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SUPREME COURT OF APPEALS
RICHMOND, VIRGINIA

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IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

RECORD NO. 1741

LULA B. WALLACE

vs.

MAXWELL G, WALLACE, AND OTHERS

NOTES OF ARGUMENT

M. CARTER HALL,
W. W. BUTZNER,
Counsel for Appellant.

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NOTES OF ARGUMENT

Historical Statement

The Provisions of the Deed

Contemporaneous Construction

Action Taken by the National Bank of Fredericksburg after the Death of A. Hansford Wallace

The Contentions of the Parties

The Errors Assigned

THE COURT BELOW ERRED—

(a) In holding that Samuel G. Wallace, the survivor, is entitled to all dividends.

(b) In holding that the words used "brothers (jointly for their joint lives or that of the survivor)" are such as to bring the deed within the exception of Section 5160 of the Code.

(c) In holding that the language used was sufficient to create a joint tenancy with survivorship in spite of the statute and all of the presumptions against survivorship.

(d) In ignoring the words, "after the death of both of their wives," and giving them no meaning or effect in determining the grantor's intention.

(e) In failing to hold that appellant, upon the death of A. Hansford Wallace, became entitled to the dividends

from the Nat. Bank stock for a period not less than the remainder of the life of Samuel G. Wallace.

ARGUMENT

I

THE LANGUAGE USED WAS NOT SUFFICIENT TO CREATE A JOINT TENANCY CONTRARY TO THE STATUTORY PRESUMPTIONS AGAINST SURVIVORSHIP.

The Statute and the Principles of Construction

(a) Deeds construed same as wills. Both must be construed according to the intention, as gathered from the whole instrument.

(b) All presumptions are against joint tenancy. The law does not favor the creation of joint tenancies. Survivorship was first abolished in Virginia in 1787, and it is the declared public policy of the State today that the right of survivorship shall not obtain in joint tenancies unless the grantor or testator expresses the clear and manifest intention in the instrumet itself that the part of the one dying should then belong to the other. The use of the phrases "joint tenants" or "joint tenancy" is not alone sufficient. The evidence of intention to overcome the strong presumption agaist survivorship must be found in other words than "jointly" and "survivor."

(c) Judge Wallace must be presumed to have been familiar with these presumtions.

An experienced lawyer—Judge—President, Virginia Bar Association—must be presumed to have known the technical requirements of the Virginia statute.

II

The Words Used Do Not Indicate an Intention to Create A Joint Tenancy

Analysis Versus Assertion—"Broken Down and Picked to Pieces"—Analyzed—Dissected—Squeezed

1. Conveyance to A. H. Wallace and S. G. Wallace without more would have created a tenancy in common.

2. The addition of the phrase "brothers jointly for their joint lives" is as equally applicable to an estate of tenancy in common as it is to a joint tenancy (cases cited Pet. p. 14-16).

3. No manifest intention so far that there should be any right of survivorship.

4. Only other words—"or that of the survivor"—This phrase not ordinarily used to create a joint tenancy with right of survivorship. (Cases cited, Pet. 16-18.)

The Virginia cases construing Sections 5159 and 5160 furnish no direct and controlling authority.

Those cited by us (Pet. p. 19) are recognized as "apparently hostile cases" to appellee's contention.

No Virginia cases are cited in appellee's brief as being directly in point, but we have been informed that they will strongly rely on *Hooe* v. *Hooe,* 13 Gratt. 245 (1856).

Hooe v. Hooe, 13 Gratt. 245 (1856).

Testator left "The use and profits of all" his "estate, real & personal," to his daughters "who may remain single." "Should they all marry, or when they die, then it is my will that my property shall be equally divided among my surviving children. My land in the County of King George, called Dissington and Friedland, I give to my son George Mason Hooe."

All the daughters married except one who remained in possession of the land called Dissington and Friedland and all of the slaves and other personal property of the testator. Suit was brought by the son of George for the immediate possession of the land on the ground that the devise of these lands operated to except them out of the estate, the uses and profits of which had in the first clause of the will been devised to the daughters who might remain unmarried.

Both the lower court and the Court of Appeals held against this contention, Justice Lee delivering the opinion of the Court of Appeals. The case is not controlling authority here and does not involve the doctrine of survivorship or any question with respect to joint tenancy.

The reasoning of the opinion and the rules for construing wills and deeds as set forth therein may however be helpfully applied to this case.

First. The opinion discusses the creation of estates by "necessary implication." The argument was that from the terms and succession of the several devises to the daughters and George M. Hooe, the subject of the latter

was, by necessary implication, withdrawn and excepted from the former, because George M. Hooe was to take Dissington and Friedland immediately and no interest in them was intended to be given in them to the daughters.

Second. To determine whether an immediate estate had been devised to George M. Hooe "by necessary implication" the court resolved the question "into an inquiry as to what was the true meaning and intention of the testator."

Third. This is to be determined, the court said "by weighing the terms of the will themselves and placing ourselves in the situation of the testator and considering the language he has used in the light reflected upon it by the circumstances surrounding him at the time his will was made, and the relative situation of the different parties."

Fourth. "The context and general tenor of the instrument" must be considered. That is, the "general intent," the "general plan and purpose," the "primary or dominant intention" of the testator must be gathered, if possible, from a consideration of the whole instrument.

The instrument here is in the nature of a conveyance in anticipation of death, designed to operate as a will, and should be liberally construed.

Fifth. Supplementing the "context and general tenor" of the instrument the court will next consider "the circumstances" by which the testator was surrounded" at the time it was made (1916, recorded 1917).

Subsequent divorce of S. G. Wallace (1919) has no relevancy. Judge Wallace knew this but made no attempt to change his beneficiaries, although he did not

die until 1927. In fact he could not change the terms of his irrevocable deed of trust.

Sixth. Inconsistent or seemingly repugnant clauses must be reconciled. Says the Court:

> "It is the duty of the judicial expounder of a will to give effect to every word without alteration or diminution, if an effect can be given to it not inconsistent with the general intent of the whole will taken together."

(Other cases cited pp. 23 Pet.)

Seventh. Every attempt must be made "to give to the whole such a construction as will render every part of it effective."

Eighth. The rule is that, "where the real intention of the testator can not be ascertained" a previous devise will be regarded as revoked by implication by a subsequent inconsistent one.

Apply that rule here. Judge Wallace first said, "The other half of said stock to be transferred to A. Hansford Wallace and Samuel G. Wallace, (brothers jointly for their joint lives or that of the survivor with power to will the same after the death of A. W. Wallace)."

Had he stopped here, there would have been no controversy.

But he had a later thought. His mind turned to the wives of his nephews, for one of whom, at least, I know he had a very deep affection and he said to himself, "I want this one half of the National Bank stock, if, after my death it is not disposed of by will, to go ultimately to H. Lewis Wallace, Maxwell G. Wallace, and Charles Wallace, but before it goes to them I want the wives

of Hansford and Sam to enjoy the dividends during their life time."

To the extent that this clause, "after the death of both of their wives" is inconsistent with the theory that Sam Wallace should, upon Hansford's death, have all the dividends during his life time, it is the "latest manifestation" of the testator's intention, and should be given effect if possible.

As the court says in the *Hooe Case* (p. 252):

> "The courts have ever betrayed an anxiety in the interpretation of wills to adopt such a construction as will give effect to every part of an instrument and thus avoid declaring any provision which it contains to be repugnant to others."

Ninth. The language to be construed is not, as in the *Hooe Case,* that "of a non-professional gentleman in the country framing for himself the testamentary disposition of his estate."

It is the language of a skilled lawyer, considering means by which to dispose of his estate in his own life time, that is, he was trying to be his own executor. One can see him pondering over the complicated distribution that is apparent throughout the entire trust deed.

The disposition of the 89 shares of National Bank stock is the last of the disposing clauses, and the reference to the wives of Hansford and Sam is the last and latest expression of his testamentary intention.

Can it be possible that this court will delete these words and give them no meaning, when no rule of law is violated by construing the deed in accord with our contention and it is clear that this is the only construction which

can be adopted that would give reasonable effect to the intention which Judge Wallace must have had in mind?

III

The Construction of the Lower Court Gives No Meaning Whatsoever to the Words "After the Death of Both Their Wives."

This court in *Halsey* v. *Fulton,* 119 Va. 571, quoted, etc., p. 23, with approval a decision of the Supreme Court of Indiana, saying:

> "Words deliberately put into a deed, and put there for a purpose, are not to be lightly considered nor arbitrarily put aside. The words in the deed before us were deliberately written in the instrument, are there for a purpose, and are not without meaning. We can assign them a meaning without encroaching upon any rule of law, and by doing this can give just effect to the intention of the grantor."

The intention of the grantor must govern. What was his intention?

We insist that his intention was that after the death of A. Hansford Wallace and Samuel G. Wallace the income from their respective shares of bank stock should go to their respective wives for life, and, after their death, as further provided in the deed.

In order to give every word used by Judge Wallace its proper meaning and correctly to determine his intention, the disposing clauses of the trust deed with respect to the National Bank stock should be separated and punctuated as is shown on p. 26 of the Petition.

Appellee's brief, page 14:

> "The National Bank of Fredericksburg was one of the great passions of his life. It was in large measure a family institution and he wished this stock to remain in the Wallace family. He did not even wish an in-law of the family to have control of this stock, and for this reason he provided that no will or wills made by his two nephews, the donees, should take effect until after the death of both their wives."
>
> "While it was a very polite way of making his intention known, it was nevertheless a very definite way of telling his nephews: 'You hold this stock together for your joint lives and as long as a survivor lives. You vote this stock in accordance with the training I have given you, and you can will it to such member of the Wallace family as you think will carry on the tradition; but, lest you should feel tempted in your disposition to favor your wives and thus risk having this stock get out of the Wallace family, no will that you make shall take effect until after the death of both your wives'."

In the first paragraph of this quotation appellee's counsel has gone far beyond and outside the record and undertaken to assert as facts matters as to which there is not a line of evidence. In the second paragraph, he has indulged in a flight of fancy, speculating in his rocking chair, on the Judge's intentions. For the sake of argument, it may be granted that the National Bank was one of the chief interests in Judge Wallace's life, and it may even be granted that he desired to keep the stock in the Wallace family. But counsel's speculation in the last quoted paragraph betrays an utter lack of

knowledge of the character and habits of Judge Wallace. While he was always most kind to his nephews and they owed him a debt of gratitude which they realized and appreciated, still when he wished to say what he wanted them to do, either in speaking or writing, he was always very emphatic, very much to the point and often curt. By no stretch of imagination could anyone, who knew the Judge, conceive of his searching for phrases in which to "politely" convey to his nephews the information that he did not intend for their wives to have any interest in the Bank Stock. If such had been his wish, he would have taken particular pains to have said so in no uncertain terms—using language that would admit of no misconstruction. On the contrary, he put into the deed the words "after the death of both of their wives" supposing they would be given their natural interpretation—which is that the wives should receive the dividends from the stock after the death of their husbands. It is a far-fetched and artificial assumption to suggest that these words were used to prevent the possibility of the stock being left to their wives. It was pretty thin courtesy, if it were intended as courtesy, and the words are not aptly used for that purpose. Grammatically, the words "after the death" would seem to modify will rather than power; that is, it is not a power arising after death of the wives, but a disposition to be effective after the death of the wives.

If the purpose of deferring the power was to prevent a disposition in favor of the wives, and thus possibly out of the Wallace family, it is difficult to see why the power should be deferred until after the death of A. W. Wallace. The life of A. W. Wallace has no place in

that scheme of things. The only sensible reason for the provision "after the death of said A. W. Wallace" is to provide for a remainder for life to A. W. Wallace. If those words created a remainder for life in A. W. Wallace, the same words used later on similarly created a remainder for life in the widows.

The expression "after the death of both their wives" does not refer to the time of making the will. It is much more reasonable to suppose that this provision was inserted because of an interest in the wives for their lives, which is not to be divested by will. There is no conceivable reason why the time of making the will should be deferred until after the death of the wives, and the clause can only be reasonably construed as a disposition that vested an interest in the wives.

Whether that interest is to be measured by appellant's life time or by that of Samuel G. Wallace, is really the principal question for this court to decide.

Respectfully submitted,

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W. W. BUTZNER,
Counsel for Appellant.

Richmond, Virginia,
January 11, 1937.