IN THE

SUPREME COURT OF APPEALS OF VIRGINIA

AT RICHMOND.

LILLIE THOMAS ET AL.

v.

JUDITH NOLEN ET AL.

REPLY BRIEF FOR APPELLANTS.

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

The uncontroverted facts in this case are: That the testator C. P. Nolen actually executed his will on November 7th, 1919. It appears that he was at work for some time writing on it, but he actually completed and put his name to it on the day of its date, November 7th, 1919.

At that time—November 7th, 1919—he had two idiotic

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children, one of which was "Jack Nolen"—and he had only two feeble-minded children at that time. He had had three, but one of them died on the 3rd day of August, 1919, three months prior to the execution of the will. See evidence of the plaintiff in the lower court, Mrs. Judith Nolen, who when recalled to the stand testified:

> "Q. Your husband had not completed his will when the little girl you have referred to as one of the idiots died, August 3rd, 1919, had he?
> "A. No, sir; finished it up directly after she died.
> "Q. He signed it in the presence of witnesses, November 7th, 1919, didn't he?
> "A. Yes."

It is uncontroverted that Jack Nolen is feeble-minded and has been from his birth. See evidence of his mother, Mrs. Judith Nolen, page 11 of the Record, where she testified:

> "Q. Your son Jack has been feeble-minded from his birth, has he not?
> "A. Yes."

The prayer of the bill asks that a guardian *ad litem* be appointed for him because he is feeble-minded and not because of infancy. It is true the prayer of the bill later refers to him as an infant, which was evidently a mere oversight in the draftsman of the bill.

It is inconceivable that the testator would have referred to a child in his will that had been dead for more than ninety days.

It is the well settled rule of law that wills should be construed to speak and take effect, as if executed immediately before the death of the testator, unless a contrary intention appears. R. C. L., Vol. 28, Section 196. But under no circumstances can it speak at a date prior to its execution. The testator only had two idiotic children at the time the will was executed, one of which was "Jack."

Counsel for appellees contend that the testator's reference to four children in the third clause of his will indicated that he intended to include "Jack." If this clause is in conflict with the later clause whereby he bequeaths one dollar each to the idiots, then the later clause controls. It is well settled that if two clauses in a will are irreconcilable that the last clause prevails. *Hopkins* v. *Graff*, 101 Va. 377.

Appellants aver that the recree of the Circuit Court of Patrick herein complained of is erroneous and should be annulled and reversed and this court enter such decree as should have been entered by the lower court under the law, the pleadings, and the evidence.

HOOKER & SANFORD,
Attorneys for Appellants.