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## Wills and Intestate Succession

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1. Learn the following: (a) The gist of 64-1 which is the general statute of descent of realty (b) Its modification in certain cases where an infant dies intestate. V#64-1--Learn--is in part as follows, "When any person having title to any real estate of inheritance shall die intestate as to such estate it shall descend and pass in parcenary to such of his kindred as are not alien enemies, in the following course:

First: To his children and descendants of deceased children.

Second: If there be none, then to the surviving consort.

Third: If none such, then to his father and mother, or the survivor.

Fourth: If none such, then to the brothers and sisters and their descendants.

Fifth: If none such, then  $\frac{1}{2}$  to the nearest paternal relatives, and the other  $\frac{1}{2}$  to the nearest maternal relatives, as follows:

Sixth: First to the grandfather or grandmother or the survivor.

Seventh: If none then to the uncles and aunts and their descendants (Note: This includes first cousins).

Eighth: If none then to the great grandparents.

Ninth: If none then to the brothers and sisters of grandparents and their descendants. (Note: This includes true second cousins).

Tenth: And so on, without end.

Eleventh: If there be no paternal then all goes to maternal kindred and vice versa. If neither, the whole shall go to the kindred of the husband or wife, in the like course as if such husband or wife had died entitled to the estate.

Drill: (a) X dies leaving a wife, child, and brother.

(b) X dies leaving a mother-in-law, a cousin (the child of his father's sister and an uncle (his mother's brother).

(c) X dies leaving a nephew and a wife.

V#64-9--If an infant die without issue having title to real estate derived by gift, devise, or descent from one of his parents, the whole of it shall descend and pass to his kindred on the side of that parent from which it was so devised, if any such kindred be living at the death of the infant. If there be none such, then it shall descend and pass to his kindred on the side of the other parent. See #9

*Illegitimate child of man - no relation*  
2. M who owned a farm in Virginia died intestate leaving only an illegitimate son. To whom does the farm go? M#927. References are to Minor on Real Property (2d Ed.)

The illegitimate children of a man are not for purposes of intestate succession any relation whatever. Hence the farm escheats.

*Common law of inheritance not in force in Va. - Statute covers everything*  
3. To what extent, if at all, is the common law of inheritance in force in Virginia? Not at all. Our statutes completely cover every conceivable situation. The common law of descent with primogeniture, preference of males over females, exclusion of lineal ascendants and of husband and wife is totally unsuited to our conditions of life.

*Intestate Succession*  
4. X died intestate survived by a widow, a brother, and two children of a deceased brother. Distribute his realty.

The widow takes the whole subject to the rights of X's creditors.

*Statute of Descent of Realty Va 64-1*

*Va 64-9 Intestate Infant*



INTESTATE SUCCESSION IN VIRGINIA (cont.) - Revised July 1956

5. H died intestate owning Blackacre in fee. He had no other assets. Blackacre is worth \$20,000. His general unsecured debts are \$25,000. H is survived by a widow, W, and by a paternal cousin. What are the rights of the parties?

Note the following possibilities. (1) By the law of intestate succession W inherits under step 2 whether she will or no. Since the rights of creditors are superior to those of heirs (disregarding homestead exemption) the wife gets Blackacre subject to the rights of creditors--economically worth nothing. (2) Since the object of the statute was to increase the rights of the wife and not to cut them down she may elect to take dower in spite of the fact that a life estate normally merges in a fee. Dower in this case would be a one third interest for life.

1/2 to maternal, 1/2 to paternal

6. X died intestate leaving a cousin, the son of his father's deceased brother; and an aunt, his mother's sister, as his only relatives. Who is entitled to the land: M#922.

At step 5 the property is divided into two equal portions one of which goes to the nearest paternal relatives (the cousin), and the other of which goes to his aunt who is the nearest maternal relative. Note that it is immaterial that the nearest relatives on one side are more distant than those on the other side.

Step-son v. 9th Cousin

7. H died intestate survived by a 7-year old stepson of whom he was very fond and to whom he stood in loco parentis, and his father's ninth cousin four steps removed whom he had never seen. Who is H's heir?

The paternal cousin is the heir. The wife's relatives do not take as long as the husband has any maternal or paternal relatives no matter how distant.

Possibility of Inheritance by Brother-in-law

8. H died intestate survived by a distant cousin and a daughter-in-law. Who is his heir?

The distant cousin. Except in the single case of husband and wife, relationship by marriage has no effect. The property would escheat before going to a daughter-in-law or uncle's wife. However, if there are no maternal or paternal relatives, or closer kin, the property goes to the wife's relatives as if the wife had died intestate owning the property. Hence a brother-in-law who was your wife's brother could conceivably inherit but a brother-in-law who was your sister's husband could not.

Application of V64-9 - Intestate Infant

9. X died intestate seized of Blackacre in fee and leaving R as his only heir. R is 18 years of age. She marries H and has a child which outlives her only a few hours. Contest between H; and S, a sister of X; and T, a sister of R's mother. Result? M#924.

Since R did not die without issue the statute about descent of infants' lands in certain cases has no application. So when R died her realty went to her infant child subject to H's curtesy rights (one third for life). When the infant died a few hours later the statute about descent of infants' land in certain cases applies since the infant got the land (1) by descent (2) from one of its parents and (3) died without issue while still under 21 years of age, so it goes to the infant's relatives on the side of its mother from whom it inherited the land. Who are these relatives?

(1) There are no other children (2) No parents (3) No brothers or sisters or descendants of brothers or sisters (4) Is there a husband? Yes, H. So H gets the land not as father of the infant but as the infant's nearest relative on his mother's side. Note that if there had been anyone related to R in classes 1, 2, or 3 such person would have taken subject to H's curtesy (one third for life). Note: Since 1956 the husband would be in class 2 above instead of in class 4, but result would be the same.

Infants' Sale of land

10. Sam and Mary, infants fourteen years of age, own a farm in Henry County, Va., which they inherited from their father, Richard. Jennie, their mother and guardian, employs you to bring a suit for the sale of the farm and the proper investment of the proceeds. The infants have a half-brother, John, and half-sister, Sarah, children of their mother by a later marriage; they have three uncles, William, Charles and Ben, brothers of their deceased father, Richard, and their father's mother, Mildred, is living. Whom would you make defendant to the bill?



In the case of the sale of infants' lands those who would be the heirs of the infant (were he dead) must be made defendants. Since Sam and Mary inherited from their father and are still under 21 and without issue the statute about the descent of infants' lands in certain cases applies. The land would descend to their heirs on the side of their father. Taking this step by step we note first that the father has no other children. The next step is the father's consort. This is Jennie. So she should be made a party defendant. Also Sam and Mary since they are over fourteen years of age, and their guardians ad litem.

*Distinction U-64-9*

11. X devised land to his grandson A who was under 21. A died without issue still under 21. Contest between A's father and mother, X being A's maternal grandfather. Result? M#924.

Since A did not get the land from one of his parents it goes as per the general statute to A's father and mother equally.

*Per Capita*

12. X died intestate leaving one grandson, a child of a deceased daughter A; and three granddaughters by a deceased son B. What interest have the grandchildren in the land? M#925.

When all who take under the intestate laws are equally related to the intestate they take per capita. The maxim applicable is "equal in blood equal in affection." Hence the grandchildren each take a fourth.

*Per Stirpes*

13. X died intestate leaving three nephews, children of a deceased brother A; one niece, a child of a deceased brother B; and a brother C. What are the rights of the parties? M#925.

Where all who take under the intestate laws are not equally related to the intestate they take per stirpes (or by representation) the more distant relatives taking altogether the share of the person they represent. Hence the children of A got  $1/9$  each, the child of B one third, and C one third. Note that the children of A and B take directly from X and hence take free of the debts of A and B.

*Collaterals of Half Blood*

14. X died intestate leaving three half brothers and one full brother as his only heirs. What portion of the land is each entitled to at common law and in Va? M#926.

At common law collaterals of the half blood were excluded entirely. In Virginia they are not postponed, but where there are collaterals of equal degree some of whom are of the full blood and some of the half blood those of the half blood take only a half portion. To find the proper denominator give a value of 2 to every collateral of the degree involved of the full blood and a value of 1 to each of the half blood, in our case 2 plus 1 plus 1 plus 1 or five. Give  $2/5$  to the full brother and one fifth (half as much) to each half brother.

*Collaterals of Half Blood*

15. X died intestate leaving as his only relatives a widow, a half brother, and an uncle of the full blood. How does X's land descend?

Since 1956 the widow takes in step 2. If there were no widow, the half brother would take the whole as collaterals of the half blood are not postponed.

16. H had a son by a first marriage and another son by a second marriage. H died intestate leaving a widow and his two sons as his nearest relatives. How does H's land descend?

The two sons share equally subject to the widow's dower (one-third for life). It is impossible to have a lineal relative of the half blood. Only collateral relatives can be of the half blood.

*"Root or Steps"*

17. W had 3 children, A by a former marriage, and B and C by a second marriage. W devised her land to B who died under 21 and without issue leaving his father, his half-brother A, and his full brother C as his nearest relatives. How does B's land descend?



While the land goes to B's relatives on the side of his mother B is the root or stirps. While A,B, and C are equally related to the mother A is a half brother and C is a full brother of B, and it is B's land that descends. Hence C gets a double portion or two-thirds and A gets a half portion or one third.

*Bastards*

18. W married H and had one child A. Later she lived in adultery with X, and had 3 children by him, B,C, and D. B died intestate survived only by A,C and D. How does B's land descend?

At common law bastards inherited from no one and through no one. A bastard was the child of no one. This harsh rule has been changed in Virginia so that bastards inherit from and through their mother. Since the father of a bastard has no standing of any sort in intestate succession he is completely ignored, and since A,B,C, and D legally have only the mother as a common parent they are all legally collaterals of the half blood. Hence A,C, and D each take one third.

*Children of Marriages null in law*

19. H and W who were both married to other parties went through a marriage ceremony. They had a child X. H died intestate. What are X's rights? M#928.

Query-Suppose W had a drop of negro blood in her would the result be the same?

V#64-7 provides that the children of marriages deemed null in law shall nevertheless be legitimate. Hence X inherits H's land subject to his first wife's dower. W has no rights. This statute applies to bigamous marriages and common law marriages but not to marriages involving miscegenation probably because the latter involves a permanent impediment while the others do not.

*Marriage plus acknowledgment legitimates*

20. W had a child by H before marriage. Later H married W. H died intestate. What rights, if any, has the child? M#928.

Unless H in some way acknowledged the child as his own the child will not inherit from H. In Virginia acknowledgment alone is not enough--marriage alone is not enough--but marriage plus acknowledgment legitimates. The acknowledgment need not be formal.

*Adopted child*

21. B left an estate in excess of \$4,000,000. His nearest relatives were the children of a deceased brother. One of these children, A, was an adopted child the other, L, a legitimate child. How should B's real estate be distributed?

Under V#63-358 an adopted child inherits from and through its adoptive parents and, if a child adopted by a step-parent, also from its natural parents. Hence A and L would share equally. In Virginia one can not only make an adopted child his own heir but also in some cases the heir of others.

22. T died having devised his real property to his child A "in order that A may build a store on the property." T died intestate as to personal property. Is A entitled to any rights therein as against the claims of B, another child? M#931.

The doctrine of advancements applies in Virginia where the ancestor dies intestate or partially intestate. Since the gift to A was made to him to advance him in life he has no rights in the rest of T's estate unless he is willing to bring the value of his advancement into hotch-pot.

23. A receives \$5,000 from his father T which is agreed to be in lieu of his inheritance. T has another son B. (a) If T dies worth nothing net, what are B's rights? (b) If T dies worth \$100,000 net, what are the rights of the parties. M#932.

(a) B has no rights. An advancement is an outright gift good as against all the world except T's creditors.

(b) In Virginia the agreement is a nullity. The law casts the descent on A and B equally regardless of agreement. So A may bring his \$5,000 into hotch-pot and claim an additional \$47,500.

24. T died leaving two nephews. A and B, as his only heirs, T had given A \$10,000 as an advancement in lieu of his inheritance. T died worth \$30,000. What are the rights of A and B? M#933.



A and B are each entitled to \$15,000. The doctrine of advancements has no application to anyone other than lineal descendants. Hence it does not apply to a nephew or a wife.

25. X gave his son-in-law \$3,000 so that he could buy a home. X later died intestate survived by his married daughter and a son. X's estate is \$3,000 net. What are the rights of the parties? *McDearman V. Hodnett, 83 Va.281, 2 S.E.643.*

It was held that an advancement to a son-in-law that necessarily inured to the benefit of the daughter was in substance an advancement to the daughter. Hence X's son takes the whole \$3,000.

26. Are advancements that are subsequently brought into hotch-pot charged with interest?

No. Advancements are not debts but gifts of a special sort. No interest is intended in the usual case.

*Statute of Distribution of Personal Property V. 64-11*

27. *V#64-11* provides that personal property of intestates shall be distributed as if it were realty with two exceptions. What are these two exceptions?

- (1) Infants--The personal property of an infant shall be distributed as if he were an adult. It is thus immaterial that he received his property from one of his parents.
- (2) Married persons.

28. H died intestate survived by a wife and a father. Distribute his personal property. *V#64-11.*

All the personal property goes to the surviving spouse in fee simple (subject to rights of the creditors of the deceased) where a spouse dies intestate and without issue.

29. W died intestate leaving a child, A, by another marriage, and H, her husband. Distribute her personal property. *V#64-11.*

Where there are issue of the deceased spouse (by what marriage is immaterial) the surviving spouse takes one third in fee, and the issue two thirds.

30. (Omit because of change in statutes)

*Spouse's Right to Personal & Real Property*

31. (a) H has a wife, and a child C. H by will gives all his property to his brother. What are W's rights with respect to his personal property? (b) H has a wife W, and no issue. He wills all his property to his brother. What are W's rights with respect to his personal property? His real property? *V#64-13 to 64-16; V#64-27.*

(a) The wife, W, may renounce the will in which case, if there are children she receives one-third the personal property in fee. The child has been completely disinherited unless he is a pretermitted child, i.e. a child not born when the will was made and not mentioned or provided for in the will. Such a child takes as if its parent had died intestate.

(b)(1) Where there are no children the wife may renounce the will and take one half the personal property.

(2) H cannot deprive W of her dower by an act of his own. Hence she gets a one third interest for life in his realty.

Note: If the wife had been given anything in the will unless expressly in addition to dower she is put to an election as she cannot take what the law allows and also under the will unless the intent of the testator to that effect is clear. The same rule applies to a gift to the husband in his wife's will unless expressly in addition to curtesy.



32. F had two sons, A and B, and a wife, W. A quarreled with F about the use of F's car and killed him during the quarrel. What are the rights of A and B in the absence of a will?

V#14-18 reads, "No person shall acquire by descent or distribution, or by will, any interest in the estate of another for whose death such person has been convicted of murder." So unless A is convicted of murder he inherits from F equally with B. Note: If A was convicted of any kind of homicide F's personal representative might have a cause of action against A under the death by wrongful act statutes. Any recovery so obtained would not be part of F's estate but would go to the statutory beneficiaries (excluding A as no man can profit by his own wrong) in such portions as the jury may direct to the other members of the first class of beneficiaries who are in this case B and W.

*Inheritance not regulated by K, but is statutory*

33. W, a childless married woman, told X that if she, X, would give her permission to W to adopt X's child, C, aged one year, she would see that C got all her property on her death. X consented. W raised C as her own child but never formally adopted him or made a will. W died. Will C inherit W's property?

No. Inheritance is not regulated by contract but is statutory. C is not an heir. C's best bet is to sue W's estate for breach of a contract made for his benefit.

*Antenuptial Agreement*

34. X told his wife to be that if she would marry him he would will all his property to her. After the marriage X made such a will and gave it to his wife for safe-keeping. A day later X made a will disposing of all his property to his brother. He gave this will to his brother. After X's death both the widow and brother claim his property. Discuss. M#1146. See also V#64-58.

This may be a mean trick, but it is a legal one. The oral promise made to his fiancée was in consideration of marriage, and thus within the statute of frauds, and unenforceable as a contract. The second will being totally inconsistent with the first revoked it whether the wife knew it or not. She may, of course, elect to take what the law allows her. Assuming no children that would be one half the personalty and dower (one third for life) in the realty. (One third as X did not die intestate).

*Doctrine of Uses*

35. Was it possible to devise land in England in the year 1520? M#1147.

In substance, yes, as follows: The would be testator could enfeoff the land to X and his heirs to hold for such uses as the feoffor (testator) should declare in his last will and testament. As equity would at that time enforce the use and as freehold estates of inheritance could be made to spring up in future under the doctrine of uses the party named in the will was entitled to the land in equity. After the statute of Wills (1541) this could be done directly without the intervention of equity.

36. A father for good reasons left all his property by will to his son, X, to the exclusion of Y. The will was not properly witnessed. Is Y under a moral duty to let X have all the property?

Blackstone says "No". If the father wants to disinherit son Y he can do so by a valid will. If there is no such will then Y has just as much right to his share as X has to his.

*Age limits for valid will - Personalty: 18, Realty: 21*

37. X, aged 19, willed all his property to Z. X died when 22 years of age. What are Z's rights, if any? V#64-49, M#1151.

In Virginia one may make a valid will of personalty when he becomes 18 but not of realty until he is 21. Hence Z is entitled to X's personal property but not to his realty. The fact that X did not die until after he was 21 is immaterial, as the will was invalid from the beginning with respect to realty. Note: If X had affixed a valid codicil to his will after he became twenty one that would be equivalent to a re-execution as the general rule is that a will speaks as of the date of the codicil unless that would clearly defeat testator's intention.



38. In a will contest in which unsoundness of mind is alleged which party has the burden of proof? W/1149.

The proponent is the one who alleges that testator made a valid will. Testamentary capacity is one of the required elements for making such a will. Hence the proponent has the burden of proof on this point. And it makes no difference whether the will has already been probated under our ex parte proceedings, or whether it is an inter partes affair.

39. Does it require greater or less mental capacity to make a contract or a will? W/1149.

It requires greater mental capacity to make a contract than a will. In the former case there is frequently a battle of wits in which there are conflicting interests. In the latter case one may draw a will at his leisure in surroundings of his own choice revocable at a later time at his pleasure. The elements of testamentary capacity are:

(1) Sufficient mental ability to know what property one has control over, (2) to know what persons are the natural objects of his bounty (3) what disposition he is actually making of his property and (4) the required physical age.

Besides testamentary capacity, there must be testamentary intent, and compliance with the legal requirements of will making.

40. Testator who lived at a hotel would ring the call bell in his room and then forget what he wanted; would take down the telephone receiver and try to prevent any one putting it back on the hook and yet complain because he could not get service; went into the public hall of the hotel in his night clothes; took the air valve off the steam radiator and said he was taking a Turkish bath. Is a will made by a man in the above condition valid? See note 6 to W/1149; In Re Carroll's Estate 196 P. (Mont.) 996.

Quite possibly. A man could act as above stated and still might have testamentary capacity although this is by no means certain. It was held in the case cited that it was a jury question.

41. Distinguish fraud, mistake, and undue influence.

A testator should be his own free agent when he makes his will as he wants it. Fraud deceives free agency; mistake misleads free agency; undue influence overcomes free agency.

42. X left all his property to the National Spiritualists Association to the exclusion of her children. Discuss. *Irwine v. Lattin*, 135 N.W. (S.D.) 759, Am. Cas. 1914 C.1044.

If X wished to leave his property to the Spiritualist Association to the exclusion of his children that is his affair and the Association wins. But if X really wished to leave it to his children and in his mind (as it appeared to him) the spirits would not let him and they compelled him (as he saw it) to leave it to the Spiritualist Association then the will is void because free agency has been overcome.

43. X had a son by a first marriage, and later married W. X by will left all his property to W. It appeared that three years after the second marriage and within a year before the execution of the will, that he said to his son, who desired to obtain a college education, "I can't do anything to help you because it will simply make trouble for me with my wife." Later X sent for his son and gave him the money saying, "It is upon the express condition that you will not let anyone know, because the minute my wife finds this out it will be all over." After the son had spent a portion of the money X demanded that it be returned saying, "My wife has found it out, and it is all over." The son returned the money. The son asks you about the advisability of contesting the will. What would you advise? *Emery v. Emery*, 111 N.E. (Mass.) 237



I would advise a contest. It is at least a jury question as to whether or not he was a free agent or his second wife's automatic yes man through no choice of his own.

44. A clause in X's will drawn by B, an attorney at law, reads, "To my friend, B, I bequeath the sum of \$5,000". Is the bequest valid? *Graham v. Courtright*, 161 N.W. (Iowa) 774.

The party who draws a will for another is a fiduciary and any advantage he seems to gain for himself is prima facie the result of fraud or undue influence. The bequest is not necessarily void, but the fiduciary drawer of another's will has the burden of rebutting the above presumption by evidence that is clear and convincing that testator freely and of his own accord wish so to dispose of his property.

45. X had a wife living and undivorced. Nevertheless he married W. W acted in good faith. A month after the marriage W made a will in favor of "her husband", X, and eleven months later died. X and W seemed to be a most devoted couple. W's heirs wish to set the will aside because of fraud and undue influence. Discuss: *In Re Carson's Estate*, 194 P.(Cal.) 5, 17 A.L.R.239.

This is a clear case of fraud in which free agency has been deceived and the will in favor of X is void. If, however, they had lived happily together for 20 years then the desire to benefit X whether or not he was her husband would have been the paramount desire. Instead of being furious had she learned the facts just before her death she would have thanked him for deceiving her into so many years of happiness. In other words if the primary reason the property was left to X was because X was her husband then the will is void for fraud, but if the primary reason was because she loved X whether deceiver or not then the will is valid.

46. X was struck by an automobile and seriously injured. Realizing that he was about to die he said, "I want my wife to have all my property." There were seven witnesses to this statement. Is this a valid nuncupative will? V/44-55

Not in Virginia. Nuncupative or oral wills are only valid when made by soldiers and sailors in active service and then only with reference to personal property.

47. X's will read as follows, "Item 1-To A, I bequeath the sum of \$5,000. Item 2-To B, I devise Cragthorn Park. Item 3-To C, I leave all the rest of my estate real and personal." The will was signed by the testator and was entirely written in his own handwriting save that the words "Cragthorn Park" were inserted by means of a rubber stamp. What, if any, are the rights of A, B, and C if there were no witnesses to the will. *In Re Thorn's Estate*, 192 P.(Calif.)19; 1157.

The whole will is invalid since an holographic will must be entirely in the handwriting of the testator. The phrase "Cragthorn Park" cannot be treated as surplusage.

48. A holographic will was dated Sept. 8, 1097. Is the will valid?

Valid in Virginia as our statute does not require an holographic will to be dated. The impossible date can be treated as surplusage.

49. Learn the gist of V/5229 which is as follows:

"Mode of Executing Will Prescribed--No will shall be valid unless it be in writing and signed by the testator or by some other person in his presence and by his direction, in such manner as to make it manifest that the same is intended as a signature, and moreover, unless it be wholly in the handwriting of the testator, the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses, present at the same time; and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary. If the will be wholly in the handwriting of the testator that fact shall be proved by at least two disinterested witnesses."

*Nuncupative Will*

*Holographic Will*

*Imp. Execution of A Will*



## WILLS *Presence of Witnesses*

9.

50. T signed his typed will in the presence of X and Y and requested them to sign as witnesses. X signed and left. Then Y signed. Is the will valid in Virginia?

If you say "No" read over V#64-51 pointing out exactly why.

Yes, will is valid for our statute requires the testator to sign or acknowledge his signature in the presence of both witnesses present at the same time, but does not require the witnesses to sign in the presence of each other but only in the presence of the testator. Of course it is the better practice to have the witnesses sign not only in the presence of the testator but also in the presence of each other.

### *Valid Signature?*

51. Patrick J. O'Neill, signing his will, wrote "Pat" and then let the pen fall from his hand, being unable to go further. Signature valid?

The will must be signed in such a way as to make it manifest that the testator intended the writing to be his signature. If Mr. O'Neill said, "I'm too weak to sign" as the pen fell from his hand he did not intend "Pat" to be his signature and the will is invalid. On the other hand if he said, "That's the best signature I can make" then the will is valid.

### *Initials*

52. A holographic will was signed only with testator's initials. Is it valid?

Pilcher v. Pilcher, 117 Va.356, 84 S.E.667, L.R.A. 1915D, 902.

If the testator intended his initials as his signature the will is valid, Letters of a testamentary character signed "Father" have been admitted to probate.

### *Signature?*

53. X made a holographic will as follows:

"January 18, 1940.

I, X, wish all my just debts to be paid after my death and I want Y to have \$4,000". The above paper was put into an envelope, and X wrote on the envelope, "This envelope contains my will-(signed)X." Is Y entitled to his \$4,000. Warwick v. Warwick, 86 Va.596, 10 S.E.843.

The will is invalid. The first X in I, X, wish my debts to be paid is not intended as a signature but only to identify the person making the will. (Note that the rule as to signing a note is contra). The X on the envelope does not purport to be a signature to the will but an authentication of the statement that what X thought to be his will was in the envelope.

### *Signature?*

54. A paper in all other respects good as an holographic will concluded as follows:

"I, John Doe, say the above is my last will and testament." Is the will valid?

Dinning v. Dinning, 102 Va.467, 46 S.E.473.

Held: Yes. That is what a signature to a will implies.

### *Attestation Clause*

55. Is it advisable to use an attestation clause? M#1161.

While the statutes in Virginia do not require any particular form of an attestation clause it is the better practice to use one. Then if a witness later claims that some formality was omitted he can be confronted with his own prior inconsistent statement to the contrary in the attestation clause. Here is an attestation clause taken from Gregory's Forms.

The above signature of the testator was made and the foregoing will was acknowledged to be his last will and testament by the said testator, in the presence of us, three competent witnesses, present at the same time; and we, the said witnesses, do hereunto subscribe the said will on the date last above written in the presence of the said testator and of each other, at the request of the said testator, who was then of sound mind and over the age of twenty one years.

### *Continuous Transaction - Order of Signing*

56. The witnesses signed the will before the testator. Then the testator signed all in the presence of each other. Is the will valid?

Yes. As long as it is one continuous transaction the order of signing is not controlling. There is no will until both testator and witnesses have signed.



"in his presence"

57. Testator was so sick that he could only at the risk of his life raise himself upon his elbow. The will was signed where testator could have soon the signing only by raising upon his elbow. Is the will valid? Jones v. Tuck, 48 N.C.202.  
Note: This is page 207 of the reprint.

The will is not valid. Where testator is too weak to see or hear what is going on except at great risk to his life the spirit of the requirement that the will be signed in his presence is violated.

"continuous transaction" "in his presence"

58. A will was attested by the witnesses subscribing their names in a different room. The testator could not see the witnesses in the act of signing. When the witnesses had signed they immediately returned to the room where the testator was. They took the will to the testator and said, "Here is your will witnessed," at the same time pointing to the names of the witnesses. Was the will duly executed? Cook v. Winchester, 46 N.W.(Mich.) 106, 8 L.R.A. 822, and see 10 Gratt. 67.

This is a very close case. It was held that the acknowledgment of the signatures in the presence of the testator coupled with an opportunity on his part to detect any change in his will that might have been fraudulently made plus the fact that it was one continuous transaction--all this was the equivalent of signing in his presence.

Blind Testator

59. There were two small rooms about 12 feet square, connected by an open archway of about half that width. Testatrix was in one room, and the signatures were written on a dining room table standing three or four feet beyond the archway, in the other room. If testatrix had had her eyesight, she could have seen the witnesses sign ten feet away in the other room. As she was blind she did not see them sign. Is the will valid? Welch v. Kirby, 256 Fed. 451, 9 A. L. R. 1409.

Held: Yes. For all practical purposes the rooms were one. The rule for a blind testator is the same as would apply if he had sight. One judge dissented on the ground that where testator is blind will should be attested as closely as reasonably possible to him so that he can make use of his other senses to prevent imposition.

Witness

60. Anna L. Jenkin's will was signed as follows: "Anna L. Jenkins, by Mary F. Hollady, Witness, Lucy P. B. Lipscomb." Is the above will valid in Virginia? Peake v. Jenkins, 80 Va.293.

Not unless it is an holographic will. Mary F. Hollady did not purport to sign as a witness but as an agent of the testatrix.

Competent Witnesses - interest

61. A wife was left a dollar by T's will. She signed the will as one of the two witnesses. Is the will valid? Smalley v. Smalley, 35 An.Rept. 353; M/1161-1162.

Yes, the will is valid in Virginia. Under VS6208 interest of a witness no longer disqualifies, nor does a witness to a will lose any benefit given him. The attorney who draws the will and a person named as executor are likewise competent witnesses.

Age of Witness

62. An eight year old child was one of two attesting witnesses. Is the will valid? M/1161-1162.

Yes. A normal eight year old child would be a competent witness as such a child is capable of realizing that an oath places him under a duty to tell the truth and is able to observe and relate what took place.

Contract or Will

63. This is an action of debt brought against the estate of deceased on the following instrument:

"Id., Sept. 4, 1884.

At my death, my estate pay to Ann Cover the sum of three thousand dollars.

Witness: Columbus Cover.

David Engol(Seal)

What result? Cover v. Sten, 10 Atl. (Md.) 231, 1 An. St. Rep. 406.

The instrument is apparently testamentary in character and unless holographic is void because there is only one witness. There is no acknowledgment of any present debt to be paid at a future time so no promise to pay will be implied. Hence it fails both as a will and as a contract debt.



64. T took certain notes from her children, for money they had received allegedly giving them a signed typed statement to the effect that she was desirous of placing some money with them and concluding: "in case I should die while said notes are in force they shall at once become null and void and not collectible." T's administrator sued on the notes. He claimed the signed statement offered as a defense was a forgery. This statement was unwitnessed. Does it make any difference so far as this case is concerned whether the signature to the statement is a forgery?

Yes, for if the typed statement is genuine, there has been a valid renunciation under U.C.C.3-605, since there is a signed writing which has been delivered. A valid renunciation is effective even though testamentary in nature and even though the statutes with respect to wills are not complied with.

*Will or deed*

65. One Ella F. Sherwood, being about to undergo an operation for a cancer, made a quitclaim deed, of all her real estate and personal property to her husband. This deed contained the following provision. "This conveyance and transfer are made upon the condition that my husband survive me, and the same is intended to vest and take effect only upon my decease, and until said time, the same shall be subject to revocation upon my part." This instrument was duly delivered to the husband. Is he entitled to her property after her death? Butler v. Sherwood. 196 App.Div.603.

Since the instrument was revocable at will and does not purport to take effect until death the instrument is an invalid will and not a deed.

66. T executed and acknowledged a deed which read as follows, "I, T, hereby grant Blackacre to John Smith at my death. Witness my hand and seal(Signed)T. (Seal)". T delivered the deed to John Smith who recorded it. After T's death intestate T's heirs claim the land. Result?

Judgment for John Smith. This is a present gift to John Smith of a present right to the future enjoyment of Blackacre. --a springing executory limitation.

67. John Noble, by warranty deed, attested by two competent witnesses, purported to convey the land in question to his son, Thomas Noble. The deed was not delivered at the time of its execution but was later put into an envelope with another deed and John Noble's will. On the envelope were the words, "The deed within to be delivered to grantees after death of grantor, all of said property to be held subject to the order of John Noble." The will expressly excepted from its operation the land in question, stating that testator had previously deeded the land to his son, Thomas. Is the instrument a deed or a will? Noble v. Tupton, 76 N.E.(ILL.)151, # L.R.A.(N.S.)645, Noble v. Fickes, 82 N.E.950, 13 L.R.A.(N.S.)1203, 12 Am.Cas.282; 21 Harvard Law Review 451.

It is neither a deed nor a will. It is invalid as a deed because never delivered to the grantee during the lifetime of the grantor. Even though duly witnessed it is invalid as a will because there is not a word in the instrument that indicates it was executed with testamentary intent and since the instrument is not ambiguous extrinsic evidence is inadmissible to prove that the undelivered deed is really a will.

68. A document in the form of a deed, and attested by two witnesses but never delivered was offered for probate as a will. The alleged testatrix signed the paper purporting to convey land upon condition that the conveyance should not take effect until after her death. Should the instrument be accepted for probate. In Re Bybee's Estate, 160 N.W.(Iowa)900.

Yes. The instrument shows on its face it was executed with testamentary intent. The fact that the maker did not know the difference between a deed and a will is beside the point.



69. T wished a relative to do his bidding and in order to scare her into minding him he executed a codicil to his will revoking a gift to her daughter. He told the witnesses that this was done for the purpose above mentioned and was not to operate as a revocation of the gift. Is the codicil valid? *Lister v. Smith*, 164 Eng. Reprint, 1232.

Since the revocatory codicil was not executed with testamentary intent, it is wholly inoperative.

70. A soldier, S, before departing for the front made a will and gave it to X for safe-keeping. In this will he left his wife a life estate in Blackacre. Later S wrote his wife from the front saying, "Before starting for the front I made my will. I left you Blackacre." S was killed in action, and his widow claims to hold Blackacre in fee simple. Discuss.

The letter does not purport to be a will but a mere statement of what he thought he had done by his will. Hence it is non-testamentary and the wife takes only a life estate in Blackacre.

71. A father wrote two of his children as follows: "Dear Children--We are all well. I am glad you put your Pork down in Pickle. That way you can keep it from butchery to butchery. I think we are going to have a very cold winter. If I am able to visit you I have some very valuable papers I want you to keep for me so if any thing happens all the sock money in the 3 Bank liberty bonds and my home on Hornor St. goes to George and Irvin. Keep this letter lock it up it may help you out. Will close your Truly, Father."

The children, George and Irvin, claim the liberty bonds and the house by virtue of the above letter, the father having died on the afternoon he wrote it. Is the claim valid? In *the Kimmels's Estate*, 123 Atl. (Pa.) 405, 31 A.L.R. 678.

Held: A valid holographic will. The statement that "if any thing happens" means "if I die" and his admonition to "keep this letter" both indicate testamentary intent. The signature "Father" is signed in such a way as to make it manifest he intended it as his signature.

72. A writing found on the fly leaf of an old memorandum book read, "Dec. 24, 1900. Everything is Lous G.T. Smith. Is 'Lou' entitled to all Smith's property? Smith v. Smith, 112 Va. 205, 70 S.E. 491, 33 L. R. A. (N.S.) 1012.

If this read "At my death everything is Lous" it would have been a valid holographic will. But the mere statement that everything is (now?) Lous is like a statement "What is mine is yours" and is not testamentary in character.

73. A paper pinned to a promissory note read, "I want Siddie Williams to have this pack. K. W. Perry." Is Siddie Williams entitled to the note after death of Perry? *Perry's Will*, 137 S.E. 145.

Held: No. There is nothing to indicate that Siddie Williams is to take the note on the death of Perry. Hence the paper has not been executed with a testamentary intent.

74. One Bennett died leaving a will containing the following provision among others., "I give and bequeath unto my wife, Grace Bennett, the sum of \$50,000 in trust, however, for the purpose set forth in a sealed letter which will be found with this will." A writing was found with the will directing that the \$50,000 be paid to William Jennings Bryan. Is Bryan entitled to the money? *Bryan's Appeal*, 58 Atl. (Conn.) 748, 107 Va. St. Rep. 34, 68 L.R.A. 353, 1 Ann. Cas. 393.

Held: No. Virginia recognizes the doctrine of incorporation by reference provided (1) there is a clear intent to incorporate (2) the matter incorporated is in existence when the will is executed (3) the matter incorporated is identified with certainty. In the instant case there is no proof as to the second element and the third element is lacking as any writing made at any time and found in the stated place would answer the description in the will.



Wills and Intestate Succession (continued) 13.  
75. T typed his will and signed it, but had only one witness thereto. Later at the bottom of the sheet T signed a holographic codicil as follows, "I want X to have \$100. In all other respects I confirm the above will." Is the will valid? Yes. All the requirements of incorporation of the invalid will into the valid codicil are present. Note that matter not entirely in the handwriting of the testator may be incorporated into a holographic will.

*Incorporation of safety deposit box*  
76. Item 3 of T's will read, "I bequeath to X the contents of my safety deposit box." Is this item valid?

Since T can change the contents of his safety deposit box from time to time without any formality whatever this case is analagous to the incorporation by reference cases where the matter incorporated must be in existence and rigidly identified. However, the better view, in the instant situation is that the words in question merely identify the gift to which X is entitled on T's death and the provision is valid.

### *Bequest to creditor*

77. T owed X \$5,000. Item 2 of T's will reads, "I bequeath X \$5,000. Should the executor pay X \$5,000 or \$10,000. 28 R.C.L. 299, #277.

Where a bequest to a creditor is equal to or greater than the sum owed him there is a rebuttable presumption that the sum bequeathed is in payment of the debt and not in addition thereto.

*Revoked*  
78. T made a will. Later he made another will which stated that it was his last will and testament. Does the second will revoke the first will? 68 C.J. 803, #491.

A second will does not revoke a prior will unless it contains a revocatory clause except in so far as the wills are inconsistent. Note: There is no presumption that a last will contained a revocatory clause.

79. T made two wills, one in 1911 and the other in 1912. By his first will he left Blackacre to John Smith. By his second will (which contained no revocatory clause) he left all his effects to his surviving brothers and sisters. T died owning Blackacre, Whiteacre, and \$10,000 worth of personal property. How should the property be distributed? In Re Wolfe's Will, 117 S.E. (N.C.) 804.

Held: The two wills are not necessarily inconsistent. The word "effects" normally refers to personalty and not realty. And this result was reached in spite of the fact that there is a presumption that the testator did not intend to die partially intestate. Hence John Smith gets Blackacre; his brothers and sisters take his personalty; and Whiteacre goes to his heirs.

80. T made a will #1. Later T made will #2. This last will was lost and it is impossible to prove its contents. Do the heirs, or the devisees of will #1 have the better right to T's  $\frac{1}{2}$  real property?

Since there is no presumption that will #2 revoked will #1 the devisees of will #1 have the better right.

81. T made a will in favor of one H, and she left this will with her lawyer, Smith. T was taken sick and shortly before her death she wrote a note as follows:

"July 3, 1913

Dear Lawyer Smith: Please destroy the will I made in favor of H. Signed (T)"

(a) If Smith destroys the will after the death of T, what result? (b) If Smith destroys the will before the death of T, what result? In Re McGill's Will, 229 N. Y. 405, 128 N.E. 194, M#1171.

(a) The death of T would have revoked the agency so the will would still be in force.

(b) Under V#5233 the will would still not be revoked as the will must be destroyed by the testator or by another in the presence of the testator.



Note: The letter to the attorney was not a revocation because T did not intend it as such. T intended the letter to authorize a revocation but she intended the destruction by the attorney to be the revocation.

Note: In Virginia there can be an holographic revocation, so if T had written on a piece of paper: "I hereby revoke all wills heretofore made by me" and signed the statement the revocation would have been effective.

82. T told Judge J she wanted to revoke her will. Judge J wrote on the back of the will, "This will is hereby revoked" and told T to sign it which T did. Is the will revoked?

No. If the revocatory writing is to revoke, it must be executed with all the requirements of a will. The above is not an holographic revocation, nor are there two witnesses.

83. Summarize V#64-59 on Revocation of Wills generally.

1.64-59 "No will or codicil, or any part thereof shall be revoked, unless by a subsequent will or codicil, or by some writing declaring an intention to revoke the same, and 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, cancelling or destroying the same, or the signature thereto, with the intent to revoke."

84. T wrote in a blank space at the bottom of his will, "This will is hereby cancelled and annulled." Is the will revoked(a)if he signs the statement?(b)If he does not sign it?

(a) If T signs the statement there is a valid holographic revocation.

(b) If he does not sign it and no part of the writing cancels any portion of the will, by the better view there is no cancellation and hence no revocation.

Note: If T had just made a large X over what he had written with an intention to cancel, the will would have been revoked.

85. Testator, being moved with a sudden impulse of passion against one of the devisees under his will, conceived the intention of cancelling it by tearing. Having torn it twice through, but before he had completed his purpose, his arms were arrested by a bystander, and his anger mitigated. He then proceeded no further and after having fitted the pieces together he said, "It is well it is no worse." Is the will revoked? Dee etc. v. Forkes, 106 Eng. Reprint 740.

All the intention without the destruction, and all the destruction without the intention are equally ineffectual to revoke a will. There must be both. The language of the testator, "It is well it is no worse" shows that in his own mind he had not finished the destruction he intended as a revocation. Hence the will was not revoked.

86. Testator's will was destroyed by mice. After he discovered this fact he said in the presence of ten witnesses, "I was going to revoke it anyway, and now that is unnecessary. I want to die intestate." Is the will revoked? Cutler v. Cutler, 40 S.E. (N.C.) 689, 57 L.R.A.209.

He did not tell the mice to destroy the will. It was not destroyed in his presence. The mice did not purport to act for a principal so technically there can be no ratification of the destruction. Yet our common sense tells us that practically no layman who wished to die intestate would draw up a formal revocation to revoke what the mice had already destroyed. The court held the will revoked, "It was destroyed, and(the remains are) in his presence." Specious reasoning to reach a just result.



*Least Destruction*  
 87. T threw his will into the fire with intent to revoke it. After he had done so he turned away. His wife took the paper from the fire. It was slightly scorched, and one hole was burned through but no part of the writing was injured. T supposed to the day of his death that the will had been destroyed. Should it be admitted to probate? *White v. Casten*, 46 N.C.197, 59 Am.Dec.585.

The will has been revoked. The least destruction by one of the designated means (burning in this case) is sufficient if there is the required intent.

### *Rebuttable Presumption*

88. The last time T's will was seen he had it in his "den". After his death it could not be found. Has he died intestate? M#1175.

If a will cannot be found and the last time it was seen it was in the possession of the testator there is a rebuttable presumption that he destroyed it with an intention to revoke it. So unless this presumption can be rebutted the will is not entitled to probate. The above rule is not affected by the fact that the testator's attorney has retained a copy at the request of the testator.

### *Partial Revocation allowed in Va*

89. T's will had three items as follows: Item 1. I bequeath \$5,000 to A. Item 2-I bequeath \$4,000 to B. Item 3-Everything else to C. Later T drew a line through Item 2. The statutory distributees claim all his property while both B and C claim the \$4,000 originally given to B. Result? *Law v. Law*, 3 So.(Ala)752; *Bigelow v. Gillett*, 123 Mass. 102, 25 Am. Rep. 32.

First note possible arguments: The statutory distributees claim a cancellation of a part of an entire will is a cancellation of the whole will. B claims that T did not intend to revoke any of the will if that meant the revocation of the whole will and that the revocation is thus ineffective under the doctrine of dependent relative revocation.

The above arguments are not good in Virginia because our statute by necessary implication("No will shall be revoked in whole or in part etc.") allows a partial revocation. Hence the gift to B has been revoked and there is that much more for C, the residuary beneficiary.

### *Constructive Trust*

90. T asked his wife to burn his will. The wife fraudulently burned another paper in his presence, and, after T's death, had his will probated. The heirs petitioned for the revocation of the probate of the will. Should the petition be granted? In *Re Silva's Estate*, 145 P.(Cal.)1015.

No. The will was not destroyed and hence not revoked. The intention was present, but not the actual destruction. However, since the wife was the beneficiary of the will, in order to prevent fraud a court of equity would declare her to be a constructive trustee of the property for the heirs.

### *Effect of Marriage on a will*

91. T proposed to W, and promised to will all his property to her if she would accept him. She accepted him whereupon he drew up a will leaving all his property to her. They were married. Shortly after marriage T died. Has he died intestate in Virginia?

No. Marriage of a man does not revoke a will. Marriage plus birth of issue both subsequent to the making of a will revoke a man's will. Marriage of a woman, however, does revoke a will. V#64-58 providing that marriage of a man or woman revokes a will was repealed in 1956 thus bringing the common law back into force.

Note 1. If, however, after a will has been revoked by marriage and birth of issue in the case of a man, or by marriage alone in case of a woman the testator makes a valid codicil the will is saved either under the doctrine of incorporation by reference or under the principle that the will speaks as of the date of the codicil.



92. Omit because of repeal of V#64-58 in 1956.

*Pretermitted child*

93. T made a will leaving X \$5,000. Later a child was born to T. Later T died. What are X's rights? M#1178-1179.

If the after born child was not mentioned or provided for in the will he is a pretermitted child and takes as if T had died intestate. If the child is an only one and there is no widow the child would take all and X nothing.

94. T made a will leaving \$1,000 to his brother B, and \$5,000 to his son S. Later a child, C, was born who was a pretermitted child. Later T died. What are the rights of the parties assuming a net estate of \$6,000 and no widow?

C takes as if T had died intestate, i.e. \$3,000. The other legatees must contribute equitably to raise this sum.

Since S takes five times as much as B he should contribute in the proportion of 5 to 1. Hence S would get \$2500, B \$500, and C \$3,000.

Note that the birth of a pretermitted child does not revoke a will. The will is still valid as to all the world except the pretermitted child. The person named as executor in the will is still eligible for that position and the beneficiaries take in so far as their rights do not conflict with the rights of the pretermitted child.

*Effect of divorce on will - None in Va.*

95. T made a will in favor of his wife. Later she secured a divorce from him. T died without ever changing his will. Did he die intestate? In *Re Bartlett's Estate*, 190 N.W. (Neb.) 869, 25 A.L.R. 45.

A divorce in Virginia has no effect in and of itself on any will that has been made. There is no implied revocation by operation of law.

96. T made a will when a rich man. Later he became relatively poor and died. As a result the residuary legatee, who would have received the most, if testator had died immediately after making his will, would receive nothing now. Has T died intestate?

A change in economic condition no matter how great does not revoke a will, but such a change frequently makes it highly desirable for the testator to change it to meet the new conditions.

97. T owned Blackacre. He devised it to X. Later T sold Blackacre to A and still later he bought it back again. T died. Is X entitled to Blackacre? M#1176.

As the law is at present the will speaks as of the moment of the testator's death so X is entitled to Blackacre.

98. T's will read as follows: "I am going to have a major operation, and if I die, I want X to have all my property." The will was duly executed. T recovered from the operation and died five years later. Did T die intestate? *Eaton v. Brown*, 193 U.S. 411, 48 L.ed. 730.



This is purely a question of interpretation. If she meant "If I die from the operation" then a condition precedent(death from the operation) has not taken place and the will is not entitled to probate.

It was held in this case that she had death in the abstract in mind, and that this idea of death in the abstract took for the time being a special form. Hence the will was valid even though she did not die from the operation.

*Latent Ambiguity*

99. Testator intended to leave all his shares in a particular company to a nephew, N, and gave instructions to that effect to his attorney. The attorney in some unexplained way wrote "all four of my shares". T died without having noticed the mistake. T owned 100 shares. Does N get 4 shares or 100 shares?

N gets 100 shares. There is a latent ambiguity when it is discovered that T has more than four shares for the testator says all my shares as well as four shares. The word four may be dropped on proper proof of the facts. Note well, however, if there is no ambiguity parol evidence is not admissible to create one. Thus if the testator wrote X stock and he meant Y stock and he has both kinds when he dies parol evidence is not admissible to show that he meant Y stock as there is no ambiguity.

100. T's duly executed will read as follows: "I leave all my property to X." It was shown that T had a son whom she supposed to be dead. As a matter of fact he appeared after T's death. What are his rights? Gifford v. Dyer, 57 Am. Dec. (R.I.) 708.

If the will shows on its face that she thought her son was dead then the gift to X is void for mistake. Where a child is disinherited intentionally it is common practice to mention him to show that he has not been left out by mistake. This is why children are sometimes cut off with a dollar. President Coolidge's will, "Not unmindful of my son, John, I leave all my property to my wife" is another example.

101. T made a will in 1900. In 1901 he made a new will revoking all prior wills, but this last will was not signed by the witnesses in the presence of the testator. T then tore up his will of 1900. Has he died intestate? Onions v. Tyrer 23 Eng. Reprint, 1085.

No, he has not died intestate. He intended to destroy the 1900 will on condition that the 1901 will was valid. Since this condition was not met the destruction of the 1900 will was legally inoperative under the doctrine of dependent relative revocation.

102. T made a will in 1910. Later he wishes to increase the amount of a legacy to A. T supposed that it was necessary to destroy the old will before a new will would be effective. Accordingly he tore up the old will. T died while his lawyer was preparing the second will. Did he die intestate?

No. The destruction was conditional, namely, "I intend to destroy the old will if that is necessary for the execution of a new one." Since the condition was not fulfilled the doctrine of dependent relative revocation is again operative.

103. Item 2 of T's will read: "I devise Blackacre to W." Later T crossed out W's name and wrote B's name above W's name. The crossing out aforesaid did not obliterate W's name. B, W, the residuary devisee and T's heirs all claimed Blackacre. Result? Wolf v. Bollinger, 62 Ill. 368.

If this were an holographic will B would prevail as the altered will is entirely in the handwriting of the testator.

If this were a formal will B cannot take as any change in a formal will must be executed with every required formality.

Since testator apparently intended to revoke the gift to W only if B could take, and since B cannot take, W still takes under the doctrine of dependent relative revocation.

If the evidence clearly indicates that testator no longer wanted W to have the bequest in any event and the jurisdiction allows partial cancellations(as does Virginia) then the residuary legatee takes.



104. In 1862 T made a will leaving all his property to A. In 1864 T made a second will leaving all his property to B. In 1865 T destroyed the will of 1864 thinking thereby to revive the will of 1862. A, B, and T's heirs claim his real estate. Discuss.

In Virginia the destruction of a revoking will does not revive the original will. If the second will was destroyed on condition that it revived the first and it did not then, under the doctrine of dependent relative revocation, the second will is still in force. (If the second will contained a revocatory clause there would be no doubt as to the correctness of the above analysis because such a will as soon as executed would revoke all prior wills and codicils. But where the wills are merely inconsistent it is arguable that neither is the will of the testator until his death and at that time will #1 is the only will in existence).

Learn the gist of Va-60 --Revival of wills after revocation.

"No will or codicil, or any part thereof, which shall be in any manner revoked, shall, after being revoked, be revived otherwise than by the re-execution thereof, or by a codicil executed in manner herein before required, and then only to the extent to which an intention to revive the same is shown."

105. T had eleven children. He devised Blackacre to his child, A, who took possession at once. Seventeen years later the other children bring ejectment. A relies on the will which he offers in the original. It appears that A has never probated the will. Discuss. Shumway v. Hollbrook, 1 Pick 114, 11 Am.Dec.153.

In the case of realty title to realty passes ipso facto to the devisee so A has a good defense. However it is exceedingly poor practice to rely on an unprobated will. There is no statute of limitations on the probate of wills.

Note 1: In the case of personal property the title on the death of deceased goes to the personal representative will or no will. A specific legatee who helps himself to the property so bequeathed is an executor de son tort and strictly accountable.

Note 2: General creditors of the deceased who are unable to collect from the personal representative may file a creditors bill against the heirs to enforce the lien the law gives them on the realty of the deceased.

106. T died intestate leaving X as his only heir. What risks are involved in buying from X who is 22 years old and unmarried?

(1) All the risks are present that would be present in the case of any purchase of realty plus (2) Did T leave a widow? plus (3) A will may be found plus (4) Did T leave any unpaid creditors whether lien or general?

Note: In the last event of one buys from an heir or heirs within a period of one year he buys subject to the rights of the ancestor's creditors. Va-51, however, protects a bona fide purchaser for value from an heir(a) if more than a year has elapsed(b) there has been no probate of a will in this state and by Va-173 no suit has been commenced for the administration of the assets of the deceased nor any reports filed as to the debts of these entitled to be paid. Va-51 similarly protects bona fide purchaser for value from a devisee or from a person representative who was given power by testator's will to sell realty from the chances that a later will may come to light.

107. X made will #1 in 1932. He made will #2 in 1937 which is inconsistent with will #1. X died in 1943 and will #1 was found and probated. In 1946 will #2 came to light and it was offered for probate. Defense: One year statute of limitation on contest of wills. What result?

The view in this state is that the probate of a later and inconsistent will is not a contest of the earlier will and hence the statute of limitations has no application. And it makes no difference whether the wills are wholly or partly inconsistent. Both wills are entitled to probate effect being given to the last in so far as they are inconsistent.

6-7-60  
Revised  
Statute

Probate

Risks in  
buying prop  
from heir or  
devisee



108. A father, F, had two sons S1 and S2. F died intestate owning real estate to the value of \$10,000. S1 owed his father \$5,000. X has a judgment against S1 for \$5,000. S1 has no property of his own. What are the rights of the parties?

Realty goes directly to the heirs. X's judgment became a lien on S1's land the moment F died. Since S1 owes the administrator \$5,000 which is unsecured and X \$5,000 which is secured X has priority. The administrator owes S1 nothing if there was no personal property other than his claim against S1.

Note: If F's estate had consisted of \$10,000 worth of personalty then the administrator would have owed S1 and S1 would have owed the administrator and the debts could have been set off each against the other in which case S1 would have received \$2500 and S2 \$7500.

109. An heir sold real estate to a bona fide purchaser for value. What are the rights of the ancestor's creditors? V. 64-173 and 64-171.

They can hold the heir personally to the extent of the value of the property sold. Unless the purchaser purchased after the expiration of a year etc. they can still reach the land itself.

110. T died intestate seized of real property only. He owes \$3,000 in debts.

Should the administrator (a) sell enough land to pay the debts, or (b) file a creditor's bill against the heirs, or (c) do nothing at all? V. 64-171

He should do nothing at all. If there is no will giving the administrator a t a or the executor authority to sell realty he has no such authority. The creditors are the ones to file the creditor's bill against the heirs.

111. One A made a will in favor of a nephew, G. On his death bed A said he wanted his will revoked and his property to go in a different way. G was called from College and requested to enter into a family settlement carrying out the last wishes of A. In doing so he gave up over \$100,000 to the advantage of all other members of the family. G now seeks to take under his uncle's will and not under the family settlement. Discuss. Moore v. Gregory, 131 S.E. 692. Read the dissenting opinion first.

The court held there was a valid family compromise settlement. The will should be probated since it was not revoked but each takes as per the terms of the settlement and not as per the terms of the will.

112. K left a legacy to her nephew, H. The will contained a provision that if any beneficiary attempted to contest the will in any way he should lose his legacy and the same should become part of the residue of the estate. H contested the will and lost. Is he entitled to his legacy? In Re Keenan's Will, 205 N.W. 1001, 42 A.L.R. 836; Fifield v. Van Wyck's Ex'r., 94 Va. 557, 27 S.E. 446.

The rule in Virginia is that unless there is a gift over to a third party of the contestant's share (a provision stating it shall fall into the residuum is not such a gift over) the forfeiture for contesting is merely in terror to discourage a contest and losing contestant is still entitled to take. If there is a gift over to a third party that shows that the testator really intended what he said and a losing contestant loses all around.

113. X was Y's heir at law. X reasonably supposed that Y died during the San Francisco earthquake and fire of 1906. In 1922 X had Y's estate administered. D was appointed administrator and paid over everything to X who lost it all. Y was not dead, and is now bringing suit against D. What result? Beckwith v. Bates, 200 N.W. (Mich.) 151, 37 A.L.R. 819; V. 64-103 et seq.

In the absence of a valid statute to the contrary death is a jurisdictional pre-requisite. D is a convertor and personally liable.

Note: Statutes merely authorizing administration after seven years absence without being heard from are unconstitutional as it violates the 14th amendment to deprive one of his property because he doesn't write letters. However, if such statutes make reasonable provisions for doing everything reasonably possible to



notify the supposed deceased and make reasonable provisions for his protection should he return they are valid. Virginia has such statutes (V. 5361 et seq.)

### *Juris. of Probate*

114. X lived part of the time in A County and part of the time in B County. He was accidentally killed while visiting in C County on Feb. 7. Administration proceedings were started in both A and B counties on Feb. 9. M was appointed as administrator by one court and N by the other. Should debtors of the estate pay M or N? Sowell v. Christensen, 245 P. (Okl.) 632, V. 64-72.

Whichever court renders judgment first (unless reversed on appeal) has jurisdiction as its judgment cannot be collaterally attacked. This is the majority rule where the courts involved are in the same state.

Note: V. 64-72 tells what court has jurisdiction in probate proceedings and is as follows: "The circuit and corporation courts of the commonwealth, and the clerks of said courts, and the duly qualified deputies of such clerks, and the clerks of all other courts having jurisdiction of the probate of wills shall have jurisdiction of the probate of wills according to the following rules: In the county or corporation wherein the decedent has a mansion house or known place of residence; if he has no such house or known place of residence, then in a county or corporation wherein any real estate lies that is devised or owned by the decedent; and if there be no such real estate, then in a county or corporation wherein he dies or a county or corporation wherein he has estate; provided, however, that in the city of Richmond etc."

### *Probate in different States*

115. Same case as above except that different states are involved instead of different counties. Should X's personal property be distributed as per the laws of State N or as per the laws of State M? Suppose X had personal property in State O also. How should it be distributed? Colvin v. Jones, 161 N.W. (Mich.) 847

Each state has equal authority to determine for itself whether or not deceased was domiciled within its borders at the time of his death and none speed in returning a judgment cannot oust other states of their equal right. Hence X's property in State M will be distributed as per the laws of State M and X's property in State N will be distributed as per the laws of State N, and State O will have to make an independent judgment of its own (as to personality) to determine whether the deceased was domiciled in State M or in State N.

### *Personal Rep.*

116. X died intestate survived by a wife, an adult son, a brother and a creditor. Each wishes to be his personal representative. Discuss. V. 64-114.

Learn the gist of 64-114 which is as follows:-- "What clerk or court to appoint administrator of an estate; who to be preferred.--In the case of a person dying intestate, the jurisdiction to hear and determine the right of administration of his estate shall be in the same court, or before the same clerk who would have jurisdiction as to the probate of his will, if there was a will. Administration shall be granted to the distributees who apply therefor, preferring first the husband or wife, and then such of the others entitled to distribution as the court or clerk shall see fit. But any of the said distributees may at any time waive their right to qualify in favor of any other person to be designated by them. If no distributees apply for administration within thirty days from the death of the intestate, the court or clerk may grant administration to one or more of the creditors, or to any other person."

### *Necessity of Witnesses At Probate*

117. A will was signed by three witnesses. One is dead, one signed only by mark and has no recollection of signing, and the third is out of the jurisdiction. Is the will entitled to probate in a state requiring three witnesses? Gillis v. Gillis, 23 S.E. (Ga.) 107, 30 L.R.A. 143. V. 64-83.

Yes. If a witness is dead his handwriting must be proved, if possible. If a witness is available it seems that he may testify as to the facts of attestation, and (at least if other witnesses cannot be found) his testimony is sufficient. Witnesses outside the state or unable to attend because of sickness may give their testimony by deposition. If a witness has forgotten or lies the will should



not be at his mercy since the witness is one required by law and proponent must call him if available. If it is impossible to find any of the witnesses or to prove their handwriting there is a rebuttable presumption of regularity. If the instrument is over thirty years of age, regular on its face, and comes from proper custody the ancient document rule that such instruments are self proving would apply in which case even available witnesses might not have to be called.

*To contest a will must have substantial interest*

118. T left all his property to his son's wife. C is a creditor of the son. The son is T's only heir. C wishes to contest the will on the theory that it is a forgery. Discuss. *Lee v. Keech*, 133 A.835, 46 A.L.R.1488.

In order to contest a will the contestant must have some substantial interest in the matter. A general creditor of an heir does not have a sufficient interest. Lien creditors of the heir may have although even that is doubtful.

119. An executor died. Does his executor succeed to his office at common law or in Virginia. V<sup>a</sup> 64-129

At common law yes. Under 64-129 no. If an executor dies before he has wound up the estate the court should appoint an administrator *abneta* (de bonis non cum testamento annexo, i.e. an administrator of goods not administered with the will annexed).

*Who gets the proceeds of insurance*

120. W owned a house. She took out fire insurance on it. W devised the land to H for life, remainder to X; and appointed H executor. W died and afterwards the house burned the policy still being in force. H collected the fire insurance and spent it. Shortly thereafter H died. X then sued the Insurance Co. Result? 11212.

In 10 Leigh(Va.) 536 it was held that where the building was totally destroyed and the premises came to the life tenant already insured the realty was in effect converted into personality, taking the form of the insurance money, and the parties thereafter had a life interest in the insurance money that they before had in the building. Hence, if the insurance company paid the corpus to the life tenant who was only entitled to the income thereon the payment was invalid and X may hold the Insurance Co.

*Death by Wrongful Act Statute*

121. X negligently killed Y.

(a) If Y has a wife, a child, and creditors and died intestate what are the duties of the administrator with respect to the claim against X?

(b) If Y has a child who has been disinherited by will in favor of H what are the duties of Y's administrator? V<sup>a</sup> 8-347 and 8-636.

(a) The death by wrongful act statute applies and not the law of intestate succession or of wills. The creditors are not the statutory beneficiaries. The administrator should collect the claim and turn it over to the statutory beneficiaries the wife and child--free from the claims of Y's creditors.

(b) even though the child has been disinherited by will he is in class 1 of the statutory beneficiaries and if he is the only member of that class the administrator should collect and pay the proceeds to him.

*When surety liable for rents converted by executor*

122. An executor collected rents from tenants and spent the money for his own purposes. Are the sureties on his bond liable?

(a) If the executor was not given the power to rent land and the rent collected was not rent in arrears when the testate died he had no mere right to the rent than you. The rent collected then is no part of the property for which he is liable as executor and hence his bondsmen would be no more liable than if he had robbed a man of \$1,000.

(b) But if the rent was rent in arrears when the testate died, or if is rent from realty held for the life of another(which by statute is part of deceased's estate), or if he had been given the right to collect the rent by the will--in these cases the rent collected would be fiduciary assets in his hands as executor for which his bondsmen would be liable.



*Wills and Intestate Succession (continued)*  
*Liability of Executor for money borrowed*

123. A was a contractor under contract to erect a building. He died and his wife qualified as his executrix. She borrowed \$900 on two notes which she signed "Lulu M. Betts, Ex." This money was used to pay for material and labor. The estate did not have sufficient funds to complete the building and can pay only 10 cents on the dollar. Is the estate liable on the notes? Is the widow? *Exchange Bank v. Betts' Estate*, 176 F.560, 3 A.L.R. 1604.

The estate is not liable on the notes. The executrix is not the agent of the estate to borrow money on the bare facts stated. The widow is personally liable unless she expressly negatived such liability in the note. The party lending her the money relied upon her with whom he dealt as it would be unreasonable to suppose he did not contract for anyone's personal liability.

*Va. Statute giving Admin. Authority to renew note*

124. A note owned by A became due one day after an administrator was appointed. Can he renew the note so as to bind the estate on the renewal note? V#4149(71)a.

In the absence of a statute he would have no authority to renew the note. As this often worked a hardship, V#4149(71)a provides that if the deceased was a maker, surety, or indorser of any note or other obligation to pay money and it is due or becomes due the personal representative shall have power to renew same in the same capacity and for an amount not greater than the sum due with interest for a period not in excess of two years from the date of his qualification and provides further that the personal representative shall not be personally liable in such event.

*Funeral Expenses*  
 125. H and W were husband and wife. W died. She has property worth \$400 and owes debts to the extent of \$400. Should the funeral expenses be paid out of W's \$400, or personally by H? See *Hall v. Stewart*, 135 Va.384, 116 S.E.469; *Edwards v. Cuthbert* 134 Va.502 at pp.507-509.

This simple question is surprisingly complex. In *Hall v. Stewart* (supra) the wife's estate consisted of realty. The husband paid the funeral expenses and sought reimbursement. It was held that the funeral expenses were not a debt of the wife but a common law obligation of the husband. Besides the statutes about descent of land say nothing about funeral expenses. Hence the husband was not allowed to recover (two judges dissenting).

In *Edwards v. Cuthbert* (supra) the burial expenses were incurred by the executors and the property of the wife was personal. The husband renounced her will and claimed half the personal property. The executor who was also the legatee sought to charge the husband for his wife's funeral expenses on the ground they were his debt.

Held: Husband not liable. V#4-147 expressly provides that no part of decedent's personal estate shall be applied to decedent's debts until the costs of administration and funeral expenses have been paid and V#4-11 states that there shall be no distribution until the same expenses have been paid. Hence, where the estate is personal the funeral expenses should be paid from her estate and the husband is not liable as a husband if her personal estate is sufficient to take care of them.

*Executor liable for debt pd. barred by S/L*

126. An executor paid a debt barred by the statute of limitations. If there were no doubt about the genuineness of the debt has he acted properly? See 24 C.J.297, #907 and notes 16 and 21 thereto; V#26-5.

No. He is required to make any defense the law allows. Otherwise he is not entitled to a credit for the amount paid. He cannot be allowed to be generous with some one else's property especially where, if the some one else were alive, some reason for non-payment might be forthcoming.

127. X mortgaged Blackacre to secure a \$2,000 note due on demand. Seven years later X died intestate. His administrator paid off the note without waiting for a formal demand. X's widow objects to the \$2,000 credit. Discuss.



If the note was due and not barred the administrator is within his rights in paying off the debt without waiting to be asked for it. A secured debt is a debt and the primary fund out of which to pay debts is personal property at large. However, since this was a demand note, the statute of limitations has run on it and there is no personal liability on the note. If the mortgage contains a promise to pay the statute probably has not run on that promise in which case the administrator should pay on surrender of the note.

128. T died insolvent. Arrange the following items in the order of their preference.  
Funeral expenses \$500; hospital bill \$300; doctor's bills \$400; due on income tax to Federal Government \$100, due on note to A \$3,000 reduced to judgment; due \$500 for converted trust funds of which T was a trustee. See V, 5390, and 5392.

The judgment lien to the extent of the value of the property upon which it is a lien has first priority as the deceased only has as his own his equity above the lien. There is no reason why a mortgagee or lienor should pay the funeral expenses of an insolvent debtor.

Next in order of priority come funeral expenses not exceeding \$200 and costs of administration. Then by numbered paragraphs:

1. Debts due the United States,
2. Debts due doctors, hospitals, nurses, and druggists rendered in connected with the last illness not to exceed \$50 for each.
3. Debts due this State,
4. Taxes and levies assessed upon the decedent previous to his death, and the lien for said taxes shall not be considered as giving priority over the amounts provided in the three preceding paragraphs.
5. Debts due as trustees for persons under disabilities, as receiver or commissioner under decree of court of this State, as personal representative, guardian, or committee where the qualification was in this State, and for monies collected by anyone to the credit of another and not paid over,
6. To all other demands, except,
7. Last of all, to voluntary obligations.

Applying the above to our problem and assuming that the value of the property subject to the lien exceeds the lien, so that the judgment lien for \$3,000 is taken care of, the order would be (a) Funeral expenses \$200, (b) Under 1 the income tax due the United States, (c) Under 2 \$50 to the hospital and \$50 to the doctors, (d) Under 5 the \$500 converted trust fund if he were a trustee for a person under disability (e) Under 6 the balances due to hospital and doctors, as for the balance of the funeral expenses, if they were reasonable under the circumstances, the court will allow reimbursement after debts have been paid.

129. T made a will in which she left X \$4,000. During T's lifetime T gave X \$3500. After T's death is X entitled to \$4,000 or \$500?

In the absence of evidence to the contrary only \$500 would be due as the \$3500 payment would prima facie operate as a partial donation of the legacy.

130. T owned a \$3,000 note secured by a mortgage. He bequeathed this note to B. When the note became due it was paid and the proceeds were deposited in the X Bank. T died. What are B's rights? See *Hoffett v. Hoon*, 136 N.E. (Mass.) 123.

A specific bequest is ordinarily adcoemed (taken away) if the specific thing bequeathed ceases to exist.

Note: There are three kinds of legacies as follows:

(1) A general legacy--To X I leave \$5,000. Since no particular \$5,000 is designated this is not a specific legacy.

(2) A specific legacy--To X I leave my Hamilton watch.

(3) A demonstrative legacy--To X \$5,000 payable from the sale of (described) property. In the instant problem if the bequest had been \$3,000 with the note indicated as the source thereof the bequest would not have been adcoemed for, in the case of demonstrative legacies, if the designated source fails the amount of the legacy is still due.



131. Would the result in 130 be the same if T had been incurably insane from the time payment was received by his committee? See in Re Cooper's Estate, 123 Atl. (N.J.) 45; 30 A.L.R. 673.

If T had not been insane he might have given the money collected to B, or he might have changed his will so that B could still take. The committee can do neither, so most courts have allowed B to take under those circumstances.

132. T devised Blackacre to A, his automobile to B, and \$5,000 cash to C. He had no other assets. If it will take part of his estate to pay his debts what will be the order of abatement? Learn the order in which funds of an estate should be applied in Virginia to the payment of legacies and devisees where there is not enough to go around. French v. Vradenburg's Ex'rs, 105 Va. 16, 52 S.E. 695.

The order in which the different funds or subjects of property constituting the estate of a deceased testator shall be applied to the payment of his debts is as follows in Virginia:

(1) The personal estate at large, not exempted by the terms of the will (as where specifically bequeathed) or necessary implication.

(2) Real estate expressly set apart by the will for the payment of the debts.

Note: Such a setting apart does not exempt the personal estate at large from being the primary source. To have this effect the realty must not only be charged but the personalty at large must be exonerated.

(3) Real estate descended to the heir.

(4) Real or personal property expressly charged with the payment of debts, and then, subject to such charge, specifically devised or bequeathed.

(5) General pecuniary legacies,

(6) Specific (and demonstrative) legacies,

(7) Real estate devised by the will.

Applying the above to our problem C first loses his general legacy; B next loses his specific legacy; and last of all C loses his specific devise of Blackacre.

133. T owned two tracts of land, tract A, and tract B. He devised tract A to X and tract B to Y. Later T mortgaged tract B, and still later died leaving only one-half enough personal property to pay the mortgage debt. Does X own tract A free from any duty to pay off any part of the balance of the mortgage debt? See Frasier v. Littleton as summarized in 52 S.W. 695 on p. 696.

Held that since neither tract is charged with the payment of debts and each has been specifically devised the equities of X and Y are equal and equity never exercises its jurisdiction so that one equal equity will be enforced to the detriment of another equal equity. Hence X need not help Y pay off the mortgage on tract B.

134. Note well this case. X mortgages Blackacre to Y to secure a loan of \$5,000 evidenced by a note. In his will X devises Blackacre to B saying nothing about the mortgage. Upon X's death should his personal representative pay off the mortgage; or does B take the land with the burden?

A secured debt is a debt. The primary fund with which to pay debts is the personal property at large and the last thing is realty specifically devised. Hence the personal representative should pay off the mortgage even though this might result in legatees not getting all or any of their legacies.

134a. T expected to have an estate of \$3,000. Accordingly he bequeathed \$2,000 to his wife, W; \$2,000 to his son, S; \$2,000 to C in payment of a debt barred by the statute of limitations; and \$2,000 to the D Charity. When he died his estate was worth \$4,000 net. Distribute it. See Matthews v. Targarena, 55A (Md.) 60, 10 Ann. Cas. 153.

Voluntary obligations are paid last. Here the wife gave up her right to renounce the will so she is not a pure volunteer and the creditor at one time gave value. Hence the wife and the old creditor get \$2,000 each and the son and D charity nothing.



135. Deceased had \$3,000 at the time of making his will and bequeathed \$1500 to each of two legatees, and subsequently purchased realty with the \$3,000 and died without personalty. What are the rights of the parties?

Real estate descended to the heir abates two steps before general legacies abate. Hence the legatees can enforce their legacies against the heir to the extent of the value of the realty.

136. If a gift of personalty or of realty lapses does it fall into the residuum in Virginia? See V 64-65 and annotations thereto.

Yes. Example: X devises Blackacre to Y who predeceases X leaving no issue. X's will contains a residuary clause which leaves all the rest of his property to Z. Contest between X's heir and Z. The latter wins as the law does not presume that X under these circumstances intended to die partially intestate.

137. T left certain property by will to A and B jointly. A died before T but T never changed his will. B; the residuary legatee; and A's heirs all claim A's one half. Result? See V 64-65 and annotations.

At common law B would win as the gift to A lapsed on his death and A and B were the joint owners of an expectancy and survivorship is an incident at law to joint ownership. By V 64-65 A's half falls into the residuum unless A left issue, in which case his half would go to his issue unless there was something in the will to indicate a different desire on T's part.

*Residuum cannot fall into the residuum*

138. The residuary clause of T's will read as follows: "All the rest of my property I leave to A and B to be equally divided between them". A died before T leaving no issue surviving him. Does A's one half of the residuum go to B or to the statutory distributees?

Here the lapse is in the residuum itself and the residuum cannot fall into the residuum. Hence in this case A's one half goes to his statutory distributees as per the laws of descent and distribution.



Parol testimony as to the meaning and interpretation placed by testator on his written words was clearly inadmissible citing 28 R.E.L. p. #2 0,251 which reads in part as follows: "The general rule is that parol evidence is not competent to prove a testator's declaration prior to or after the execution of his will to aid in its construction, nor are such declarations admissible even if made at the very time of execution. Since the testator's intention is to be ascertained from his written will, his parol declarations of his understanding of the meaning of the will are not admissible for the purposes of interpreting his testament. It is obvious that if verbal declarations were admitted wills might be overthrown which expressed the intention of one who could not dispute evidence of his declarations, nor give any explanation of them and thus grave evils would result."

(Exceptions sometimes recognized—1. Part of res gestae. 2. E. plain latent ambiguity. 3. To rebut a resulting trust arising merely by implication of law).

## WILLS

190 S.E. 91.

X filed a bill in equity to establish the contents of a will alleged to have been improperly destroyed. What degree of proof is needed to establish the contents thereof. The proof must be "strong and conclusive" in such cases.

WILLS—Conflict of Laws *Widow v. Sister*

194 S.E. 804.

X died leaving a will in favor of his widow. X had only personal property. By the law of N.Y. a sister would take the personal property if the will was void. X's sister wishes to show that the will was obtained by X's widow undue influence and hence that the will is void. X's sister claims that X was domiciled in N.Y., and was hiding out in Virginia because he was a married Catholic Priest. The evidence indicated that X had come to Virginia to make it his home, and hence he was domiciled here. Can X's sister contest the will in Virginia? No. She has no interest, for if the will is void his widow nevertheless gets all the personal property by intestate succession since there were no issue of the marriage.

WILLS *Deed or Will?*

194 S.E. 799.

T deeded land to X and delivered the deed to X unconditionally. The deed stated that the property is hereby transferred to X at T's death in consideration of X's support of T for the rest of T's life.

The heirs of T claim that the deed is in reality an unwitnessed will and hence void. Is the contention sound?

No. The property passes at once with only the enjoyment postponed until the grantor's death, and hence the instrument is not testamentary in character.

WILLS *Presumption of Fraud—when draftsman is beneficiary & in position of trust*

197 S.E. at 405

1. "We have repeatedly subscribed to the principle that where the draftsman holds a position of trust or confidence, and is himself made a major beneficiary in the will, his participation creates a presumption of fraud.—It is necessary to overcome this presumption by evidence which satisfies the jury, and it is for the jury to determine whether the burden has been borne."

2. Verdict where issue is devisavit vol non is entitled to same weight as in an issue of fact in common law action.

WILLS—Equity *Jurisdiction to impeach will & setting*

197 S.E. 422.

A Virginia statute authorizes an interested person who was not a party to probate proceeding to proceed by bill in equity to impeach or establish a will. Plaintiff also asked for an accounting from an executor who had already qualified.

Has the court jurisdiction over this latter request? The jurisdiction here arises by statute and not by the general rules of equity. The court is limited to try the single issue devisavit vol non, and when that issue has been duly determined the court's jurisdiction is ended.



The principle that equity, having taken a case, will give complete relief has no application where jurisdiction is based upon a statute, but the statute in such a case limits the court's jurisdiction to the matter covered by the statute.

WILLS *Anti-lapse Statute V 64-64* 198 S.E.466.

By his will X left \$10,000 to trustees to pay \$250 per month to A until the \$10,000 was exhausted. A died first leaving children, and X did not change his will. Contest between the residuary legatee and the children of A. Note residuary legatee's contention: Testator had undertaken to create a trust which has turned out to be a trust for the benefit of one who had predeceased him and that one cannot set up a trust for the benefit of a dead man.

Held: A beneficiary under a trust is a legatee under our anti-lapse statute V 64-64. Hence A's issue take as the substituted legatees of the deceased ancestor just as if their names had been inserted in the will by the testator himself.

WILLS *Presumption in favor of per capita* 198 S.E.474.

Q. All other things being equal does the law favor per capita distribution or per stirpes distribution?

A. There is a presumption (rebuttable, however, by a very faint glimpse of a contrary intention in the context) in favor of a per capita distribution.

WILLS 198 S.E.474, 475.

Per capita or Per Stirpes? 1. To A and B and the children of C. 2. To A, B, and C, and their children. 3. To the descendants of A and B. 4. To my son, James, for life, and at his death to the children of any of his brothers who may then be dead. 5. To my son, James for life, and at his death to his brothers surviving him or the children of any of his brothers who might then be dead.

The first four are per capita. The fifth is per stirpes. The word "or" indicates that the gift to the children of deceased brothers is substitutional for the gift to the brothers in the event the brothers should first die.

WILLS *Advancement V-64-63* 198 S.E.902.

Testator had three children. He left one of these children \$10,000 as a legacy. Before his death he conveyed a piece of land worth \$9,500 to this child by deed of gift. Testator died. Is the child entitled to \$10,000 or only to \$500? Code 64-23 reads, "A provision for or advancement to any person shall be deemed a satisfaction in a whole or in part of a devise or bequest of such person, contained in a previous will, if it would be so deemed in case the devisee or legatee were the child of the testator; and whether he be a child or not, it shall be so deemed in all cases in which it shall appear from parol or other evidence to have been so intended." Held: (one judge dissenting) that this statute does not change the common law rule of presumed intent, that the burden of rebutting this presumption is on the legatee, and as he has failed to carry this burden, he is only entitled to \$500.

WILLS 200 S.E. at 658.

State the duty of an executor with respect to the amount of care he should use.

"Nothing more is in general required than that he should act in good faith, and with the same prudence and discretion that a prudent man exercises in his own affairs." If more than this was exacted it would discourage competent persons from acting as fiduciaries.

WILLS 7 S.E.2d 877.

The law of undue influence: It is a species of fraud. He who alleges it must prove it by clear and satisfactory evidence. It cannot be based upon bare suggestion, innuendo, or suspicion. Before undue influence can be made the ground for setting aside a will it must be sufficient to destroy free agency on the part of the person executing the instrument. It must amount to coercion or duress.



While proof of undue influence may rest entirely on circumstantial evidence, it should not be lightly inferred from circumstances which are capable of innocent construction.

Now apply the above to the following case: Testator had 7 children by his first marriage. After the death of his first wife he married C who had been his housekeeper for 60 days. Ten years later Testator devised almost all his property to C for life, remainder to his oldest son who had married C's daughter by a former marriage. T had two years after this to change his will, if he wished. He had had two slight strokes of paralysis but had fully recovered. He drank quite a good deal, but was not drunk when he made his will. The trial court held the will invalid because of undue influence. Was this error? Yes, case reversed.

WILLS *Holographic Will (Revocation)* 7 S.E.881.

T made a valid holographic will. Later he wrote beneath the will and above his signature, "this will is null and void after this date Jan. 12, 1938." There was no new signature. The original will was witnessed by two witnesses. Is the will now entitled to probate?

Held: No. A holographic will remains a holographic will regardless of the presence of attesting witnesses. In the absence of fraud and other like defenses, changes, interlineations and erasures in a holographic will, made after the execution of the will and wholly in the handwriting of the testator, do not invalidate the will if testator's name still remains in such manner as to manifest it was intended as his signature. The will then becomes re-executed with all the changes as valid and subsisting parts of the new will. With like effect the same rule applies to a valid revocation. In other words, in order that the revocation be valid, it was not necessary that, if he signed again if testator's name remained in such manner that it was manifestly intended by him as and for his signature to the revocation.

WILLS *Testamentary Intent* 7 S.E.2d 115.

T died leaving an instrument entirely in his own handwriting as follows: "Everything left to sister for life times--(signed) C.A. Grimes". He had two sisters. Is this a valid will?

Held: Yes. Case of 70 S.E.491. "Everything is Lous". distinguished. The word "is" refers to the present and is not testamentary in character, but the word "left" is commonly used to indicate testamentary intent.

When it appears that he has two sisters this creates a latent ambiguity. Parol evidence is then admissible to show that he always called one sister "sister" and the other sister "Rhody".

The fact that testator had had epileptic fits for 29 years did not necessarily make him incompetent to make a will as long as he knew what property he had, who were the natural objects of his bounty, and how he was disposing of his property. He had a right to make an unjust will if he had testamentary capacity.

WILLS--Trusts 7 S.E.2d 891.

Two statements appear in this case that you should note.

1. Under Ch. 221 of our Code a probate court has concurrent jurisdiction with a court of equity, (and so if an estate is being administered by a creditor's bill in equity by one who has not filed proof of claims--the probate procedure will not lie)

2. If a party is a trustee, but has not qualified before a court as such, the commissioner of accounts has no general supervision over his accounts, (and hence the statutory provisions relative to surcharging or falsifying a fiduciary's account under control of the commissioner of accounts have no application.

WILLS IMPORTANT *Two wills offered to probate* 9 S.E.2d 308.

In 1934 T's will was admitted to probate. In 1939 a later and inconsistent will was offered for probate. Should it be admitted?



Against admission: By statute V, §5259 if a will is admitted to probate it can be attacked by bill in equity within one year. The admission of a new inconsistent will is in effect a collateral attack on the prior probate proceedings and cannot be allowed after the one year statute. Otherwise there would be no statute-of-limitations on the probate of a later will and all real estate titles based on devise would be clouded. Some decisions elsewhere and Justice Gregory adopt this view.

For admission: One of the leading cases on this subject in the U.S. is Schultz v. Schultz decided in 1853 by our Supreme Court of Appeals. The court there said (and this is the weight of authority) that the probate of the second will is not a contest within the meaning of Code §4-61. It does not attack the due execution of the will previously admitted. It is true that both instruments cannot stand. But the first will is revoked by the act of the testator in executing a subsequent will, and not by the judgment of the court in admitting the later will to probate. The result flows not from any proceeding attacking the probate of the first will, but from the law which gives vitality and force to the last testamentary act of the testator.

Schultz v. Schultz followed (Mr. Justice Gregory dissenting in an able opinion) and second inconsistent will admitted to probate upon proper proof being offered.

WILLS--Evidence Compare these 3 cases

177 Va. 509.

Case 1. Devise to John S. Slaughter. There is no one by that name. Is extrinsic evidence admissible to show that testator meant John S. Hawkins? (p. 516)

Case 2. Devise of Lot 6 in square 403. Testator owned no such lot, but did own Lot 3 in square 406. Is extrinsic evidence admissible that testator meant the latter lot. (p. 516)

Case 3. The present case--Gift of 5 shares of C stock to X. Testatrix owned 10 shares. She made no other disposition of the other 5 shares, and later wrote X that she had left her all ten shares. Is this evidence admissible?

Held: In cases 1 and 2 there is a latent ambiguity and parol evidence is admissible to clear same, but five shares is 5 shares, and not ten. There is no ambiguity. Thus in case 2 if testator had owned both pieces of land extrinsic evidence would have been admissible, and in case 1 if there had been a John S. Slaughter extrinsic evidence would have been inadmissible to vary the plain meaning of the will. Note: that in case 3 the rule was applied in spite of the fact that it resulted in partial intestacy which, though the law does not favor, is still fairly common.

WILLS *Destruction of Revoking Will does not revive prior will* (Bar Exam) Dec. 1943.

In 1938 A made a will leaving all of his property to his son John. In 1940 he made another will leaving all of his property to his daughter Susan. Shortly thereafter Susan married a very rich man and A, feeling that her husband would provide for her, decided to leave his property to his son. He thereupon, in the presence of witnesses, destroyed the will he had made in 1940. After A's death John claimed A's property under the 1938 will. How should the Court rule?

Since the second will was totally inconsistent with the first it revoked the first will in Virginia. The destruction of a revoking will does not revive a prior will. As Code §4-30 reads, "No will or codicil or any part thereof, which shall be in any manner revoked, shall, after being revoked, be revived; otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required..."

WILLS *Defenses to Juris for Probate* (Bar Exam)

Administration on the estate of Jones was granted by A by the Circuit Court of N County, in this State, the court finding as a fact that Jones died a citizen and resident of N county. A duly qualified as administrator in accordance with the proper statute. One D admittedly owed Jones a \$1,000. On D's refusal to pay the sum, A, as administrator of the estate of Jones, brought suit against D to recover the amount. D set up alternatively the following defenses: (1) That Jones was not dead; (2) that Jones died a citizen of Maryland, and that administration of his estate had already been granted by a probate court in that State. What is the effect on A's suit of each of these defenses, taken alone, if true? (1) If Jones is still alive the court had no jurisdiction to appoint A as administrator, and the defense is good.



(2) Since Virginia has the same right as Maryland to determine whether or not Jones was domiciled in Virginia or in Maryland it is immaterial in Virginia that a Maryland Court had already granted administration, and that defense is had.

WILLS And Administration Duty to wind up not run business Bar Exam Dec. 1943.

A was the owner and operator of an automobile repair shop in the city of Norfolk, Va. After his death his son, X, qualified as administrator of the estate. X found that his father owed debts amounting to \$5,000 and had assets amounting to \$5,000. He consulted several of his father's business friends who were engaged in a similar line of business, and was advised, that, if he would purchase certain modern equipment, the business would unquestionably make sufficient profit to pay all of his father's debts in full. Believing this to be true, and actuated only by the desire to see that the debts were paid, he invested \$1,000 of the estate's money in the necessary equipment and continued to operate the business. However, the war resulted in the rationing of gasoline and in a short while the repair business fell off and he was forced to close the business after losing \$2,000. The creditors brought a suit against X to recover the said \$2,000. Can they recover?

It is the duty of the personal representative to wind up a business which his deceased father operated and not to run it. If he does the latter, he is personally liable for any loss that may result whether due to his fault or not.

WILLS Compensation to Executor

200 S.E. at 660.

Facts: The executor did not make annual ex parte settlements of its accounts, as it is required to do under Code 26-19. In spite of that fact the court allowed it \$1,000 compensation as executor. Was this proper?

Held: Quoting 143 S.E. 495, "The general rule on the subject of the fiduciary's compensation is that the amount thereof, or whether for maladministration, he should be denied all compensation is in the sound judicial discretion of the court to be exercised according to the circumstances of the case. In Virginia the practice is to allow 5% commission upon receipts, unless reason to the contrary is shown."

In the instant case the delay in final settlement was due to the conduct of the beneficiaries themselves and they were constantly informed as to the condition of the estate. Hence it was not an abuse of discretion to allow reasonable compensation.

WILLS

180 Va. 394.

(a) An instruction to the jury in a will case was substantially as follows: "The fact that S was the chief beneficiary, and that S stood in a fiduciary relationship to testatrix raises a presumption of fraud". Held error unless S drew the will. In the instant case a third party drew the will so the instruction was erroneous.

(b) The burden of proof to show testamentary capacity is on the proponent—but, the burden of proof to show undue influence is on the contestant who claims undue influence.

(c) Undue influence cannot be shown directly by the statements of testator, for they are hearsay. (But statements of the testator which tend to show a relevant mental state are admissible as evidence of that mental state).

WILLS Revocation Rebuttable Presumption of Destruction Overcome 181 Va. 34.

T made a will in favor of her adopted grand-daughter in May, 1939. She died in June 1940, at which date no will could be found. T was the last person in possession of the will. The presumption in such a case is that T destroyed the will with intent to revoke same. The evidence to rebut this presumption must be strong and conclusive.

The following quotation (p. 39) is worthy of your attention: "We have conclusive evidence of the testatrix's deep affection for her adopted granddaughter, continuing over a long period and down to the testatrix's death; repeated declarations of the testatrix before the execution of the will of her intent to leave all of her property to this granddaughter; repeated declarations of the testatrix subsequent to the making of the will, and only a short time before her death, that such a will had been written, was in existence, and was still in her possession; the entire lack of evidence of any cause or reason for the testatrix to have made a change in this testa-



mentary disposition of her property; and conclusive proof of the lack of affection on the part of the testatrix for her next of kin, the appellants, or any of them. In our opinion this is amply sufficient to support the conclusion that the testatrix did not destroy her will with the intent to revoke it..".

#### WILLS--Burden of proof in contest cases

181 Va.67,79-80.

The trial court in a will contest case in which there had been an ex parte probate refused to allow contestants the right to open and close the final arguments. Was this error?

Held: No. The side with burden of proof has the right to open and close. The burden of proof is on the proponents even if there has been an ex parte probate. The fact that a presumption of testamentary capacity may aid proponent and cast upon contestants the burden of going forward with the evidence does not change the burden of proof, and hence proponents have the right to open and close.

#### WILLS--Ademption

*Ademption*

181 Va.395.

T bequeathed a note to her nieces. The note was secured by a purchase money mortgage. All the rest of T's property was "bequeathed" to the C charity. Before T died the note was paid. T kept the money intact and separate frequently stating that she wished her nieces to have it. T died. Are the nieces or the C charity entitled to the money?

Held: There is no ademption where testator intends none. Here the evidence is conclusive that none is intended and hence the nieces take. Note that if T had mingled the money received from the note with his other money and made no statements of intention then there would have been an ademption of a specific legacy.

Note: In the above case all of T's residuary property other than the money was real property. The C charity argued that the word "bequeathed" applied to personal property and hence indicated an intention that the money go to them. The court held that "bequeathed" was merely a misnomer inadvertently used by T.

Note: 181 Va.869 omitted because of 1956 change in law.

#### WILLS *Executor's Commission*

181 Va.943.

Q. If an executor is directed to sell realty and pay the proceeds to Y, and Y elects to take the land instead is the executor entitled to the commission he would have received had he sold the land?

A. Yes, but since he did not sell it the commission should be ordinarily 5% of the appraised value of the land.

Q. If an executor is a lawyer, and the estate is involved in proper litigation is the executor entitled to compensation as a lawyer also, if he handles the litigation for the estate?

A. Yes. While he could have hired another attorney he can do the work himself and is entitled to a reasonable fee for the extra legal work.



T devised realty and personalty to his wife with full power to dispose of same but whatever may remain undisposed of at the time of her death to his brother, B.

Q. What estate has the wife? A. Under the principal laid down in May v. Joynes one who has the absolute disposition of property has the fee. The attempted gift over is said to be void for uncertainty and repugnancy.

Q. Is evidence admissible to show that T meant to give his wife a life estate?

A. No. Such evidence may easily be imagined or invented; and, when fraudulently produced would be difficult of detection. The pertinent inquiry is not what the testator meant to express but what the words he used do express.

## WILLS

*Holographic Will*

183 Va. 453.

Is the following holographic instrument entitled to probate holographic will  
"Having had my other wills examined by a lawyer, at his suggestion I am hereby making a will in my own handwriting. "I, Dr. Robert Edward Hamlet, do hereby declare this to be my last will revoking all prior wills. "I want all my just debts paid. "I want my brother to have Blackacre. "I want the Cumbeys family to have Whiteacre. "I want my son, John, to have the rest of my property. "Done by me of good and sound mind on this 13th day of Nov. 1941. I appoint John Hamlet as executor to serve without bond". No signature at end.

Held: Not entitled to probate because not signed in such a way as to make it manifest that testator intended it to be a signature as required by V. 64-51. His signature in the second paragraph only indicates his intention to make a will. There must be a concurrence of the animus testandi and the animus signandi--that is, the intention to make a will and the intention to sign the instrument as and for a will". In this case we have the former but not the latter.

Note: Compare the case with 102 Va. 467 where the concluding sentence was, "I, John Dinning, say this is my last will and testament." Held good, as that is what the signature means anyway.

## WILLS

*Presumption that Will properly Executed*

183 Va. 649

If the attesting witnesses forget ~~some~~ all of the facts essential to the validity of the will, is it entitled to probate?

Held: This does not avoid a prima facie case made out by proof of the genuineness of the signature of the testator and the subscribing witnesses. The presumption that the will was properly executed will uphold it in the absence of clear and satisfactory proof to the contrary.

## WILLS

183 Va. 649, 655.

Under what circumstances does a proponent of a will who has made out a prima facie case still have the burden of going forward with the evidence?

In a case in which all the following elements are present: (1) Where the draftsman holds a position of trust and confidence, and (2) Where he himself is a major beneficiary, and (3) Where the testator is sick and inclined to yield readily to persuasion. "In such a case not only does the burden of proof not shift but the burden of producing evidence continues likewise unchanged".

## WILLS

183 Va. 663.

Ellen Gayle made a will in favor of A, B, and C. After the death of C she wrote A as follows: "I will now have to make a change in my will. I want you to have C's share. Just hold this little piece of paper in case there should be trouble.

(Signed) Sister Ella"

Is this valid holographic codicil?

Held: Yes. There was testamentary intent as she says, "I will Now have to change my will". The admonition to keep the paper in case of trouble shows she meant the letter to be more than a friendly epistle.



WILLS *Personal Property - Intention of Testator* 184 Va. 111.  
Testatrix left her "tangible personal property in her house" to her four nieces and her land and all other property to M. Everyone thought she was a poor widow. After her death \$6,000 in currency, gold coin, and silver was found cleverly hidden here and there in the house. As between the nieces and M who is entitled to the money?

Held: Justice Holt dissenting, that the nieces took the money under the facts of this case. Testatrix was unlettered and probably was unacquainted with the distinction between tangible and intangible. She would naturally wish to prefer her nieces over a stranger to her blood. It is the duty of the court to carry out her presumed intentions, and it is permissible to look at the circumstances to ascertain that intention. Blood is thicker than water, and unless the nieces whom she thought of first in the first clause of her will, get the money, they would only have \$325 worth of old furniture between them.

#### WILLS *Burden on Proponents of will*

184 Va. 926.

Eight months after X's death his second wife found a plain card on one side of which was written "Mrs. X is a humbug. Dont you think so Har Ha. but I", and on the other side, "owe every thing to her and leave all to my wife fee simple. X Nov. 3-1942". This card was admitted to probate by the clerk, as X's holographic will. Contestants contend that the will side of the card is a forgery, but failed to prove their contention by a preponderance of the evidence. Nevertheless the trial court revoked the probate. Did the court do the correct thing if the evidence was evenly balanced?

Yes. Proponents have the burden of proving that the will was X's will and entirely in his own handwriting. If the evidence is only evenly balanced they have not sustained that burden. Ex parte probate has no effect on the rules about burden of proof since adverse parties have not yet had their day in court.

#### WILLS *Liability for debt on devised land subj. to mortgage* 185 Va. 160.

X purchased land subject to a mortgage. Later he agreed with the mortgagee to assume the mortgage and did so. When X died he devised the land to Y. Is the primary liability for some \$6,000 still due on the mortgage on the land devised to Y, or on X's personal representative?

Held: Personal property at large is the primary fund to pay all debts unless there is something in the will to indicate a contrary intent. Hence X's personal representative should exonerate the land. (A lone Va. case 89 Va. 96 holding the contrary was expressly overruled.)

#### WILLS *Legacy given to cr. deemed in satisfaction of debt unless intention contrary* 185 Va. 161.

X was in poor health. He promised his sister that he would pay her well if she would help him manage his affairs. He left her property by his will worth some \$8,000 and made other generous provisions for her. The sister put in a claim against X's estate for \$8,000 the amount of which was reasonable and amply corroborated. Should it be allowed?

Held: No, "It is well settled that a legacy given by a debtor to his creditor, equal to or greater than the debt, is, in the absence of proof of a contrary intention, deemed to be in satisfaction of the debt. If the creditor accepts the legacy the doctrine of equitable election precludes his recovery of the claim against the testator's estate."

#### WILLS *Appointment of Admin.*

185 Va. 418

X died testate leaving his property to his widow for life, remainder to his children and nominating his wife executrix. The widow died before the estate was settled. There were four children, A, B, C, and D. A was the first to apply for the position of administrator de facto, and was appointed by the clerk without consulting the rest of the children some of whom were on bad terms with A. The other children petitioned the court to remove A and to appoint A and B jointly. This the court refused to do. B, C, and D appeal. What results.



Held: Affirmed. A was in the preferred class along with B, C, and D. He was first in time to apply and hence first in right. The clerk of court has the right to prefer one distributee over another. A should not be removed except for cause. The court should not compel two brothers who are on bad terms with each other to act as joint administrators as that would be inviting trouble.

WILLS *Intestate Succession ; Presumption of Destruction* 185 Va. 773.

(a) Col. Tate left a net estate of \$400,000 in personal property and \$100,000 in realty. He was survived by his widow and four nephews and one niece, children of a deceased sister. If he died intestate, how would his property be distributed?

The \$400,000 would all go to his widow in fee simple. Since there are no issue the widow would get all the realty instead of just a third, for life, as result of 1956 change in the law of inheritance.

(b) Col. Tate made a will in 1933. Later he made an holographic will in 1939. Neither will could be found after his death in 1941. There was no convincing proof of the contents of the 1939 will. A jury found that his will of 1933 was the legal effective will. What result on appeal?

Held: In Virginia the statements of a testator are admissible to rebut or to reinforce the presumption that if a will is traced into the possession of a testator and cannot be found at his death, that he destroyed it with the intention of revoking it. Col. Tate's statements after 1933 and his actions here reinforce that presumption. So the will of 1933 is out. As to the lost 1939 will, the court will require the clearest evidence of its contents even aside from any question of presumption of destruction. Hence Col. Tate has died intestate.

Note: 185 Va. 933 has been omitted because of change in law.



*Revocation - Evidence*  
T executed her will, and her attorney kept a copy. T died some sixteen months later-- and the will she had executed and kept in her possession--could not be found. There was evidence that she distrusted some of her nearest relatives and that is why she prepared the will in duplicate. There was also evidence that while she was unconscious before her death her strong box had been tampered with. She had not told her trusted attorney that she was dissatisfied with her will. Proponent's evidence of the above facts was admitted, but the court refused to admit contestant's evidence that T had told W who was a close friend of T's for the past 25 years that T was displeased with B, the chief beneficiary, who had asked T for a loan and when refused became insulting and abusive. T said to W, "I am glad he showed his true colors; he will never get anything from me."

(1) Do the proponents have to prove the non-destruction of the will by the testatrix by a preponderance of the evidence? Their burden is far greater. They must prove it by evidence that is strong and conclusive.

(2) Did the court err when it excluded W's testimony? Held: Yes. Declarations of the testator made after the execution that show an intention not to revoke, or conversely, an intention to revoke, are equally relevant and it is error to exclude them.

WILLS *Judicial Estoppel (R/S)? Testamentary Capacity* 186 V. 630.

M was an old negro woman who had by hard work and frugality saved \$10,000. Someone cheated her out of \$1500 so her relatives asked A, an attorney, to take charge of the balance. He declined, but suggested the appointment of a committee for that purpose. He drew the petition and he was appointed committee after a finding that M was incapable of taking care of her property. A then told M that was all and that she could leave. M replied that A had not yet drawn her will, and A said that she was right, he had forgotten, so A drew up her will. On her death contestants claimed that proponents were judicially estopped to claim that she had testamentary capacity.

Held: In order to have judicial estoppel (res adjudicata) the issues must be the same. They are not the same in this case because it requires less mentality to make a will than to manage one's property where one must match wits with others who may have adverse interests. In order to make a will one must merely know what property he has, what persons are the natural objects of his bounty, and what disposition he is making of his property. The condition of being unable, by reason of weakness of mind to manage and care for an estate, is not necessarily inconsistent with capacity to make a will. Hence proponents are not estopped to claim the will is valid.

WILLS 186 V. 630, 637.

In a will contest case, of what evidentiary value, if any, is the fact that at the time M made her will a committee for her property had been appointed on the ground of mental incompetency?

Held: (1) It is not conclusive evidence of lack of testamentary capacity.

(2) In Virginia it is not even presumptive evidence of lack of testamentary capacity.

(3) But such fact is admissible in evidence for the consideration of the jury.

Note 1. The above principles are the same where testator has been committed to an insane asylum.

Note 2. The converse is true. Hence a judgment declaring testator of sound mind and refusing to appoint a committee is not conclusive evidence of his testamentary capacity. P. 638.



In a case in which the capacity of testatrix to make a will was challenged the beneficiaries were those who had done the most for her in her declining years. Is this fact proper to be considered in determining the question of testamentary capacity.

Held: Yes. If one does what an ordinary prudent sane testator would do that is evidence of testamentary capacity! Note: This is a corollary to the rule that an unnatural disposition of one's property is some evidence that he lacked testamentary capacity.

### WILLS Dower Property Taking under Will

186 Va. 914.

*Impt* T left his widow by his will \$7,000 and a life estate in all his land. The remainder in fee in the land was left to B who was T's brother. There was only \$4,000 in personal property. The court charged B's remainder in fee with the \$3,000 deficiency. B claims that devised realty is never to be charged with pecuniary legacies. Is B or the trial court correct?

Held: The trial court is right in this type of case. When the widow takes under the will she gives up the right to renounce the will and take what the law allows, and thus takes as a purchaser for value whereas B is a mere volunteer. Since she is a purchaser for value she has priority over B. Note especially that in a case of this kind not involving creditors of T the relative values of what is given the widow under the will and what she would take if she renounced the will are not considered. B's devise in fee has been impliedly charged with the payment of the widow's legacy.

If the rights of T's creditors were involved then the excess value of what the widow takes under the will over the value of her dower which she surrendered when she took under the will would be subject to the prior rights of T's creditors.

### WILLS Executor can attest to will

186 Va. 927.

V#5245 reads, "No person shall, on account of his being an executor of a will be incompetent as a witness for or against the will." Note the statute does not say an executor may attest a will. Contestant claimed that common law principles govern attestation by executors and hence the will was invalid because not attested by two competent persons.

Held: Since the only reason an executor was ever held to be an incompetent person was because of interest and since V#285 abolishes incompetency because of interest, and since the whole tendency of the times is towards competency despite interest, and since it would be strange to say that an executor was a competent witness in court for or against the will but not a competent person to attest the will, contestant's contention was not upheld. The will is valid.



### WILLS Holographic Will - Codicil

187 Va.463.

T wrote a valid holographic will in favor of his mother and signed it. Then he wrote "P.S. Real Estate and Government Retirement." Does the real estate go to the mother?

Held: No. The post script is unsigned and so is not signed in such a way as to make it manifest that the testator intended it as his signature. It is in reality an incomplete codicil. While the will is good the post script is inoperative.

Note 1. If there had been an addition or change in the will proper all in the handwriting of the testator then the original signature would validate the changes.

Note 2. The court also held that on the issue of finality of testamentary intent that only the physical will could be considered. Hence evidence that he told his mother at the time that he wanted her to have everything was not admissible.

### WILLS Incorporation by Reference

187 Va.511.

L's will provided that certain items of his be sold and the proceeds be given to his brother, B, to be used as he might later request. A letter bearing the same date as the will was sealed and addressed to B and in this letter was a direction to B to make a contract with a florist to deliver a perfect rose to Miss X every Saturday morning the said contract and letter to be kept absolutely secret. Two questions arose: (1) Is the personal representative under a duty to see that the contract is made? (2) If not who is entitled to the fund provided for the contract?

Held: The letter is no part of the will. It is not incorporated by reference because it was to be a later instrument. Only instruments in existence at the time the will is made can be incorporated. The fact it bears the same date as the will is immaterial as it may have been written later on in the day, or at another later date and ante-dated. Besides it is not sufficiently identified as any letter written at any time would satisfy the description. It was purely an attempt to make a secret agreement with his brother and not meant as a part of the will. Bryan's Appeal 77 Conn.240 followed. Miss X takes nothing under the will. In such a case B is not entitled to the proceeds personally but holds them in trust for the heirs and statutory distributees (there being no residuary clause giving the estate to others) who are the beneficiaries of a resulting trust.

### WILLS Valid witness?

187 Va.581.

Compare these two cases: Case 1 is Peake v. Jenkins, 80 Va.293, in which a will was signed and attested as follows: -Anna L. Jenkins, by Mary F. Holliday. Then under the word "Witness" one other person signed. Held: Will not valid as it has only one witness. Mary F. Holliday did not sign as a subscribing witness but only as an agent or amanuensis of the testatrix. See 187 Va. at pp. 591-592.

In the instant case Testator, T, was too nervous to sign. One of the subscribing witnesses was not present when T acknowledged the will. One Trout, a notary public, signed T's name to the will and left a space for T's mark which T with assistance was able to make. Trout then certified under his notarial authority that T had signed. Does Trout's notarial signature plus the signature of the witness who was present make two witnesses? Held: Yes. Trout's signature was no part of the signature of the testator. He did not sign T's name. T signed his own name by making his mark. Trout certified to that fact which is exactly what any attesting witness to a will does. Trout's notarial certificate is merely surplusage. T's will is valid.

### WILLS IMPORTANT Will or Contract - Valid witness?

187 Va.730

T made a will in favor of R. Later she fell in love with S, and S and T entered into the following agreement, "It is mutually agreed that on T's death all of T's property is to go to S if T dies first; and it is also mutually agreed that on S's death all of S's property is to go to T if S dies first". Both S and T signed and there was one witness. Later T died. Contest between R and S. Who wins? Held for R. The agreement above set forth is in reality a mutual will. It is ambulatory and no rights vest in the other's property until death of T or S. But since it has only one witness it is not a valid will and fails as a will. Since it is fundamentally testamentary in character it cannot be treated as a contract. The law of wills cannot be changed by an agreement between the parties. The will in favor of R can only be revoked by the ways



given in the Code and an improperly executed will is not one of these ways. This instrument is actually a will dressed in the clothes of a contract—an old will with a "new look". There is no such hybrid instrument as yet known to the law. "Due to its conflicting features, inherent infirmity, and external insufficiency, it died aborning."

### WILLS Trust fails to deprive W of distributive share 188 Va.723.

H and his wife, W, were estranged. H, by an instrument under seal created a trust in the sum of \$20,000. T was named as trustee, and the corpus of the trust was to be his personal property upon certain trusts at H's death to the extent necessary to produce the \$20,000. The object of the agreement was to deprive W of her distributive share of H's personal property. Has he done so?

Held: (1) Since H parted with no property in his lifetime he died possessed of the property and W is entitled to her distributive share.

(2) An agreement to create a trust is not a trust, and where there is no consideration and the object of the creation of the trust is to defraud the wife, equity will not lend its aid even though the agreement to create the trust is under seal.

### WILLS Here, Trust Succeeds

188 Va.723,734.

H was estranged from his wife, W, so to prevent her from getting any part of his personal property (which consisted of \$50,000 in stock) he conveyed all the stocks to T as trustee, T to pay the income from the stocks to H during H's lifetime, and on his death to distribute them to designated individuals. Upon H's death intestate W claimed her distributive share. Is she entitled thereto?

Held: No (109 Va.117) "But whilst the husband cannot defeat the wife's claim to her distributive share by will, he may do so by any irrevocable disposition of the personal property in his lifetime, although he secure a life estate to himself, and although his declared purpose is to disappoint the wife's claim as one of his distributees".

"During her husband's lifetime his wife has no interest whatever in his personal estate. He may transfer it, give it away, or squander it".

### WILLS

188 Va.723,736.

Case 1. X promised in an instrument under seal to give Y \$1,000 as a present. As between X and Y is this a valid contract in Virginia?

In the absence of fraud, yes. "In a contract under seal a valuable consideration is presumed from the solemnity of the instrument—and presumed conclusively, no proof to the contrary being admitted either at law or in equity so far as the parties themselves are concerned".

Case 2. H in order to deprive his wife, W, of her distributive share in his personal property contracted under seal and without consideration to pay T \$50,000 payable on his death. Does this create a present debt payable in the future so that T has a valid claim against H's estate?

Held: No. Here the transaction affects W so it is not a case in which the parties only are involved. The voluntary sealed gift to T is in reality a disguised legacy. W may renounce and take her distributive share. One may not so easily deprive his wife of her share of the property on his death.



The following was entirely in the handwriting of the deceased. Is it a good will?

Robertta Leckie Rittenhouse

Written by myself October 13th, 1946

I leave my Cousin James Bradshaw Beverly \$5,000

I leave my dear friend, Mrs. Anna F. Rogers, \$20,000

I leave the rest of my money to the X Church

The few things I have left are to be given to Mrs. Harry F. Byrd.

This is My last Will and Testament.

Held: (2 judges dissenting) a good will. Our statute merely requires that a will be signed in such a way as to make it manifest that testator intended it as his signature. It need not necessarily be signed at the end. Here testatrix has made an orderly and complete disposition of all her estate, and it is manifest that she intended her name at the beginning to be her signature. Unlike the other cases of this sort in Virginia the above will shows finality on its face. "When the last sentence of the will, 'This is my last will and testament,' is considered with the first paragraph, it is manifest that she intended her name as a signature to her will."

## WILLS

*Will made After adjudged insane*

190 Va.480.

1. T was born in 1857 and died 90 years later in a hospital for the insane. She made a will in 1915 before any adjudication of insanity, and she made a second will in 1916 after having been adjudged insane but while released on furlough. "Is the law was at that time such an adjudication was prima facie evidence of testamentary incapacity. The proponents of the 1915 will claimed that the court should have granted their motion for a separate trial as the issues involving the validity of the 1915 will were quite different from those involved in the 1916 will.

Held: The trial of the rights of all interested parties in will cases in one proceeding is expressly allowed by V. 5257 (now 64-79) which reads in part, "In every such proceeding the court may require all testamentary papers of the same decedent to be produced". In the absence of evidence of an abuse of discretion the action of the trial court in so requiring is not error.

2. In the above case the court granted an instruction the gist of which was that a witness to a will by the very act of signing impliedly represents that he believes the testator has sufficient mentality to make a will. Was such an instruction proper?

Held: Yes. The presumption is that one would not knowingly lend his aid to the execution of an invalid will. In the absence of such an instruction there would be a danger that the jury would give too much or too little weight to the attestation.

## WILLS

*Dependent Relative Revocation*

190 Va.648

T made an holographic will. Some years later she asked F, a friend, who knew more English than law to polish it up for her. F obligingly made immaterial changes in capitalization, punctuation and sentence structure. According to F it was T's purpose to copy the will as changed wholly in her own handwriting.

F also stated that she had seen this new will and that it expressly revoked all prior wills and codicils but that she could not remember its contents well enough to state whether it made changes in the original will or not. No trace of this alleged later will could be found. T's first will was offered for probate. Is it entitled to probate?

Held: Yes. (1) The law takes no notice of very little things. The will as originally written by T should be probated and the changes treated as surplusage, "Wholly" must be given a reasonable construction and not an absolute one. There is no pretence of fraud or forgery. If an holographic will were written in French and there was a typed interlinear translation the will surely would not be vitiated thereby.

(2) As far as the evidence of revocation is concerned the court applied the doctrine of dependent relative revocation or more simply conditional revocation. T did not mean to revoke the first will unless the second will was effective. If the second will is lost and there is not sufficient evidence to establish it then it is not effective, and hence the condition of the revocation of the first will was not met and the first will is entitled to probate.



T owned a half interest in a funeral home as a partner. He had other assets after the payment of debts of \$5,000. Among the assets of the funeral home was a bank account of \$5,000. By his will he (1) left his half interest in the funeral home and its real and personal property to his daughter, D, (2) left \$5,000 to his sister, S, and (3) left \$3,000 to his relative, R. What are the rights of the parties?

Held: D takes first. A half interest in the funeral home includes a half interest in all the assets of the home (after debts of the partnership have been paid,) and its bank account is an asset of the home. D's legacy was a specific legacy and the legacies to S and R are general legacies. If there is not enough for all, general legacies abate before specific legacies, so S and R have no claim whatever to the funeral home's bank account.

## WILLS

SignatureFraud absent

191 Va. 842.

T's will was written partly in pencil by himself and partly in ink by a friend, F, who was a notary public, and who was asked by T to prepare the will. A substantial part of T's estate was left to his housekeeper who was F's mother-in-law. There was a 2½ inch empty space after the end of the will and before T's signature. C signed the will as a witness. Then there was the word "over" and on the other side the following: "C have this day personally appear before as witnesses to T Signing the above statement"

"Given under my hand and seal this 20th day of November 1948. (Signed) F. My commission expires 3/16/51."

T had asked both C and F to act as witnesses.

T's heirs attacked the will. The Chancellor instructed the jury that there was insufficient evidence of fraud and upheld the will. Was this correct?

Held: Yes. The facts stated above do not tend to show any fraud in the absence of other evidence thereof. They merely show that some layman unskilled in the art of drawing wills has attempted to write one. T asked F, an old friend, to write the will, and there is no evidence of over-reaching. It was also held that F signed as a witness 187 Va. 581 followed. A witness to a will testifies both as to testator's signature and the presence of the witnesses at time testator signed. F was asked to sign as a witness, and presumably did so. This result is not avoided by the fact that F wrote a superfluous and legally inoperative paragraph above his signature. This is especially true in Virginia where our statute expressly states that no particular form of attestation is necessary. Any form of signing a will with the intention of acting as a witness is sufficient.

## WILLS

Murdered Testator Statute held inapplicable

192 Va. 337.

H and W were husband and wife and owned land in fee simple as joint tenants without survivorship. In 1929 they executed a joint will directing that the survivor shall take all the property of the first of them to die, for life, with complete power to dispose of the whole in such manner as he or she may see fit, and whatever remains undisposed of at the death of the said survivor shall pass to their issue, if any, and in the event there is no such issue then to X. Several years later a son, S, was born to them. In 1941 W died. Shortly thereafter H executed a will leaving all the above land to S. S saw this will in 1948 and murdered his father for the purpose of acquiring the land at once. V#54-13 provides that no one can acquire title to property by descent or by will who murders the ancestor or testator for the purpose of acquiring the property. Is S entitled to the land?

Held: Yes. The father had a life estate plus a power to sell inter vivos. He had no power to dispose of the land by will. S did not acquire title to the land by descent from his father, or by will from his father. Hence the above statute is not in point. S acquired title as a purchaser under the joint will of 1929. This will was effective the moment W died at which moment S acquired a vested remainder in the fee subject to divestment in case his father disposed of the land inter vivos. Hence this is a case of a remainderman killing the life tenant and is not covered by the above statute.



In the absence of statute there is no forfeiture of property for crime. S gets the land not because the court wishes to reward S for his crime, but because that is the law.

Note: The above discussion is limited to the half interest originally owned by W. S does not take the half interest owned by H and devised to him by H because V#64-18 applies and prevents S from taking such interest. if S is convicted of the murder of his father regardless of the motive (as statute now reads).

#### WILLS

192 Va. 684.

Points to be noted: (1) A will written in ink may be cancelled in pencil. (2) If testator has possession of his will, and it is found cancelled after his death there is a rebuttable presumption that he cancelled it with an intention to revoke it, and this presumption is applicable even if others also had easy access to the will. (3) Admission of a will to probate on ex parte probate proceedings is not prima facie evidence of the validity of the will. Such admission is a neutral circumstance.

#### WILLS Adopted Child Intestate Succession

193 Va. 455.

W died intestate survived by H, her husband, and by P an adopted child of W's deceased brother. Does P or H inherit W's realty?

Since 1956 a spouse is in second place, so H inherits.

Note: The intestate laws in force at the time of W's death and not those in force at the time of P's adoption determine P's rights.

#### WILLS Good Estate Tax Problem - Widow's Share

194 Va. 1.

Testator directed that all his debts, and all estate taxes be paid by his executors as soon as practicable after his death. He also left one-third of his personal property to his widow in lieu of her distributive share. Does the widow take one third of the gross estate or one third of the net estate after payment of debts and taxes?

Held: Only one-third of the net estate. The primary fund out of which to pay debts is personal property at large. While the testator could have charged other property with the payment of debts and estate taxes he did not. The Apportionment Act (V#64-150 et seq.) has no application where the will specifies the funds from which estate taxes are to be paid. (Note: This interpretation increased the amount of the federal estate tax and lessened the amount of the widow's share of the net estate as the widow would otherwise have had the benefit of certain exemptions but this is the result the testator gets whether he knew the tax consequences or not).

#### WILLS Real Property Equitable Conversion

198 Va. 528.

T, a wealthy widow, had acquired certain property from and through her husband, and land from her own ancestors. She made a will leaving the latter property to five of her own next of kin, and everything else to persons who were her deceased husband's next of kin whom we will call X and Y. Shortly after making this will she became mentally incompetent and died without regaining her competency. During this period of time G qualified and acted as her guardian. Because part of her land which she had inherited from her own ancestors was about to be flooded as the result of the construction of a dam by the Federal Government, G sold the timber thereon for \$40,000, and later settled with the Government for \$44,000 for the land taken by it. Later T died. X and Y claim the \$84,000 as residuary beneficiaries of T's will claiming that the sale of the land and the timber converted them to personalty, and hence they were personalty as of the moment before T's death at which time her will speaks.

Held: This contention is not well taken. G had no power to in effect change T's will and T was under a disability to change it. The rule is well established in Virginia that a guardian or committee cannot change personalty to realty or vice versa except for certain limited purposes and then only with the consent of the proper court. Hence the \$84,000 which is the proceeds of lands devised to her own next of kin goes to such next of kin.



WILLS Property *What Committee must do to Renounce* 1716. 191 Va. 136.

T died testate survived by his widow, W, and collateral relatives including brother and leaving a net estate of \$240,000. W is incurably insane, has a life expectancy of 4 years, and it costs \$16,000 a year to do everything possible for her care and comfort. She was bequeathed \$20,000. T had created during his lifetime a trust fund of \$60,000 the income from which was to be used to care for her, and the corpus of which could be invaded only in case of need. The legatees admitted that the provisions for W were probably not adequate and proposed a more adequate arrangement to make more certain that W would be properly taken care of. The following questions arose: (1) Can W's Committee renounce the will by his own act? (2) If not may he petition the court to renounce the will? (3) If he does so petition the court may the court enter into an arrangement that will carry out the testator's intentions (thereby excluding his wife's relatives) subject only to looking after W properly during her lifetime?

Held: (1) W's Committee by his own act has no right to renounce the will. (2) The Court is the guardian of all incompetents, so the Committee can petition the court to renounce. (3) The Court must either renounce or decline to renounce. It has no authority to enter into special arrangements that might more adequately protect W and carry out T's wishes. (3 judges disagreeing on this point). In the instant case it was obviously to the interest of W to renounce so the trial Court should have so decreed.

WILLS Inconsistent Wills Partial Intestacy 194 Va. 794.

H and W were husband and wife. In 1936 H made a will leaving everything to W. In 1942 H made an holographic will as follows: "In case of my death I want W to have full right to everything for her life to do as she thinks best. At her death everything that has been deeded to us jointly I want sold and 1/2 to go to her brothers and sisters, the other half to my nieces and nephews. (Signed) H". The will of 1942 was probated in 1943. The will of 1936 was offered for probate after W's death in 1950. The clerk refused to allow its probate claiming that the 1942 will had revoked the 1936 will. Was this error?

Held: Yes. The 1942 will contains no revocatory clause and is not totally inconsistent with the 1936 will. Unless the 1936 will is admitted to probate H has died intestate as to his reversionary interest in all his property held separately by him, and the law abhors a partial intestacy as nature abhors a vacuum. Quoting with approval Am. Jur., Wills #476 p. 333 "Unless the two instruments are so inconsistent as to be incapable of standing together in any of their parts, the earlier one is deemed to be revoked only to the extent necessary to give the later one effect, and both are to be admitted to probate as constituting together the last will of the decedent."

WILLS Residuary Clause 195 Va. 214.

Clause 7 of T's will read "My lot at W Beach is to be sold, and the proceeds paid into my estate." Clause 12 reads, "Any other property - - my interest in the Home Estate at Waverly - - is given to my brother Robert". Is Robert entitled to the proceeds of the sale of the lot?

Held: Yes. "Proceeds to be paid into my estate" does not mean "proceeds to be paid my heirs". It is presumed that when one makes a will he means to dispose of all of his property. Clause 12 was meant to be a residuary clause. Quoting with approval from 128 A.L.R. 823, "The mere designation or enumeration of property in a residuary clause in a will, in connection with general words of disposition, does not restrict or limit the property passing by such clause to that designated, or to property of like nature to that designated; and property within the import of the general words may pass under the clause, although not within the description of the property specifically designated".



WILLS *Appeal from Clerk in Probate* 17. - *Juris of Cir. Ct.* 195 Va. 912.

A died testate domiciled in West Virginia. A copy of his will was admitted to probate by the clerk in B County in Virginia where some of A's land was located. X appealed to the circuit court after giving proper notice to the proponents. The latter offered no evidence when the appeal came to trial. The court entered an order denying probate and expunging the will from the records. The court also decided on evidence presented by one Y that Y was a bona fide purchaser of A's land in B County from the heirs. Discuss points involved.

Held: (1) An appeal lies under our statutes V#64-72 through #64-88 from the clerk to the court not only in the case of domestic wills but foreign wills as well. (2) The burden is on proponent to establish the will and on an appeal the case is tried de novo. When proponents failed to produce any evidence the court had no alternative other than to deny probate. (3) But in cases to probate wills there can be no other point before the court. When it denied probate its jurisdiction was exhausted. Hence its decision that Y was a bona fide purchaser from A's heirs is void and of no effect.

WILLS *Testamentary Capacity - Evidence Required* 196 Va. 300.

X made a will in 1931 after the death of his wife by which he left most of his property to his sister, S, and Blackacre to the Y Church. Later on in the year he became insane and was admitted to Western State Hospital. On Feb. 3, 1942 he made a will in favor of the Hospital. S predeceased him leaving no issue. There was competent medical evidence to indicate that at most times he had testamentary capacity, but no evidence was introduced to show that he had such capacity on Feb. 3, 1942. There was some evidence to indicate that on Feb. 7 he did not have testamentary capacity. The jury found the will of Feb. 3, 1942 valid, but the trial court set aside the verdict and held the 1942 will invalid. What result on appeal and who will get X's property?

Held: (1) When he was adjudged insane there arose a presumption of testamentary incapacity. (2) Clear and convincing proof is necessary to overcome the presumption. (3) The proof must relate to the very time that the will was executed. It is not enough to show that testator had the capacity most of the time if there is no evidence that he had it at the time he actually made the will. (4) A verdict that has been set aside by the court is not entitled to the same weight as one approved by the court. (5) The presumption of incapacity was not overcome. (6) Since S died without issue the gifts and devises in the 1931 will lapsed. Hence Blackacre goes to the Y Church and his heirs take all the rest of his property.

WILLS *Equity Bill to establish a lost will - S/L* 197 Va. 22.

W died and her husband, H, qualified as her administrator in April 1952. In May of 1953 H filed a bill in equity to establish a lost will which left him everything. The heirs claim that under V#64-84 and 64-85 a bill to establish or impeach a will must be filed within a year. Is this contention sound?

Held: Not as applied to the facts of this case. The statutes referred to apply only to the case in which an order has been entered allowing or disallowing the probate of a will. The establishment of a lost will or other lost instrument comes within the common law inherent powers of a court of equity--and is not a right created by statute and limited in time by the statute so that a suit must be filed within the time specified in the statute. Note: The right to establish or impeach a will already probated is the creature of statute and must be exercised within the time limited by the statute.

WILLS *Presumption of Partial Intestacy* 89 S. 2d, 332, 197 Va.

Mrs. T died leaving a signed will written entirely by her in pencil part of which is as follows "I bequeath 1st Baptist Church \$300. All my possessions are to be sold to highest bidder. Mr. Rucker will sell my home. All bills must be paid promptly. Should there be any money left its to go to the Baptist Home for ladies". There was some \$17,000 left after the home was sold and all debts paid. Do the proceeds of her home go to the Baptist Home or has she died intestate as to such proceeds?

Held: For the Baptist Home. There is a strong presumption against partial intestacy. She had directed that her home be sold and converted into money. No absolute technicality.



meaning may be ascribed to the word "money" in a will, and its meaning in every case must depend on the context and the surrounding circumstances. In this case she clearly intended the balance of all the money after the personalty and realty had been sold to go to the Baptist Home.

#### WILLS Insurance Trusts

197 Va. 145.

T at the time of making his will and executing the trust mentioned below had four daughters by a prior marriage and W, a second wife. He desired to have them all share equally in his estate, but if W renounced his will she would get more than any one of the children. T had several life insurance policies in which he had reserved the right to change beneficiaries. By a trust instrument between the N Bank and himself, and by appropriate action he changed the beneficiaries to the N Bank, but provided that no interest was to pass to said N Bank until his death other than the right of custody. The trust instrument provides that if W renounced his will his four children would each get one-fourth his life insurance as beneficiaries of the life insurance trust, but if she did not renounce the will W and the four children should each take one-fifth. Nothing was stated as to what was to happen if he died intestate. T died and W renounced the will. She claims that the insurance trust is void because testamentary in character and not complying with the formalities required in the execution of wills.

Held: (three judges dissenting) that this contention is correct. T did not intend the Bank to have any interest in the policies at all (except mere custody) until his death. If he died leaving a will then and then only was the bank to take, for if he died intestate the trust would not become operative. The "transfer" was illusory.

#### WILLS Taxation *Inheritance Tax*

197 Va.

X died testate in 1888. He gave his daughter D a life right in certain property and a special testamentary power of appointment of the corpus. D died in 1952. She was possessed of individual property worth \$80,140. The corpus of the appointive property was \$125,000. D by a valid will left the \$80,140 to her cousin C. She also exercised her power of appointment over the \$125,000 in favor of C. Is the \$125,000 subject to inheritance tax?

Held: Yes, V#58-157 makes the tax applicable to "all estates of deceased persons which shall come into possession of beneficiaries by the exercise or relinquishment of powers---".

Should C pay an inheritance tax on the combined amounts as if the amounts came from one person only, or should he pay two separate taxes computed on two separate sums? (Because of progressive tax rates this makes a difference of about \$4,000).

Held: The appointee takes not from the appointor, but from the donor of the power. Hence C takes \$125,000 from X and \$80,140 from D who is a mere conduit of X's title to C.



A owned property worth \$300,000 when he died testate. He also had a life estate in property worth \$180,000. He also had a general testamentary power of appointment as to this latter. When A died he left various legacies which carefully distinguished between his own estate and the estate over which he had the power of appointment. His will contained provisions directing that all taxes assessable against the estate of any of the beneficiaries should be paid out of "my general fund." It was further provided that if his estate should not be sufficient to pay all the taxes and the various bequests, then the various bequests should be reduced proportionally. A's estate was not sufficiently large to pay all the taxes and bequests. Note that A under his general testamentary power could have appointed the \$180,000 to his executor. Should this amount be included in the corpus from which taxes and legacies of A's property will be paid?

Held: No. While A could have appointed to his executor by will he did not do so. He expressly provided that all taxes and bequests of his own property be paid from his own property so he had no intent to charge the property over which he had a power of appointment. In the case of a general testamentary power of appointment the subject matter does not belong to the appointor and cannot be reached by his creditors. He is a mere conduit from the creator of the power to the appointee.

## WILLS Real Property

198 Va.263.

X bequeathed \$10,000 to his two nephews, A and B, "one to heir from the other and should they leave no living heir of <sup>their</sup> body" to D. A and B were unmarried when the testator died. They owned premises on S Street as tenants in common. The \$10,000 was turned over to A and B in return for A and B selling the premises on S Street to T, a trustee, the same to be held by T according to the terms and provisions of X's will. A and B later married, died childless and left widows to whom each willed all his property. Contest between the widows and D, the land having increased in value to \$30,000.

Held: A and B had estates for life, remainder to the survivor in fee subject to a contingent shifting executory devise in favor of D. Since the contingency happened D is entitled to the premises. The land on S Street took the place of the \$10,000. Note: It was plausibly (but unsuccessfully) argued that A and B were only entitled to the income on the \$10,000 until it could be ascertained whether the contingency of their dying without issue would happen, and that their conveying their own land to T was for the purpose of saving X's personal representative harmless in the event they spent the corpus. Whether it was as per the holding or as per the disallowed contention depended on their intention.

## WILLS Validity of No-Contest Provision

198 Va.522.

Testator provided in his will that if any beneficiary contested his will he should forfeit his share in favor of those beneficiaries not contesting, and if all beneficiaries contested that all his property was to go to the X Church. All beneficiaries, adult and infant, joined in a contest on the ground of mental incompetence. Is the X Church entitled to all the property?

Held: Yes. Such a clause is not against public policy at least so far as a contest on the ground of mental incompetence is concerned as a contest on such grounds stirs up family animosities to the injury of all. (It is stated the rule might be different in the case of a bona fide contest on the ground of forgery). It was held that since infants can sue and be sued they were equally bound by the result along with adults.

The fact that there was a gift over to the X Church in case of a contest indicates that the words used by the testator were really meant, and not merely in terrorem i.e. just to frighten.

## WILLS Privilege to Invade Corpus

198 Va.637.

In 1933 Dr. J died testate. He left his widow the income from all his property for life. His will provided that if the income should be less than \$6,000 per year she was privileged to invade the corpus to make up the difference. The remainder was given to Dr. J's next of kin. The widow survived Dr. J for many years. She only used a portion of the corpus to which she was entitled but her annual statements which she filed with the Commissioner of Accounts showed an annual charge for the deficiency. Dr. J's next of kin claimed that by failing to take out each year's



deficiency from the corpus she waived her rights thereto.

Held for the widow's personal representative. Dr. J intended her to have at least \$6,000 annually in the nature of an annuity, and whatever she did not use of this \$6,000 each year, became a lien on the balance of the corpus. No statute of limitations is involved as there is no debt. This conclusion is re-inforced by the fact that the estate was charged each year with any deficiency for that year.

WILLS

*Changing Holographic W. 4*

198 Va.887.

T made a valid holographic will. Later he scratched out part of the will. It does not make sense unless the matter scratched out is also considered.

Held: The portion of the will containing the scratched out words is void for uncertainty. The presumption is that T scratched it out. It is not permissible to take into consideration the words scratched out in order to determine his intent as that would be mere guess work.

WILLS Creditors Rights

198 Va.748.

Land was conveyed to A and B in fee as joint tenants with survivorship. A and B gave their joint notes in the amount of \$7500 to X and Y. These notes were secured by a deed of trust on the land which A and B also signed. A died intestate leaving personal property worth \$2,000 and no other debts than the one described above. A's sole distributee was D who claimed the \$2,000 arguing that since B received the whole of the land by survivorship he should exonerate A's personalty at least to the extent of the value of her half the realty. B qualified as A's administrator.

Held: The debt was a joint one. A's personal property at large is the primary fund with which to pay A's debt. The fact that the debt is a secured one is immaterial. Hence B is entitled to have the \$2,000 applied on her half of the indebtedness. If B had to pay the whole indebtedness he would be entitled to contribution from A.

WILLS--TRUSTS--PROPERTY

*Partition*

198 Va.854.

T devised his apartment house equally to his daughters D and E "with the understanding" that each daughter was to live in one of the four apartments, that each was to rent out one of the apartments, that the rents were to be used to defray the expenses of upkeep, and that this arrangement should continue until the youngest child of these two daughters then living should become sixteen years of age. At that time the youngest child was less than a year old. D wishes partition, but E contends that the property cannot be sold or partitioned until the youngest child becomes 16 years of age.

Held: Partition granted. Unless modified by statute it is well settled in Virginia that a gift or grant of a beneficial estate, in fee or absolutely, whether legal or equitable, has certain legal incidents of which the estate cannot be divested, and all conditions adopted for that purpose are repugnant and void. Among these incidents are the power of alienation, and the liability of the property for debts. E's contention that the language "with the understanding" created a spendthrift trust was overruled. The words are at best merely precatory and not mandatory. They create no equitable charge on the property.



Item 5 of T's holographic will read in part "(5) Life interest in the sum of twenty thousand dollars each to

A and B

C and D

E

At the death of each beneficiary, the principal to go to Sheltering Arms Hospital, for the enlargement of its charitable work."

Before T died he crossed out the names of A and B and wrote in front of A's name "Died Dec. 44--T".

Hospital claimed that five separate life estates were created, and as fast as they terminated the principal belonged to it, and that revocation of the life estates did not affect the remainders.

Held: Contention unsound. Only the undeleted portions of an holographic will can be properly probated. The will speaks as of the date of T's death and at that time there are only three separate life estates with remainders in the hospital.

WILLS Per capita or by representation?

199 Va.767.

T devised her farm, "to the children of my niece, B, and the children of my nephew, A, they having the use of it their lifetime. If they die one or the other inherits the property." At the time T died B and A were unmarried. After B and A died B was survived by eight children and A by one. A's child claimed a half interest because she was the only member of one class.

Held: B and A were given life estates with survivorship. On the death of the longer liver, the farm goes per capita to the nine persons described by the will. There is nothing in T's will to indicate that she intended any unequal treatment of children not yet in existence. Each of the nine takes per capita in his own right as a purchaser directly from T.

WILLS Oral agreement to devise realty

199 Va.778

H and W were husband and wife. W was much younger than H. In order to provide for her in case of H's prior death (as seemed most likely) H conveyed all his realty to her in consideration of her oral promise to make a will in H's favor so that if H should happen to be the survivor he would get his realty back. W made such a will. However, before her untimely death from cancer, she secretly made a new will giving H only a life estate and the remainder to D. W had told numerous persons about the arrangements made between H and herself.

Held: While the agreement to devise realty is within the statute of frauds, it is taken out of the statute in equity in this case for there is a clearly proven oral contract, H's actions resulted from the contract, and H has so far performed that failure to enforce the agreement would perpetrate a fraud on him for which money damages only would be an inadequate remedy. D holds the remainders as a constructive trustee. V#8-286 requiring corroboration where one party is incapable of testifying was satisfied.

WILLS Per Capita

199 Va.860.

E, having survived his wife, died testate. He left most of his property "in equal shares to my lawful heirs and the lawful heirs of his deceased wife in accordance with the Statutes of the State of Virginia. His heirs were three nephews and three nieces, and his wife's heirs were twelve in number consisting of two brothers, a sister, and nine nieces and nephews who were the children of a deceased sister. Should the property be distributed equally (1/18 each), or should one half go to his heirs equally and one half to his wife's heirs?

Held: Equally. The will says "in equal shares". Where there is a devise or bequest to several persons in general terms indicating they are to take equally, each individual takes an equal share for they are presumed to be referred to as individuals, and not as a class. The reference to the statutes of the State merely indicate who is to take and not how or in what shares they would take.



T made a will in favor of A in 1938. T made a wholly inconsistent will in 1947, but this will did not contain a revocatory clause. Later T revoked the 1947 will by tearing off the signature thereto with the intention of revoking it, and still later T executed the following instructions entirely in her own handwriting, "I give all that I possess to my beloved nephew, N. (Signed) T". The Court held that N took everything.

Held: Error. There is nothing whatever to show testamentary intent in the gift to N, and the fact of testamentary intent must be shown in the alleged will itself. The words "give" and "beloved" in themselves merely show an intent to make a present gift of T's property to N whom she loved. Since there was no delivery or declaration of trust, it is an incomplete gift. Note: If T had written "On my death I give" or "I leave all to N" the result would have been different as these words would have shown a testamentary intent.

It was also held that A took everything. Since the second will contained no revocatory clause it would have no legal effect until T's death. T revoked this will before her death. Hence, it never took effect as a will and thus was never legally operative for any purpose whatever, Hence the first will in favor of A was never revoked.

#### WILLS--Revocation of will containing a revocation clause

201 Va.950. *Timberlake*

If a second will is totally inconsistent with a first will, but contains no revocatory clause, both wills are equally ambulatory, so if the second will is destroyed by the testator the first will is entitled to probate. If a testator writes a declaratory revocation of a will in a proper manner, the prior will is revoked as of the time of the execution of the declaratory revocation, and under V#64-60 the revoked will is not revived by a destruction of the revocation. The instant case is half way between the above two cases. T executed her first will in 1954. Then she executed a second will in 1955 which contained a testamentary revocatory clause--i.e. one in the new will that is part and parcel of that will. Later she destroyed the 1955 will. Is the 1954 will entitled to probate or has T died intestate?

Held: By a 5 to 2 decision that the 1954 will is entitled to probate. Both wills were ambulatory and had no legal effect until T's death. At that time there was only the 1954 will. The testamentary revocatory clause was just as ambulatory as the will containing it, and was not in existence at the time of T's death. Hence the 1954 will was never revoked, and, if never revoked, V#64-60 with reference to the revival of revoked wills is inapplicable. The inapplicable section reads, "No will or codicil, or any part thereof, which shall be in any manner revoked, shall, after being revoked, be revived otherwise than by the re-execution thereof \* \* \*".

#### WILLS--Codicil--Revival by Codicil

202 Va.764.

In 1952 T made a will in favor of A. In 1953 she expressly revoked this will when she made a new will in favor of A, B, C and D equally. After T's death a duly executed instrument made in 1959 on stationery bearing the printed inscription, "Last Will and Testament" was found. This instrument read so far as material as follows:

"Whereas, I, T did on the 22nd day of April, 1952, make my last Will and Testament in writing, and whereas I desire to make an affirmative declaration concerning O, I do now make this codicil thereto, to be taken as part thereof.

"I wish it to be clearly understood that under no circumstances is the aforesaid O to receive anything from my estate. I have been advised that under my Will she will receive nothing, however, being fully acquainted of her vicious trouble-making character, I deem it advisable to make this declaration."

V#64-60 provides that, "No will or codicil, or any part thereof, which shall be in any manner revoked, shall, after being revoked, be revived otherwise than by the re-execution thereof, or by a codicil executed in the manner hereinbefore required, and then only to the extent to which an intention to revive the same is shown."

Is A entitled to all T's estate under the revived 1952 will or to only one fourth thereof under the 1953 will?



Held: The latter. The 1952 will was not revived by a codicil because there was no testamentary intent in the 1959 writing. It disposed of no property. It changed no will. It did not state that the 1952 will was confirmed, nor did it purport to incorporate therein any provisions of the 1952 will. Hence it is not a codicil which is an addition, modification or qualification of a will.

## WILLS

*Probate*

203 Va.246.

T was a wealthy retired school teacher with intense likes and dislikes who died testate at the age of 88 survived by a brother, B, and two nephews who were both doctors. She had supported B for many years. When B was 80 years of age he married W for whom T had no use whatever. W threatened to sue T for slander and alienation of affections. In order to protect herself T, at the nephews' suggestions, conveyed her realty to them reserving a life estate in herself. When the threatened law suits failed to materialize she demanded that her nephews reconvey to her. When they refused to do so she instituted a suit which was compromised. She (let us assume mistakenly) thought her nephews were trying to steal her land, so she changed a will in their favor and cut them off with trifling sums. Shortly before her death she re-executed the will in a more formal manner. The nephews contested the will on the ground that she was laboring under a delusion. The evidence was overwhelming that T knew what she was doing and was in possession of her faculties.

Held: Will is entitled to probate. No one else should be allowed to make T's will for her. A will should not be set aside because others believe that the testatrix has been unreasonable or has mistaken the motives of her heirs. There is nothing in this case to show that her mistake, if there was one, was the result of an insane delusion. Testatrix had a plausible reason to disinherit her nephews. Action based on reason is not action caused by insanity.

WILLS Effect of a three for one stock split

204 Va.867.

T was a wealthy and kind lady. A few years before her death she made her will. She left 380 shares of AT and T stock to the C Charity (and other charitable gifts) pursuant to an overall plan. Shortly thereafter she came quite sick and while she was sick the AT and T gave all stockholders two additional shares for each share already owned so that the three shares were the ownership equivalent of the former one share. T died soon thereafter. The residuary beneficiaries claim that by V#64-62 a will speaks as of the moment before testator's death and that the will gives the C Charity 380 shares (not 1140 shares) of stock.

Held: For the C Charity which takes 1140 shares. T's intent must be ascertained from the will as a whole. It is apparent that T meant to give the C Charity the proportional ownership of 380 shares as of the date of the execution of the will. This is in the nature of a specific legacy and is not adeemed by the unilateral act of the AT and T. V#64-62 applies unless there is evidence that T intended otherwise, and in this case there is such evidence.

WILLS--General or Specific Legacy--Abatement

205 Va.318

T was survived by a number of nephews and nieces, A, B, C and D. In his will he left A Blackacre, B \$40,000, C \$30,000 and D 1000 shares of X Stock. A codicil to the will stated that in the event he no longer owned the stock at the date of his death D was to receive its market value as of that date. There was not enough money and personal property at large to pay debts, taxes, costs of administration and the pecuniary legacies of B and C. If D's legacy is a general legacy because no particular shares are designated and because T did not state "my" 1000 shares of stock then D's legacy will abate proportionately with those of B and C, but if D's legacy is a specific legacy the entire burden of paying debts etc. will first fall on B and C.

Held: This is a specific legacy. T owned an interest in the X Corporation evidenced by 1000 shares of stock. This specific interest has been specifically bequeathed to D. The fact that T made a codicil giving D the value of the stock if there had been an ademption is not enough to indicate that he intended to make it a general legacy.



S advanced a large sum of money to his friend D. It was provided in the deed of trust executed to cover the debt that, in the event of the decease of S, the monthly payments were to be reduced fifty per cent, and the balance due would become payable to and become the property of W, S's wife. It was expressly stipulated that this provision was testamentary in nature. S died after the first payment was due and W brought an action to declare void the provision allowing reduced payments upon the death of S. She contended that the provision was testamentary in nature and that, since the instrument was not properly executed as a will, the provisions were invalid and void.

Held: For D. The rule of construction in determining whether an instrument is a will or contract is, that if it passes a present interest, it is a deed or contract, but if it does not pass an interest until the death of the maker, it is a testamentary paper. Here the provision for reduced payments began with the words, "It is agreed and understood by and between the parties hereto." These are words of contract, importing an intention of the parties to be then and there bound. The provision created a present interest in D, though the enjoyment was postponed until the death of S. The provisions represented the present fixing of the terms of the deed of trust by which the parties were thereafter granted.

Note: Where a negotiable instrument makes provision for acceleration upon default in any payment, failure of holder to use due diligence to enforce such provision after the accelerating event has occurred, amounts to a waiver of such default, and the holder cannot rely upon it to accelerate payment.

D, a life tenant under her husband's will, obtained from P, a remainderman, a release of the latter's interest in the estate in consideration for giving of a mortgage debt. D died, and P claimed a testamentary share in the property allegedly part of D's deceased husband's estate on the ground that the release was obtained from her fraudulently.

Held: A life tenant is a trustee only in the limited sense that he cannot harm or dispose of the property to the injury of the remaindermen's rights. He is not precluded from acquiring the estate in remainder by gift or purchase, nor is any such transaction to be presumed invalid.

Va. Code #64-58 read in part as follows: "Every will made by a man or woman shall be revoked by his or her marriage..." Decedent made a will in 1937. Later that same year she married H. In 1956 the above code section was repealed. Decedent died in 1965, H having predeceased her. Is the 1937 will entitled to probate?

Held: No. The fact that a will is ambulatory and speaks as of the maker's death does not preclude the general assembly from enacting laws which revoke and declare or nullify an existing will upon the occurrence of a specified event such as marriage. After such a revocation, unless the will is revived in a manner prescribed by law, the will never speaks. The fact that #64-58 was repealed before decedent's death is of no consequence, as the repeal had no retroactive effect.



1. Learn the following: (a) The gist of 64-1 which is the general statute of descent of realty (b) Its modification in certain cases where an infant dies intestate.

V#64-1--Learn--is in part as follows, "When any person having title to any real estate of inheritance shall die intestate as to such estate it shall descend and pass in parcenary to such of his kindred as are not alien enemies, in the following course:

First: To his children and descendants of deceased children.

Second: If there be none, then to the surviving consort.

Third: If none such, then to his father and mother, or the survivor.

Fourth: If none such, then to the brothers and sisters and their descendants.

Fifth: If none such, then  $\frac{1}{2}$  to the nearest paternal relatives, and the other  $\frac{1}{2}$  to the nearest maternal relatives, as follows:

Sixth: First to the grandfather or grandmother or the survivor.

Seventh: If none then to the uncles and aunts and their descendants (Note: This includes first cousins).

Eighth: If none then to the great grandparents.

Ninth: If none then to the brothers and sisters of grandparents and their descendants. (Note: This includes true second cousins).

Tenth: And so on, without end.

Eleventh: If there be no paternal then all goes to maternal kindred and vice versa. If neither, the whole shall go to the kindred of the husband or wife, in the like course as if such husband or wife had died entitled to the estate.

Drill: (a) X dies leaving a wife, child, and brother. *Child subject to divorce if wife*

(b) X dies leaving a mother-in-law, a cousin (the child of his father's sister) and an uncle (his mother's brother). *1/2 to cousin 1/2 to uncle*

(c) X dies leaving a nephew and a wife. *Wife*

V#64-9--If an infant die without issue having title to real estate derived by gift, devise, or descent from one of his parents, the whole of it shall descend and pass to his kindred on the side of that parent from which it was so devised, if any such kindred be living at the death of the infant. If there be none such, then it shall descend and pass to his kindred on the side of the other parent.

2. M who owned a farm in Virginia died intestate leaving only an illegitimate son. To whom does the farm go? M#927. References are to Minor on Real Property (2d Ed.)

The illegitimate children of a man are not for purposes of intestate succession any relation whatever. Hence the farm escheats.

3. To what extent, if at all, is the common law of inheritance in force in Virginia? Not at all. Our statutes completely cover every conceivable situation. The common law of descent with primogeniture, preference of males over females, exclusion of lineal ascendants and of husband and wife is totally unsuited to our conditions of life.

4. X died intestate survived by a widow, a brother, and two children of a deceased brother. Distribute his realty.

The widow takes the whole subject to the rights of X's creditors.



5. A died intestate owning Blackacre in fee. He had no other assets. Blackacre is worth \$20,000. His general unsecured debts are \$25,000. H is survived by a widow, W, and by a paternal cousin. What are the rights of the parties?

Note the following possibilities. (1) By the law of intestate succession W inherits under step 2 whether she will or no. Since the rights of creditors are superior to those of heirs (disregarding homestead exemption) the wife gets Blackacre subject to the rights of creditors--economically worth nothing. (2) Since the object of the statute was to increase the rights of the wife and not to cut them down she may elect to take dower in spite of the fact that a life estate normally merges in a fee. Dower in this case would be a one third interest for life.

6. X died intestate leaving a cousin, the son of his father's deceased brother; and aunt, his mother's sister, as his only relatives. Who is entitled to the land: M#922.

At step 5 the property is divided into two equal portions one of which goes to the nearest paternal relatives (the cousin), and the other of which goes to his aunt who is the nearest maternal relative. Note that it is immaterial that the nearest relatives on one side are more distant than those on the other side.

7. H died intestate survived by a 7-year old stepson of whom he was very fond and to whom he stood in loco parentis, and his father's ninth cousin four steps removed whom he had never seen. Who is H's heir?

The paternal cousin is the heir. The wife's relatives do not take as long as the husband has any maternal or paternal relatives no matter how distant.

8. H died intestate survived by a distant cousin and a daughter-in-law. Who is his heir?

The distant cousin. Except in the single case of husband and wife, relationship by marriage has no effect. The property would escheat before going to a daughter-in-law or uncle's wife. However, if there are no maternal or paternal relatives, or closer kin, the property goes to the wife's relatives as if the wife had died intestate owning the property. Hence a brother-in-law who was your wife's brother could conceivably inherit but a brother-in-law who was your sister's husband could not.

9. X died intestate seized of Blackacre in fee and leaving R as his only heir. R is 18 years of age. She marries H and has a child which outlives her only a few hours. Contest between H; and S, a sister of X; and T, a sister of R's mother. Result? M#924.

Since R did not die without issue the statute about descent of infants' lands in certain cases has no application. So when R died her realty went to her infant child subject to H's curtesy rights (one third for life). When the infant died a few hours later the statute about descent of infants' land in certain cases applies since the infant got the land (1) by descent (2) from one of its parents and (3) died without issue while still under 21 years of age, so it goes to the infant's relatives on the side of its mother from whom it inherited the land. Who are these relatives?

(1) There are no other children (2) No parents (3) No brothers or sisters or descendants or brothers or sisters (4) Is there a husband? Yes, H. So H gets the land not as father of the infant but as the infant's nearest relative on his mother's side. Note that if there had been anyone related to R in classes 1, 2, or 3 such person would have taken subject to H's curtesy (one third for life). Note: Since 1956 the husband would be in class 2 above instead of in class 4, but result would be the same.

10. Sam and Mary, infants fourteen years of age, own a farm in Henry County, Va., which they inherited from their father, Richard. Jennie, their mother and guardian, employs you to bring a suit for the sale of the farm and the proper investment of the proceeds. The infants have a half-brother, John, and half-sister, Sarah, children of their mother by a later marriage; they have three uncles, William, Charles and Ben, brothers of their deceased father, Richard, and their father's mother, Mildred, is living. Whom would you make defendant to the bill?



In the case of the sale of infants' lands those who would be the heirs of the infant (were he dead) must be made defendants. Since Sam and Mary inherited from their father and are still under 21 and without issue the statute about the descent of infants' lands in certain cases applies. The land would descend to their heirs on the side of their father. Taking this step by step we note first that the father has no other children. The next step is the father's consort. This is Jennie. So she should be made a party defendant. Also Sam and Mary since they are over fourteen years of age, and their guardians ad litem.

*If doubtful make both Mildred & Jennie defendants.*

11. X devised land to his grandson A who was under 21. A died without issue still under 21. Contest between A's father and mother, X being A's maternal grandfather. Result? M#924.

Since A did not get the land from one of his parents it goes as per the general statute to A's father and mother equally.

12. X died intestate leaving one grandson, a child of a deceased daughter A; and three granddaughters by a deceased son B. What interest have the grandchildren in the land? M#925.

When all who take under the intestate laws are equally related to the intestate they take per capita. The maxim applicable is "equal in blood equal in affection." Hence the grandchildren each take a fourth.

13. X died intestate leaving three nephews, children of a deceased brother A; one niece, a child of a deceased brother B; and a brother C. What are the rights of the parties? M#925.

Where all who take under the intestate laws are not equally related to the intestate they take per stirpes (or by representation) the more distant relatives taking altogether the share of the person they represent. Hence the children of A got 1/9 each, the child of B one third, and C one third. Note that the children of A and B take directly from X and hence take free of the debts of A and B.

14. X died intestate leaving three half brothers and one full brother as his only heirs. What portion of the land is each entitled to at common law and in Va? M#926.

At common law collaterals of the half blood were excluded entirely. In Virginia they are not postponed, but where there are collaterals of equal degree some of whom are of the full blood and some of the half blood those of the half blood take only a half portion. To find the proper denominator give a value of 2 to every collateral of the degree involved of the full blood and a value of 1 to each of the half blood, in our case 2 plus 1 plus 1 plus 1 or five. Give 2/5 to the full brother and one fifth (half as much) to each half brother.

15. X died intestate leaving as his only relatives a widow, a half brother, and an uncle of the full blood. How does X's land descend?

Since 1956 the widow takes in step 2. If there were no widow, the half brother would take the whole as collaterals of the half blood are not postponed.

16. H had a son by a first marriage and another son by a second marriage. H died intestate leaving a widow and his two sons as his nearest relatives. How does H's land descend?

The two sons share equally subject to the widow's dower (one-third for life). It is impossible to have a lineal relative of the half blood. Only collateral relatives can be of the half blood.

17. W had 3 children, A by a former marriage, and B and C by a second marriage. W devised her land to B who died under 21 and without issue leaving his father, his half-brother A, and his full brother C as his nearest relatives. How does B's land descend?



While the land goes to B's relatives on the side of his mother B is the root or stirps. While A, B, and C are equally related to the mother A is a half brother and C is a full brother of B, and it is B's land that descends. Hence C gets a double portion or two-thirds and A gets a half portion or one third.

18. W married H and had one child A. Later she lived in adultery with X, and had 3 children by him, B, C, and D. B died intestate survived only by A, C and D. How does B's land descend?

At common law bastards inherited from no one and through no one. A bastard was the child of no one. This harsh rule has been changed in Virginia so that bastards inherit from and through their mother. Since the father of a bastard has no standing of any sort in intestate succession he is completely ignored, and since A, B, C, and D legally have only the mother as a common parent they are all legally collaterals of the half blood. Hence A, C, and D each take one third.

19. H and W who were both married to other parties went through a marriage ceremony. They had a child X. H died intestate. What are X's rights? M#928.

Query-Suppose W had a drop of negro blood in her would the result be the same? V#64-7 provides that the children of marriages deemed null in law shall nevertheless be legitimate. Hence X inherits H's land subject to his first wife's dower. W has no rights. This statute applies to bigamous marriages and common law marriages but not to marriages involving miscegenation probably because the latter involves a permanent impediment while the others do not.

20-61.1

20. W had a child by H before marriage. Later H married W. H died intestate. What rights, if any, has the child? M#928.

Unless H in some way acknowledged the child as his own the child will not inherit from H. In Virginia acknowledgment alone is not enough--marriage alone is not enough--but marriage plus acknowledgment legitimates. The acknowledgment need not be formal.

21. B left an estate in excess of \$4,000,000. His nearest relatives were the children of a deceased brother. One of these children, A, was an adopted child the other, L, a legitimate child. How should B's real estate be distributed?

Under V#63-358 an adopted child inherits from and through its adoptive parents and, if a child adopted by a step-parent, also from its natural parents. Hence A and L would share equally. In Virginia one can not only make an adopted child his own heir but also in some cases the heir of others.

22. T died having devised his real property to his child A "in order that A may build a store on the property." T died intestate as to personal property. Is A entitled to any rights therein as against the claims of B, another child? M#931.

The doctrine of advancements applies in Virginia where the ancestor dies intestate or partially intestate. Since the gift to A was made to him to advance him in life he has no rights in the rest of T's estate unless he is willing to bring the value of his advancement into hotch-pot.

23. A receives \$5,000 from his father T which is agreed to be in lieu of his inheritance. T has another son B. (a) If T dies worth nothing net, what are B's rights? (b) If T dies worth \$100,000 net, what are the rights of the parties. M#932.

(a) B has no rights. An advancement is an outright gift good as against all the world except T's creditors.

(b) In Virginia the agreement is a nullity. The law casts the descent on A and B equally regardless of agreement. So A may bring his \$5,000 into hotch-pot and claim an additional \$47,500.

24. T died leaving two nephews. A and B, as his only heirs, T had given A \$10,000 as an advancement in lieu of his inheritance. T died worth \$30,000. What are the rights of A and B? M#933.



A and B are each entitled to \$15,000. The doctrine of advancements has no application to anyone other than lineal descendants. Hence it does not apply to a nephew or a wife.

25. X gave his son-in-law \$3,000 so that he could buy a home. X later died intestate survived by his married daughter and a son. X's estate is \$3,000 net. What are the rights of the parties? *McDearman v. Hodnett, 83 Va.281, 2 S.E.643.*

It was held that an advancement to a son-in-law that necessarily inured to the benefit of the daughter was in substance an advancement to the daughter. Hence X's son takes the whole \$3,000.

26. Are advancements that are subsequently brought into hotch-pot charged with interest?

No. Advancements are not debts but gifts of a special sort. No interest is intended in the usual case.

27. V#64-11 provides that personal property of intestates shall be distributed as if it were realty with two exceptions. What are these two exceptions?

- (1) Infants--The personal property of an infant shall be distributed as if he were an adult. It is thus immaterial that he received his property from one of his parents.
- (2) Married persons.

28. H died intestate survived by a wife and a father. Distribute his personal property. V#64-11.

All the personal property goes to the surviving spouse in fee simple (subject to rights of the creditors of the deceased) where a spouse dies intestate and without issue.

29. W died intestate leaving a child, A, by another marriage, and H, her husband. Distribute her personal property. V#64-11.

Where there are issue of the deceased spouse (by what marriage is immaterial) the surviving spouse takes one third in fee, and the issue two thirds.

30. (Omit because of change in statutes)

31. (a) H has a wife, and a child C. H by will gives all his property to his brother. What are W's rights with respect to his personal property? (b) H has a wife W, and no issue. He wills all his property to his brother. What are W's rights with respect to his personal property? His real property? V#64-13 to 64-16; V#64-27.

(a) The wife, W, may renounce the will in which case, if there are children she receives one-third the personal property in fee. The child has been completely disinherited unless he is a pretermitted child, i.e. a child not born when the will was made and not mentioned or provided for in the will. Such a child takes as if its parent had died intestate.

(b)(1) Where there are no children the wife may renounce the will and take one half the personal property.

(2) H cannot deprive W of her dower by an act of his own. Hence she gets a one third interest for life in his realty.

Note: If the wife had been given anything in the will unless expressly in addition to dower she is put to an election as she cannot take what the law allows and also under the will unless the intent of the testator to that effect is clear. The same rule applies to a gift to the husband in his wife's will unless expressly in addition to curtesy.

*Wife takes whole - No issue & husband dies intestate*  
*" " 1/2 - No issue & renounce the will*  
*" " 1/3 - Wife & children & renounce will or H dies intestate.*



32. F had two sons, A and B, and a wife, W. A quarreled with F about the use of F's car and killed him during the quarrel. What are the rights of A and B in the absence of a will?

V#64-18 reads, "No person shall acquire by descent or distribution, or by will, any interest in the estate of another for whose death such person has been convicted of murder." So unless A is convicted of murder he inherits from F equally with B. Note: If A was convicted of any kind of homicide F's personal representative might have a cause of action against A under the death by wrongful act statutes. Any recovery so obtained would not be part of F's estate but would go to the statutory beneficiaries (excluding A as no man can profit by his own wrong) in such portions as the jury may direct to the other members of the first class of beneficiaries who are in this case B and W.

33. W, a childless married woman, told X that if she, X, would give her permission to W to adopt X's child, C, aged one year, she would see that C got all her property on her death. X consented. W raised C as her own child but never formally adopted him or made a will. W died. Will C inherit W's property?

No. Inheritance is not regulated by contract but is statutory. C is not an heir. C's best bet is to sue W's estate for breach of a contract made for his benefit.

34. X told his wife to be that if she would marry him he would will all his property to her. After the marriage X made such a will and gave it to his wife for safe-keeping. A day later X made a will disposing of all his property to his brother. He gave this will to his brother. After X's death both the widow and brother claim his property. Discuss. M#1146. See also V#64-58.

This may be a mean trick, but it is a legal one. The oral promise made to his fiancée was in consideration of marriage, and thus within the statute of frauds, and unenforceable as a contract. The second will being totally inconsistent with the first revoked it whether the wife knew it or not. She may, of course, elect to take what the law allows her. Assuming no children that would be one half the personalty and dower (one third for life) in the realty. (One third as X did not die intestate).

35. Was it possible to devise land in England in the year 1520? M#1147.

In substance, yes, as follows: The would be testator could enfeof the land to X and his heirs to hold for such uses as the feoffor(testator) should declare in his last will and testament. As equity would at that time enforce the use and as freehold estates of inheritance could be made to spring up in future under the doctrine of uses the party named in the will was entitled to the land in equity. After the statute of Wills(1541)this could be done directly without the intervention of equity.

36. A father for good reasons left all his property by will to his son, X, to the exclusion of Y. The will was not properly witnessed. Is Y under a moral duty to let X have all the property?

Blackstone says "No". If the father wants to disinherit son Y he can do so by a valid will. If there is no such will then Y has just as much right to his share as X has to his.

37. X, aged 19, willed all his property to Z. X died when 22 years of age. What are Z's rights, if any? V#64-49, M#1151.

In Virginia one may make a valid will of personalty when he becomes 18 but not of realty until he is 21. Hence Z is entitled to X's personal property but not to his realty. The fact that X did not die until after he was 21 is immaterial, as the will was invalid from the beginning with respect to realty. Note: If X had affixed a valid codicil to his will after he became twenty one that would be equivalent to a re-execution as the general rule is that a will speaks as of the date of the codicil unless that would clearly defeat testator's intention.