannot be held to have created a term for years or a life estate and a remainder. There is no provision here made for a present enjoyment of the property comprising the fund from the date of the testator's death to its ultimate distribution; as has been shown, there was nobody in existence at the testator's death who was entitled to page 137 } any of the benefits from the fund with the result that there has already been a gap between the testators' death and the right to enjoy the property, and there will probably be additional gaps in the future as no grandchildren are currently receiving an education.

Even, however, if the limitations created could be so construed, it seems to the Court that the Rule against Perpetuities would render articles 6th and 7th of the testator's will void. The authorities are to the effect that gifts to classes are not regarded as vested, as concerns the application of the Rule against Perpetuities, until the maximum and minimum number of the class, and the exact share that each beneficiary is to receive, have been determined. So in *Gray, The Rule Against Perpetuities*, (4th Ed.) (1942), Secs. 110.(1), 110.1 (pp. 97-99), it is said:

“(1). Remainders to a Class. Sometimes a remainder is given to a class of persons, e. g. to children, the number of members in which may be increased between the time of creating the remainder and the termination of the particular estate; for instance, on a devise to A. for life, remainder to the children of A. and their heirs as tenants in common. Here, although it is certain that each child born, or its heirs, will have a share in the estate, that share will be diminished by the birth of every other child of A. Each child, nevertheless, on its birth is said to have a vested remainder. The remainder is said to ‘open’ and let in the after-born children. So when the remainder is to an individual and a class, as to A. and the children of B.

“The placing of this class of remainders under the head of vested remainders is to some extent artificial. Such a remainder is vested, in so far as it is certain that whenever and however the preceding estate determines there will be one or more persons who will surely come into possession of the land, but in so far as it is not certain what the number or those persons will be, or in other words as the number and

consequent size of the shares if contingent, the remainder cannot be truly said to be in all respects vested. The imperfect character of the vesting in this class of cases is brought out by the application of the Rule against Perpetuities. Interests which are truly and in all respects vested, never come within the Rule, but when there is a gift in remainder to a class which has become vested in a living person, if the number of persons who will finally constitute the class may not be determined until a remote period, the remainder is void. For instance, suppose a devise to A. for life, remainder to his eldest son (unborn) for life, remainder to the grandchildren of B. B. is living and has had one grandchild, page 138 } C., born to him.

"C. is said to have a vested remainder, but as the number of the *grandchildren* in whom the remainder is ultimately to vest in possession, and consequently the size of the shares, cannot be determined till too remote a period, the whole devise to the grandchildren is invalid as too remote. This is apparently an exception to the rule that vested interests are never too remote, but in truth remainders of this sort, although called vested, are not really so; at a certain point, and on the point which the Rule against Perpetuities touches, they are, in fact, contingent."

See also the following cases and authorities: *Pitzel v. Schneider*, 216 Ill. 87, 74 N. E. 779 (1905); *Kates v. Walker*, 82 N. J. L. 157, 82 Atl. 301 (1912); *Gillen v. Hadley*,— N. J. Eq.—, 150 Atl. 779 (1930); *Laughlin v. Elliott*, *supra*; *Mockbee v. Grooms*, 300 Mo. 446, 254 S. W. 170 (1923); *Hassell v. Simms*,—Tenn.—, 141 S. W. (2d) 472 (1940); *Leake v. Robinson*, 2 Meriv. 263, 35 Eng. Rep. 979 (1817); *Taylor v. Crosson*, 11 Del. Ch. 145, 98 Atl. 373 (1916); *Aldendifer v. Wiley*, 306 Ill. 426, 138 N. E. 143 (1923); *Keefer v. McCloy*, 344 Ill. 454, 176 N. E. 743 (1931); *Lawrence v. Smith*, 163 Ill. 149, 45 N. E. 259 (1896); In *Re: Lee's Estate*, — Wash. (2d) —, 299 P. (2d) 1066 (1956); *Fidelity & Trust Co. v. Tiffany*, 202 Ky. 618, 260 S. W. 357 (1924); *Crawford v. Carlisle*, 206 Ala. 379, 89 So. 565 (1921); *Hewitt v. Green*, 77 N. J. Eq. 315, 77 Atl. 25 (1910); *Hooper v. Wood*, — W. Va. —, 125 S. E. 350 (1924); Leach, *Perpetuities in a Nutshell*, *supra*; Leach, *Rule Against Perpetuities and Gifts to Classes*, (1938), 51 Harv. L. Rev. 1329; L Minor on Real Property (2d Ed., 1928), Sec. 824 (pp. 1065-6); 41 Am. Jur., *Perpetuities*, Sec. 52; note 11 Col. L. Rev. 270, 271.

Construing the will as seems proper to the Court, the limitations would be void even if a remainder rather than an executory interest had been created. Cognizance is taken

of the argument of the guardian *ad litem* that not only the three grandchildren living at the testator's death, but all future grandchildren hereafter born, if the testator intended to include them, must be regarded as taking absolutely vested and indefeasible interests, which in the event of their death prior to the distribution of the fund or prior to their undertaking their education, would be distributed to their

heirs at law under the Statute of Descents and
page 139 } Distribution. It does not appear to the Court

that the testator used language which can be interpreted to create such interests nor that such a construction would be in accordance with his intent. The *Bayly* case, *supra*, illustrates that some of the possibilities that have to be taken into consideration in determining the application of the Rule against Perpetuities sometimes occur, unlikely though these eventualities may be. In the *Bayly* case there was an out-right present gift by the testatrix to the grandchildren of her living son with instructions that the property be held in trust, used for the education and support of the grandchildren, and distributed when the youngest should arrive at the age of twenty-one. There were seven children born to the son and all seven predeceased him. In the instant case, it would not require many more deaths to upset the intention of the testator that each grandchild should share alike in the distribution of the fund. Should one of the present children of Mrs. Clements, for example, die, without issue, after the death of Mrs. Clements and her husband, the other child surviving to the time of distribution would receive twice as much as the respective sons of W. H. Burruss, Jr. and of Sarah B. Dennis. This example is based on the assumption that no more children are born. The testator, if he meant anything by "each of whom are to share alike," meant a *per capita* distribution to his grandchildren in existence at the time for distribution. The limitations considered in *Driskill v. Carwile* and *Harris v. Harris, supra*, seem more like the limitations created by the testator; and these cases, rather than *Bayly v. Curlette*, appear to be here applicable and controlling.

As has been pointed out, however, the Court does not think that the will in any event can be construed to create an estate for years or for life and a remainder, either vested or contingent. If the estate created is to be classified, the testator created a springing executory limitation. The possibility is that this limitation may not vest and that no beneficiary can become entitled to any benefits in the fund

either for his education or by way of ultimate dis-
 page 140 } tribution until a period too remote under the Rule
 against Perpetuities. No benefits of any kind
 may be payable out of this substantial sum for a period longer
 than lives in being and twenty-one years from the testator's
 death, and the result would be that the property would be
 taken out of the stream of commerce for an excessive period.
 This is the very kind of limitation which the Rule against
 Perpetuities came into being to prevent and which it has
 been held to prevent for many decades. The Court is there-
 fore constrained to hold articles 6th and 7th of the will void
 on this ground.

Many attacks have been made upon the Rule against
 Perpetuities and particularly in its application to class gifts.
 As was well said in the case of *Beverlin v. First National
 Bank, supra*:

“The most vigorous assault on the class gift rule announced
 in *Leake v. Robinson* was made by Professor W. Barton Leach
 in ‘*Perpetuities and Class Gifts*’ in 51 Harv. Law Rev.
 1329.

“Notwithstanding these divergent views, we think the rule
 in *Leake v. Robinson*, as stated in Gray, *Perpetuities, supra*,
 having been followed by the courts of England and America
 for a century has become an integral part of the common
 law rule, and if a change is to be made it must be made by
 the Legislature.”

The Court also holds articles 6th and 7th void for vagueness
 and uncertainty. The inconsistency between the treatment of
 the testator's principal asset—the stock which he owned in
 the Burruss Land & Lumber Company—in articles 3rd, 4th
 and 5th on the one hand and in article 7th on the other hand,
 has been pointed out. Apparently he intended a substantial
 gift to his children in the first set of articles in the event
 that his son predeceased him. It is impossible to determine
 why he did not want to make any gift to his children if his son
 survived him, but to name his grandchildren as his chief
 beneficiaries. The evidence does not show that the testator
 has already provided for these natural objects of his bounty
 by *inter vivos* gifts; it shows to the contrary. In addition,

the testator provided in all events for the dis-
 page 141 } position of almost all of his stock in the Burruss
 Land & Lumber Company under the provisions of
 articles 2nd, 3rd, 4th and 5th. Article 7th indicates that he
 was proceeding on the assumption that he had made no
 disposition of this stock. In the third place, article 7th is

contradictory in its two sentences. The first sentence directs that his stocks, bonds, and insurance be kept invested as they are after paying taxes. How one can keep insurance invested after the insured's lifetime, the Court is at a loss to state. In the second sentence, however, he directs only that his bank stocks be kept invested in bank stocks, he directs that his Burruss Land & Lumber Company stock be used to pay taxes, and he directs, by implication, that his other stocks are to be sold since he states that the proceeds from them are to go into the fund created for his grandchildren.

He states that his grandchildren are to obtain an education as high as their abilities may acquire. He then says each of them is to share alike. While an attempt has been made to reconcile these two provisions and the Court feels fairly well satisfied that it has done so, it does not appear that any one can state with assurance that the two provisions are not inconsistent. Even if the interpretation is correct, however, while the ordinary provision for the use of property for the education of children or grandchildren may be administered with reasonable certainty that the testator's wishes are being fulfilled, considerable uncertainty is necessarily encountered in the proper administration of a fund to furnish an education to grandchildren "as high as their abilities may acquire." It sometimes happens that a person fairly well advanced in years abandons one pursuit to engage in another requiring additional education; it sometimes happens that a person decides fairly late in life to develop a talent hitherto unknown or unused. Almost any decision that all
page 142 } of the testator's grandchildren had at any moment received an education as high as the abilities of each one of them might justify would be, as it seems to the Court, arbitrary. The standard fixed by the testator is not sufficiently clear for reasonably accurate enforcement.

The guardian *ad litem* makes a clever and ingenuous argument to the effect that the testator primarily intended a gift to his grandchildren; that his direction that the fund be established and used for the education of his grandchildren is precatory and not mandatory; that the Court's holding that the standard of education is too vague for enforcement is an additional reason to hold that he intended a gift to grandchildren free from any trust; and that the Court should order the fund delivered either to the three grandchildren living at his death or to them and future grandchildren thereafter to be born. This argument has elicited the citation of authorities some of which, cited by the guardian *ad litem*, hold that the testator's language in the various wills con-

sidered was precatory, and others of which, cited by counsel for the executors, hold that the language used was mandatory. *Rowlett v. Rowlett*, 5 Leigh 20 (1834); *Bayly v. Curlette*, *supra*; *Watts v. Finley*, — Ga. —, 1 S. E. (2d) 723 (1939); *In Re: James' Estate*, 273 Wis. 50, 76 N. W. (2d) 553 (1956); *Broadbuss v. Gresham*, 181 Va. 725 (1943); *Bares' Ex'rs. v. Montgomery*, 143 Va. 303 (1925); *Sherwin v. Smith*, 282 Mass. 306, 185 N. E. 17 (1933); *Laws v. Christmas*, — N. C. —, 100 S. E. 587 (1919); *Waldroop v. Waldroop*, — N. C. —, 103 S. E. 381 (1920).

The Court does not regard any of the authorities as particularly pertinent, because it appears that the provisions of the will in question are mandatory. The over-riding purpose of the testator was to provide for the education of his grandchildren. He did not, as has been done in other cases, give property to one person and then state that he requested or desired that it be used for the education of his grandchildren; his language was peremptory. He dis-
 page 143 } rected that certain property be sold and the proceeds "be placed in a fund from which my grandchildren are to receive an education as high as their abilities may acquire." The Court is of the opinion that if it were to hold that the fund was distributable either to the three living grandchildren, or to them and the additional grandchildren as they are born, free of the requirement that it be used for the grandchildren's education and distributed when this process has been completed, the Court would be defeating the testator's intention. Actually the guardian *ad litem*, himself, has shown difficulty in deciding whether the testator intended a disposition to the three grandchildren living at the testator's death or to them and others later to be born. This is another uncertainty to add to those which have been mentioned and attempted to be solved.

This opinion should not be terminated without an expression of the Court's feeling that the testator's children should feel an even greater moral obligation than no doubt they realize naturally to assure the education of all their children. It is not improbable that they may, out of respect for their father's wishes, themselves establish a fund to guarantee that all the grandchildren receive an education; and the Court feels that it may appropriately call to their attention this possibility as a happy solution for conforming to the wishes of their father, especially in view of the substantial benefits which they will receive from the estate.

The Court, in view of all of the above, concludes as follows:

1. That the holographic will revoked the earlier will in its entirety except for Article VII thereof;

2. That by article 2nd of the holographic will the testator provided a gift of 50 shares of Class A common stock of Burruss Land & Lumber Company, Inc., to each of the following: A. F. Durham, Jr., J. M. Gilley, Mrs. Allie M. Daniel, H. H. Dennis, W. R. Seay, Mrs. D'alma Hoffarth, and Miss Helen C. Burruss;

page 144 } 3. That by article 3rd of the holographic will, the testator intended that sufficient shares of stock in the same Company be offered to his son, William H. Burruss, Jr., at the par value of \$100 per share, to give his son a majority of such stock; and that the purchase price for such stock should be paid in twenty equal annual installments, without interest;

4. That articles 4th and 5th of the holographic will were to be effective only if William H. Burruss, Jr. predeceased the testator, and, this eventuality not having occurred, the said articles 4th and 5th are of no effect;

5. That articles 6th and 7th of the holographic will are void for violation of the Rule against perpetuities and for vagueness and uncertainty; and,

6. That the residue of the testator's estate, after payment of all debts, administration costs, taxes, and other charges, and the delivery of 50 shares of stock of Burruss Land & Lumber Company, Inc., to each of the persons mentioned in paragraph 2 hereof, shall be distributed, in equal shares, to the four children of the testator, namely: Sarah B. Dennis, Helen C. Burruss, William H. Burruss, Jr. and Florence B. Clements, Jr., they being his sole heirs at law and distributees.

Counsel may prepare and present a note for decree not inconsistent with the views and conclusions herein expressed.

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NOTICE OF APPEAL OF WILLIAM H. BURRUSS, III,
HENRY A. DENNIS, JR., and W. H. CLEMENTS, III,
infant respondents, and the grandchildren of William H.
Burruss, deceased, who at the institution of this pro-
ceeding were unborn and unknown, and ASSIGNMENTS
OF ERROR.

* * * * *

The respondents assign the following errors to the said decree and memorandum opinion:

The Circuit Court erred in its construction of the will of 1955

(A) In holding:

(1) That the deferred payment sale of stock authorized in Art. 3d is to be interest free.

(2) That a trust arose from Arts. 6th and 7th and that this trust was void as a perpetuity and for vagueness and uncertainty.

page 146 } (3) That said null and void trust delayed the intended final distribution of the estate so that it too was void as a perpetuity.

(4) That declarations of intention may be invoked to expand the term "grandchildren" to include those born after the death of the testator.

(5) That the recipients of the disposition intended by Arts. 6th and 7th, and who are there described only as "my grandchildren," include grandchildren born after the death of the testator, and finding therein a perpetuity voiding the gift to grandchildren living at testator's death.

(6) Arts. 6th and 7th limit final distribution to only those grandchildren, if any, who might survive the time when each and every grandchild shall be saturated with education; and finding therein a perpetuity voiding said Arts. 6th and 7th.

(7) Arts. 6th and 7th to give rise to a disposition which is void when a reasonable construction is available which will give rise to a disposition which is valid; and

(B) In not construing Arts. 6th and 7th to vest an immediate absolute estate in the grandchildren living at testator's death.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

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