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Record No. 5174

In the Supreme Court of Appeals of Virginia at Richmond

BETTY JANE WOOD MERSON

v.

P. M. WOOD, ET AL.

FROM THE CIRCUIT COURT OF SCOTT COUNTY

RULE 5:12—BRIEFS

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

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

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

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 5174

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 4th day of March, 1960.

BETTY JANE WOOD MERSON, Appellant,

against

P. M. WOOD, ET AL., Appellees.

From the Circuit Court of Scott County

Upon the petition of Betty Jane Wood Merson an appeal and supersedeas is awarded her from a decree entered by the Circuit Court of Scott County on the 18th day of September, 1959, in a certain proceeding then therein depending wherein P. M. Wood and another were plaintiffs and the petitioner was defendant; upon the petitioner, or some one for her, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of two thousand dollars, with condition as the law directs.

RECORD

* * * * *

PETITION FOR DECLARATORY JUDGMENT.

The plaintiffs complain of the defendant and for cause of action allege:

I.

That this is a proceeding for declaratory relief under the provisions of Sections 8-578, et seq., of the Code of Virginia (1950) as amended, for the purpose of determining a question in actual controversy between the parties hereto.

II.

That Item 2nd. of the last will and testament of Annie C. Leece which was probated in the Clerk's Office of the Circuit Court of Scott County, Virginia on January 23, 1912, and recorded in Will Book No. 16, at page 318, provides as follows: "I give and bequeath to my son John S. Leece all of my land which I am now in possession of and on which I now live during his lifetime, and if he dies without heirs, I devise that the land be then sold and divided between my three (3) grandchildren Carrie A. Leece, Geneva
page 2 } A. Wood and Henry H. Wood, Carrie A. Leece to receive one-half of the purchase money and Geneva A. Wood and Henry H. Wood the other one-half equally between them," as will appear from a certified copy of said will and filed herewith marked "EXHIBIT 1" and prayed to be read as a part hereof.

III.

That the said John S. Leece departed this life on the 26th day of March 1958, leaving no issue or heir of the body, he having died without ever having any natural children.

IV.

That on the 20th day of July 1940, the plaintiff, P. M. Wood, by deed acquired all the right, title and interest of Geneva A. Wood in the real estate of which the said Annie C. Leece died, seized and possessed as will appear from a certified

copy of said deed filed herewith marked "EXHIBIT 2" and prayed to be read as a part hereof.

V.

That on the 24th day of August 1940, the plaintiff, P. M. Wood, by deed acquired all the right, title, interest and claim, whether vested or contingent, of Henry K. Wood and Lillian C. Wood in the real estate of which the said Annie C. Leece died, seized and possessed, as will appear from a certified copy of said deed filed herewith marked "EXHIBIT 3" and prayed to be read as a part hereof.

VI.

That on the 17th day of February 1941, the plaintiff, J. W. Frazier, by deed acquired all the right, title and interest of Carrie A. Spence (nee Leece) in the real estate of which the said Annie C. Leece died, seized and possessed, as will appear from a certified copy of said deed filed herewith
page 3 } marked "EXHIBIT 4" and prayed to be read as part hereof.

VII.

That the defendant is reportedly or allegedly asserting some claim or interest in the real estate of which the said Annie C. Leece died, seized and possessed and which was devised as aforesaid by Item 2nd of the last will and testament of Annie C. Leece, said allegedly assertion of claim or interest being based on some claimed or alleged adoption proceedings by the said John S. Leece.

VIII.

That a controversy has arisen between plaintiffs and defendant relative to their legal rights under the provisions of said Item 2nd of the last will and testament of the said Annie C. Leece, the plaintiffs claiming under said deeds from Geneva A. Wood, Henry K. Wood and Carrie A. Spence and the defendant claiming under some claimed or alleged adoption proceedings.

IX.

That the true meaning and legal effect of the provisions of Item 2nd of the last will and testament would be that if the

said John S. Leece should die without issue or heirs of the body to invest the fee simple title to the real estate of which Annie C. Leece died, seized and possessed in the three (3) grandchildren named in the will, and would not pass any legal right, title, interest or claim therein to a person whom the said John S. Leece adopted.

X.

That plaintiffs allege that the words "and if he dies without heirs" as used by the testatrix should be construed to mean issue or the heirs of the body, and were never
page 4 } intended to include or embrace an adopted child.

WHEREFORE, plaintiffs pray for a declaratory judgment under Sections 8-578, et seq., of the Code of Virginia (1950) as amended, construing the provisions of the last will and testament of Annie C. Leece, and declaring that the true meaning and legal effect of Item 2nd thereof to be that if John S. Leece should die without issue or heirs of the body that the remainder should pass to the three (3) grandchildren named in said last will and testament, and that the words "if he dies without heirs" be construed to mean issue or heirs of the body, and were not intended to include an adopted child or children; and that plaintiffs may have their costs and such other and further relief as the court may deem equitable and proper.

P. M. WOOD
J. W. FRAZIER
By Counsel.

COLEMAN & COLEMAN, p. q.
Gate City, Virginia
By S. W. COLEMAN, JR.

QUILLEN & CARTER, p. q.
Gate City, Virginia
By CECIL D. QUILLEN

Filed in the Clerk's Office the 12th day of June 1958.

Teste:

C. B. McCONNELL, Clerk
FERUA DARNELL, D. C.

* * * * *

page 5 } "EXHIBIT 1."

I, Annie C. Leece of the County of Scott and State of Virginia being of sound mind, and disposing memory, do make this my last will and testament which is as follows:

Item, 1st I devise that all my burial expenses be first paid.

Item, 2nd. I give and bequeath to my son John S. Leece all of my land which I am now in possession of and on which I now live during his lifetime, and if he dies without heirs, I devise that the land be then sold and divided between my three Grand children Carrie A. Leece, Geneve A. Wood, and Henry H. Wood, Carrie A. Leece to receive one half of the purchase money and Geneva A. Wood and Henry H. Wood the other half equally between them.

Item, 3rd. I give and bequeath to my Grand daughter Carrie A. Leece two *beeds* and bed Chlothes also one two year old mare, and one cow.

Item, 4th, If Carrie A. Leece should die before marriage the money which I bequeath her and which is herein mentioned shall go to Geneva and H. K. Wood.

Given under my hand and seal this 27th day July 1907.

ANN C. LEECE (Seal)

JAS. F. SUTTON
W. B. JACKSON
Witnesses.

I Annie C. Leece do annex this codicil to my within will.

I will that my Grand-daughter Carrie A. Leece free access to the house, in which I now live so occupy as a dwelling house so long as she lives single, and furthermore I give and bequeath unto my daughter-*inlaw* (now Sallie P. Jordon) one dollar.

ANN C. LEECE.

Witnesses
JAS. F. SUTTON
W. B. JACKSON

A paper writing purporting to be the last will and *tw*stament of Annie C. Leece, deceased, was produced in court,

page 6 } proved by the oath of J. F. Sutton, one of the subscribing witnesses thereto, is admitted to probate and ordered to be recorded as and for the true last will and testament of the said Annie C. Leece, deceased.

Teste:

J. F. RICHMOND, Clerk.

A Copy—Teste:

C. B. McCONNELL, Clerk.

* * * * *

page 7 } "EXHIBIT 2."

This Deed, made this the 20th day of July 1940, by and between Geneva A. Wood, party of the first part, of Cincinnati, Ohio, and P. M. Wood, party of the second part, of Gate City, Virginia.

Witnesseth: That for and in consideration of the sum of Two Hundred Dollars ($200.00) cash in hand paid and before the sealing and delivery of these presents, the receipt of which is hereby acknowledged, the said party of the first part doth hereby grant, bargain and sell, and convey, with covenants of general warranty, unto the party of the second part, all of her right, title, and interest to that certain tract of land, located in Scott County, Virginia, containing 93 acres, more or less, be the said interest vested or contingent, and further, being that land of which Annie C. Leece died seized and possessed, which said interest was devised to the said party of the first part by the said Annie C. Leece, her Grandmother, by will under date of 27 July 1907, which said will is of record in the Clerk's Office of Scott County, Virginia, in Will Book 16, at page 318.

Witness my hand and seal:

GENEVA A. WOOD (Seal)

State of Ohio, to-wit:
Hamilton County, ss:

I, a Notary Public of and for the county of Hamilton, State of Ohio, do hereby certify that Geneva A. Wood, whose name is signed to the foregoing writing bearing date the 20 July

1940, has this day, acknowledged the same before me in my presence and State aforesaid.

Given under my hand and seal this the 24th day of July 1940.

SAUL M. GREENBERG
Notary Public.

My Commission expires Dec. 20, 1942.

Virginia,
Scott County, to-wit:

In the Clerk's Office of said county the 27 day of July 1940, the foregoing writing was presented, and with certificate annexed, admitted to record and duly indexed at 8:10 o'clock A. M. D. B. 108 page 122.

Teste:

H. P. BOATRIGHT, Clerk

Stamps 55

A Copy—Teste:

C. B. McCONNELL, Clerk.

page 8 } "EXHIBIT 3."

This Deed, made and entered into this the 24th day of August, 1940, by and between Lillian C. Wood and Henry K. Wood, parties of the first part, and P. M. Wood, party of the second part.

Witnesseth: That for and in consideration of the sum of Two Hundred and Fifty Dollars ($250.00), cash in hand paid to the parties of the first part by the said party of the second part, at and before the sealing and delivery of this deed, the receipt whereof is hereby acknowledged, the said parties of the first part do grant, bargain, sell and convey unto the said party of the second part all their right, title, interest and claim whether vested or contingent, in and to that certain tract or parcel of land, situate lying and being in Johnson Magisterial District, Scott County, Virginia, on the waters of Big Moccasin Creek, containing 93 acres, more or less, and being the property of which Anne C. Leece died seized

and possessed, and in which John S. Leece now holds an interest for his natural life, and which said tract or parcel of land was devised to John S. Leece by Anne C. Leece in her last will and testament of record in the Clerk's Office of Scott County, Virginia, in W. B. No. 16, at page 318, to which reference is hereby made for a more particular description of the property hereby conveyed.

To have and to hold unto the said party of the second part, his heirs and assigns forever.

Witness the following signatures and seals.

LILLIAN C. WOOD (Seal)
HENRY K. WOOD (Seal)

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

I, D. A. Johnson, a notary public of and for the county aforesaid, in the State of Virginia, do hereby certify that Lillian C. Wood, and Henry K. Wood, whose names are signed to the foregoing writing, bearing date on the 24th day of August, 1940, have acknowledged the same before me in my county and state aforesaid.

My commission expires on the 21 day of Jan. 1944.
page 9 } Given under my hand this the 24 day of August 1940.

D. A. JOHNSON, Notary Public.

Virginia,
Scott County, to-wit:

In the Clerk's Office of said county the 27 day of Aug. 1940, the foregoing writing was presented, and with certificate annexed, admitted to record and duly indexed at 1:45 o'clock P. M. D. B. 108 page 227.

Stamps 55

Teste:

H. P. BOATRIGHT, Clerk.

A Copy—Teste:

C. B. McCONNELL, Clerk.

* * * * *

page 10 } "EXHIBIT 4."

This Deed, made and entered into this the 17th day of February, 1941, by and between Carrie A. Spence (formerly Carrie A. Leece) and H. L. Spence, parties of the first part, and J. W. Frazier, party of the second part,

Witnesseth: That for and in consideration of the sum of Eight Hundred, Dollars ($800.00) cash in hand paid to the said parties of the first part by the said party of the second part, at and before the sealing and delivery of this deed, the receipt whereof is hereby acknowledged, the said parties of the first part do grant, bargain, sell and convey unto the party of the second part, with covenants of general warranty, all the right, title, interest and claim in and to that certain tract of land situate in Johnson Magisterial District, Scott County, Virginia, on the waters of Big Moccasin Creek, containing 93 acres, be the same more or less, and being all the right, title, interest and claim, whether vested or contingent, acquired or to be acquired, by Carrie A. Spence (formerly Carrie A. Leece) by virtue of the provisions of Item 2nd. of the last will and tesatment of Annie C. Leece, deceased, of record in the Clerk's Office of Scott County, Virginia, in W. B. No. 16, at page 318, or acquired or to be acquired as an heir at law of John S. Leece.

To have and to hold unto the said party of the second part, his heirs and assigns forever, in fee simple.

Witness the following signatures and seals:

CARRIE A. SPENCE (Seal)
H. L. SPENCE (Seal)

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

I, Homer Austin, a notary public of and for the county aforesaid, in the State of Virginia, do hereby certify that Carrie A. Spence and H. L. Spence, whose names are signed to the foregoing writing annexed hereto, bearing date on the 17th day of February 1941, have acknowledged the same before me in my county and state aforesaid.

page 11 } Given under my hand this the 22 day of February, 1941.

My commission expires on the 21 day of Sept. 1942.

HOMER AUSTIN, Notary Public.

L. S.

Virginia,
Scott County, to-wit:

In the Clerk's Office of said county the 24 day of Feb. 1941, the foregoing writing was presented, and with certificate annexed, admitted to record and duly indexed at 9 o'clock A. M., D. B. 110 page 434.

Stamp 1.10

Teste:

H. P. BOATRIGHT, Clerk.

A Copy—Teste:

C. B. McCONNELL, Clerk.

* * * * *

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* * * * *

ANSWER OF BETTY JANE WOOD MERSON AND CROSS-BILL.

The answer of Betty Jane Wood Merson to a petition filed against her in the Circuit Court of Scott County, Virginia by P. M. Wood and J. W. Frazier.

This defendant reserving to herself the benefit of all just exceptions to said petition for answer thereto as to so much thereof as she is advised that it is material that she should answer, answers and says:

1.

That the defendant supposes that the allegations set out in Paragraphs 1 and 2 are true.

2.

Defendant supposes that the allegations set out in Paragraph 3 are true.

3.

Defendant is not advised as to the allegations set out in Paragraphs 4, 5 and 6, but prays for strict proof of same.

4.

That the allegations set out in Paragraph 7 are true and the defendant doth allege and aver that she was legally and regularly adopted by John S. Leece and his wife, Mrs. Clyde Leece, by the County Court of Sullivan County, Tennessee, on the 6th day of September, 1949, as shown by an page 15 } attested copy of said order, petition and proceedings of adoption by the County Court of Sullivan County, Tennessee, which is filed herewith as Exhibit A and prayed to be read and considered as a part of this answer. The copy of these adoption proceedings in Sullivan County, Tennessee has been duly attested by the Clerk of the County Court of Sullivan County, Tennessee. That said adoption proceedings is not at this time certified under the acts of Congress, but the defendant makes the avow that same will be properly certified under the acts of Congress before this cause comes on to be heard, and will be properly introduced into the evidence in this case.

5.

Your defendant admits that a controversy has arisen between the plaintiffs and the defendant relative to their rights under the last will and testament of Annie C. Leece and your defendant doth allege and aver that she is the owner of all the real estate mentioned and described in these proceedings in fee simply by virtue of the above mentioned adoption proceedings regularly and duly had in the County Court of Sullivan County, Tennessee, at the October Term 1949 thereof, and that the said petitioners have no interest whatever in said real estate of which Annie C. Leece died seized and possessed and devised to her son, John S. Leece, in Item 2 of the said last will and testament of the said Annie C. Leece, and that by virtue of said adoption proceedings the defendant became the heir at law of John S. Leece under the Virginia

Statute made and provided in such cases, and that your defendant is the heir at law of John S. Leece.

page 16 } 6.

That the defendant denies the allegation set out in Paragraph 9 of the petition as to the construction and interpretation placed on said will by the petitioners, but that your defendant doth allege and aver that by the terms of said will and by the adoption proceedings aforesaid your defendant is the absolute owner in fee simple of all the real estate mentioned and described in this proceeding, and mentioned and described in the last will and testament of Annie C. Leece, and that your defendant, by virture of the above mentioned adoption proceedings became the heir at law of said John S. Leece in accordance with the Virginia adoption statute.

7.

That the defendant denies the interpretation or construction placed on said will as alleged in Paragraph 10 of said petition, but again doth allege and aver that she is the absolute owner in fee simple of the real estate mentioned and described in these proceedings and that the petitioners have no interest whatever in said real estate and that the defendant is the owner in fee simple of said real estate by virtue of said will, and that your defendant, became an heir of John S. Leece by virtue of the adoption proceedings aforesaid, and that under the Virginia adoption statute an adopted child is a true heir of the adopting parents, and inherits to the same extent as if your defendant were the natural child of John S. Leece.

And now having fully answered the petitioners' *petiton* this defendant prays to be hence dismissed with her reasonable costs by her in this behalf expended.

And your defendant doth hereby pray that this answer be likewise treated as both an answer and cross-bill and that the defendant prays the following affirmative relief:

page 17 } a. That the deeds from Genieva A. Wood, Henry K. Wood and Lillian C. Wood conveying their purported interest in said real estate to P. M. Wood, and the deed from Carrie E. Spence (nee Leece) purporting to convey her interest in the above real estate to J. W. Frazier be cancelled, rescinded, vacated and set aside as said deeds might constitute a cloud on the title to the real estate mentioned and described in these proceedings which real

estate is owned exclusively by the defendant, Betty Jane Wood Merson, in fee simple; and,

b. That the said last will and testament of Annie C. Leece and the adoption proceedings hereinbefore mentioned and set out be properly construed by this Honorable Court and that the Court vest title in said real estate in the defendant, Betty Jane Wood Merson, and that the defendant will ever pray, etc.

BETTY JANE WOOD MERSON
By Counsel

ROY V. WOLFE, JR.
Counsel for defendant

E. H. RICHMOND
Counsel for defendant

Filed July 7, 1958.

FERUA DARNELL, D. Clerk.

page 18 } EXHIBIT A.

MINUTES, SULLIVAN COUNTY COURT
OCTOBER (22ND) TERM, 1949.

ADOPTION PROCEEDINGS.

JOHN S. LEECE and wife, CLYDE LEECE

to adopt

BETTY JANE WOOD, an adult.

In re: Adoption of Betty Jane Wood, adult daughter of Henry K. Wood and Leota S. Smith Wood, Divorced, by John S. Leece and wife, Clyde Leece.

ORDER.

A petition having been filed in this Court by John S. Leece and wife, Clyde Leece, praying that they be permitted to adopt Betty Jane Wood, an adult born on October 9, 1924, as their own child:

PETITION.

"Your petitioners John S. Leece and wife, Clyde Leece, both members of the Caucasian race, respectfully represent unto the court:

That Betty Jane Wood, a female member of the Caucasian race, age 24, sought to be adopted herein, was born in Scott County, Virginia, on October 9, 1924, but is now a citizen of Sullivan County, Tennessee; that her parents were divorced in Scott County, Virginia, in 1939.

That Betty Jane Wood is now an adult and desirous of being adopted by your petitioners.

Petitioners, John S. Leece, age 78, and wife, Clyde Leece, age 62, respectfully show unto the Court that they were married in Scott County. Va., on July 21, 1941; that they have no children of their own, and owing to the age of your petitioners, it is doubtful that they will ever have any children of their own; that petitioners are possessed of a 100 acre farm which they wish to leave to their grand-niece, Betty Jane Wood, sought to be adopted herein.

Petitioners represent that it will be for the best interests of Betty Jane Wood for the Court to permit petitioners to adopt her.

That Betty Jane Wood owns an equitable interest, amounting to $4000.00, in the house and lot located at 1808 Kenwood Road, Kingsport, Tennessee, which is valued at $8500.00.

page 19 } The premises considered, petitioners pray:

1st. That this petition be filed as a petition for adoption, and that the Court set a date for a hearing in the matter.

2nd: That, upon the hearing, the Court enter an order to the effect that said Betty Jane Wood be and become the adopted daughter of petitioners herein, and have all the rights and privileges of a child born to petitioners, with the capacity to inherit from them and to succeed to their real and personal property.

3rd: Petitioners pray for such other and further orders and judgments herein as may fully carry out the intentions and wishes of petitioners.

(ss) JOHN S. LEECE
(ss) MRS. CLYDE LEECE

State of Virginia,
County of Scott.

John S. Leece and his wife, Clyde Leece, petitioners named in the foregoing petition, being first duly sworn, make oath that they have read the foregoing petition and know the contents thereof, and that the statements made therein are true of their own knowledge.

(ss) JOHN S. LEECE
(ss) MRS. CLYDE LEECE

Sworn to and subscribed before me at office in Gate City, Va., this the 10th day of August, 1949.

(SEAL) My commission expires: August 7, 1951.

(ss) E. H. McCONNELL
Notary Public

State of Tennessee,
County of Sullivan.

Betty Jane Wood, a citizen and resident of Sullivan County, Tenn., an adult and the person sought to be adopted herein, being first duly sworn, makes oath that:

page 20 } She has read and understands the purpose of the petition filed by John S. Leece and wife, Clyde Leece, for her adoption; that she consents to and wishes to be adopted by the petitioners, her great-uncle and great-aunt, and hereby expressly waives the requirements of Chapter 127, Public Acts of 1949, as passed by the General Assembly of the State of Tennessee.

(ss) BETTY JANE WOOD

State of Tennessee,
County of Sullivan.

This 6th day of September, 1949, before me personally appeared Betty Jane Wood, to me known to be the person described in and who executed the foregoing instrument and acknowledged that she executed the same as her free act and deed.

Witness my hand and notarial seal at office in Sullivan County, Tennessee, this 6th day of September, 1949.

(ss) N. E. WEBER
Notary Public

(SEAL) My commission expires: April 20, 1950.

It further *appezring* to the Court that Betty Jane Wood has consented to and is desirous of being adopted by said petitioners and that the petitioners are persons of good character and the Court being otherwise satisfied with the reasons given for the adoption said Betty Jane Wood:

It is hereby ordered, adjudged and decreed that the said Betty Jane Wood be and become the adopted daughter of the said John S. Leece and wife, Clyde Leece, and that she shall have all of the rights and privileges of a child born to the said petitioners, and shall be entitled to inherit from them as their own child and next of kin.

It is further ordered that petitioners pay all costs of this cause.

T. R. BANDY
Judge of the County Court for
Sullivan County, Tennessee.

page 21 } State of Tennessee,
Sullivan County.

I, Marjorie S. Harr, Clerk of the County Court of Sullivan County, Tennessee, hereby certify that the foregoing is a true and correct copy of the adoption proceedings in the Matter of John S. Leece and wife, Clyde Leece, to adopt Betty Jane Wood, an adult, as same will appear of record in my office in Minute Book Y-1, at page 37.

Witness my hand and official seal at office in Blountville, Tennessee, this the 14th, day of August, 1958.

MARJORIE S. HARR, Clerk
Sullivan County, Tennessee

page 22 } CERTIFICATE OFFICIAL
CHARACTER OF JUDGE
AND CLERK.

State of Tennessee,
Sullivan County.

I, Hal H. Carr, County Judge of Sullivan County, Ten-

nessee, and Presiding Justice of the County Court of said County and State, do certify that Marjorie S. Harr, whose genuine signature is subscribed to the foregoing certificate, which is in due form and which is executed by the proper office, is now, and was at the time of signing same, County Court Clerk of Sullivan County, Tennessee, duly elected, qualified and acting, and that all of her official acts, as such, are entitled to full faith and credit.

Witness my hand and seal of office, at office, in Blountville, Tennessee, this 14th day of August 1958.

HAL H. CARR, County Judge.

State of Tennessee,
Sullivan County.

I, Marjorie S. Harr, County Court Clerk of Sullivan County, Tennessee, do certify that Hal H. Carr, whose genuine signature is subscribed to the foregoing certificate which is in due form and which is executed by the proper officer, is now, and was at the time of signing same, County Judge of Sullivan County, Tennessee, and Presiding Justice of the County Court of said County and State, duly elected, commissioned, qualified and acting, and that all of his official acts, as such are entitled to full faith and credit.

Witness my hand and seal of office, at office in Blountville, Tennessee, this 14th, day of August 1958.

MARJORIE S. HARR, Clerk.

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* * * * *

MOTION TO STRIKE OUT PORTIONS OF ANSWER AND CROSS BILL.

Come now the plaintiffs by their Counsel and move the Court to strike out the following portions of the answer filed by the defendant in this cause, and also come now the plaintiffs by their counsel and move to strike out all the allegations in said answer purporting to be a cross-bill asking for affirmative relief for the following reasons:

1. Plaintiffs, by their counsel, move to strike out Sections 4, 5, 6 and 7 of said answer, because said sections of said answer are not responsive to the issues raised in the petition

herein filed; said sections of said answer purport to bring into issue the validity of adoption proceedings set out in said answer; said answer attempts to adjudicate title to said lands; said sections of said answer seek to adjudicate issues beyond the allegations set out in said petition and not germane to the issues raised at this stage in these proceedings.

2. Plaintiffs, by counsel, move to dismiss and strike out all of the allegations of the answer purporting to be a cross-bill asking for affirmative relief for the reason that said allegations ask for affirmative relief which goes beyond the scope and prayer of the petition for declaratory judgment, and raises issues which are beyond the scope of the

page 24 } petition for declaratory judgment and seeks relief which is not asked for in the petition for declaratory judgment, and also asks the Court to adjudicate matters which are beyond the jurisdiction of the Court, and actually amounts to an independent suit, and it is in no way responsive to the narrow issue presented by the petition for declaratory judgment.

P. M. WOOD and
J. W. FRAZIER, plaintiffs
By Counsel

Counsel:

COLEMAN & COLEMAN
By S. W. COLEMAN, JR.
Gate City, Virginia.

QUILLEN & CARTER
By CECIL D. QUILLEN
Gate City, Virginia.

Received and filed August 15, 1958.

E. T. CARTER, Judge.

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* * * * *

STIPULATION.

It is stipulated by and between Counsel for plaintiffs and Counsel for defendant that the following facts may be read

and considered as a part of the record in the above styled cause, the same as if such facts had been proved by competent evidence:

1. At the time of the execution of the will of Annie C. Leece on July 27, 1907, Annie C. Leece had the following children living at that time, to-wit: Lillian L Wood, James Leece and John S. Leece.

Also at the time of the execution of said will, Carrie A. Leece, Geneva A. Wood and Henry H. Wood, grandchildren of Annie C. Leece, were living. Geneva Wood and Henry H. Wood were children of Lillian Wood, and Carrie A. Leece was the daughter of James Leece. The said Carrie A. Leece, Geneva A. Wood and Henry H. Wood were nieces and nephew respectively of the said John S. Leece.

2. At the time of the death of Annie C. Leece in 1912, Lillian Wood, James Leece and John S. Leece were living. Also Carrie A. Leece, Geneva A. Wood and Henry H. Wood were living at the time of the death of Annie C. Leece.

3. At the time of the execution of said will and
page 26 } also at the time of the death of Annie C. Leece, the
said John S. Leece did not have any children by blood or issue of the body. At the time of the death of the said John S. Leece, he had no children by blood or issue of the body.

4. At the time of the execution of the will by Annie C. Leece and at the time of her death, John S. Leece was married and living with his wife.

5. The Defendant Betty Jane Merson was born October 9, 1924 and is a grand niece of John S. Leece and great granddaughter of Annie C. Leece.

P. M. WOOD and
J. W. FRAZIER, plaintiffs
By Counsel

COUNSEL:

COLEMAN & COLEMAN
By S. W. COLEMAN, JR.

QUILLEN & CARTER
By CECIL D. QUILLEN

BETTY JANE WOOD MERSON
ROY V. WOLFE, JR.
By her Counsel.

E. H. RICHMOND
Counsel for Betty Wood Merson.

Filed 8-15-58.

E. T. CARTER, Judge.

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This cause came on this day to be heard upon the petition, answer and cross bill filed by the defendant in this cause; upon motion of the plaintiffs to strike out Sections 4, 5, 6, and 7 of said answer and to dismiss and strike out all the allegations of the cross bill filed with the answer in this cause.

Upon consideration of which the court is of the opinion that said answer and cross bill are proper and that said motion to strike out Sections 4, 5, 6, and 7 of said answer and to strike said cross bill filed with said answer should not be granted, and it is adjudged, ordered, and decreed that said motion to strike be and the same is hereby overruled, to which action of the court the plaintiffs by counsel except.

It is further adjudged, ordered, and decreed that the plaintiffs shall have a period of thirty (30) days from August 15, 1958, for the purpose of filing an answer to the cross bill filed in this cause.

To C. B. McConnell, Clerk.

Enter this decree this the 18th day of August, 1958.

E. T. CARTER, Judge.

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REPLICATION TO ANSWER AND ANSWER TO CROSS BILL.

Without waiving the motion heretofore made to strike out Sections 4, 5, 6 and 7 of the answer of Betty Jane Wood Merson filed in said cause and to strike said cross bill filed

to said answer, and without waiving the exception taken by plaintiffs to the failure of the Court to strike said sections of said answer and said cross bill, the petitioners, P. M. Wood and J. W. Frazier for replication to said answer say as follows:

1. Petitioners reply generally to all paragraphs of and all matters contained in said answer.

And now, without waiving the motion heretofore made as aforesaid to strike said sections of said answer and said cross bill so filed in this cause, petitioners for answer thereto say as follows:

1. Petitioners deny all the allegations contained in Paragraph 5 of said answer and cross bill and say that they are now the owners in fee simple of the lands mentioned and described in these proceedings, and that the de-
page 29 } fendant, Betty Jane Wood Merson, has no interest therein and is not an heir of John S. Leece as contemplated under the said last will and testament of the said Annie C. Leece; and

2. Petitioners deny that by virtue of said will and said alleged adoption proceedings, the defendant is the owner in fee simple of the real estate mentioned and described in these proceedings and mentioned and described in the last will and testament of Annie C. Leece; and deny that the defendant, Betty Jane Merson is an heir at law of John S. Leece as contemplated by the said last will and testament of the said Annie C. Leece, deceased; and

3. The complainants deny the allegations contained in Paragraph 7 of said answer and cross bill insofar as said paragraph of said answer and cross bill alleges that the petitioners have no interest in said real estate, and that the defendant is the owner in fee simple of said real estate by virtue of said will and that she is an heir of John S. Leece; but on the other hand say that the defendant, Betty Jane Merson, has no interest whatsoever in said real estate, but that the complainants are the owners in fee simple thereof; and

4. Complainants deny that the defendant is entitled to the relief asked for in sub-section (a) of Paragraph 7 of said answer and cross bill with respect to cancelling, rescinding, vacating and setting aside said deeds to complainants as clouds on the title to said real estate, but on the other hand say that said deeds are valid and subsisting deeds conveying the interests of the parties grantor therein to your
page 30 } complainants as their interest appear in said deeds; and that complainants are the owners in fee

simple of said lands and that the said Betty Jane Wood Merson is not the owner of any part or portion of said real estate and has no interest therein; and

5. Complainants do further deny that the defendant, Betty Jane Wood Merson, is entitled to have title to said real estate vested in her but that the Honorable Court should declare that petitioners are the sole owners in fee simple of said real estate in accordance with their interests as set forth in said deeds aforesaid.

And now having fully answered, petitioners pray to be hence dismissed.

P. M. WOOD and
J. W. FRAZIER, petitioners
By Counsel

QUILLEN & CARTER, p. q.
By CECIL D. QUILLEN
Gate City, Virginia.

COLEMAN & COLEMAN, p. q.
By S. W. COLEMAN, JR.
Gate City, Virginia.

Filed September 12, 1958.

FERUA DARNELL, D. Clerk.

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STIPULATION.

It is stipulated by and between counsel for plaintiffs and counsel for the defendant that the value of the real estate mentioned and described in these proceedings and which is the subject matter of this litigation is valued in excess of Ten Thousand Dollars.

It is further stipulated between counsel for the plaintiffs and counsel for the defendant that Chapter 127 of the Public Acts of Tennessee 1949 on adoption shall be treated as introduced in this case.

Given under our hands this the 19th day of November, 1958.

COLEMAN & COLEMAN
Counsel for Plaintiffs

QUILLEN & CARTER
Counsel for Plaintiffs

E. H. RICHMOND
Counsel for Defendant

ROY V. WOLFE, JR.
Counsel for Defendant

(On Back)

Received and filed November 19th, 1958.

E. T. CARTER, Judge.

* * * * *

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* * * * *

OPINION.

On the .. day of June, 1958, the complainants filed their petition in this case against the defendant, Betty Jane Wood Merson, praying for a declaratory judgment to determine the ownership of a tract of land disposed of under the last will and testament of Annie C. Leese, a resident of Scott County, Virginia.

Annie C. Leece executed her will on the 27th day of July, 1907, which was probated before the Circuit Court of said county, January 23rd, 1912. She left surviving three children, a daughter Lillian C. Wood and two sons, James Leece and John S. Leece, and three grand children, Carrie A. Leece, daughter of the said James Leece, and Genevia A. Wood and Henry K. Wood, children of her daughter, Lillian C. Wood; the son John S. Leece was unmarried at the time the will was executed. Since the testatrix's death, the said Carrie A. Leece has married a Mr. Spence, both of whom are living, and the son, John S. Leece, was married on July 21st, 1941, to his wife Clyde Leece who predeceased the said John S. Leece

and said John S. Leech departed this life in March, 1958, and at the times was a resident of the state of Tennessee.

After the complainants filed their petition in this case, the defendant, Betty Jane Wood Merson, appeared and asked leave to file her answer in this case, to the filing of same the complainants objected, and over the objections of the complainants the court permitted the filing of said answer, to which the complainants excepted. Certain facts stated in writing agreed to and signed by the parties are exhibited with and made a part of the record in this case by agreement of the parties.

Petitioner, P. M. Wood, asserts title to an one-half undivided interest in the land in controversy under a
page 46 } deed he holds from Geneva A. Wood and Henry H. Wood whereby they conveyed to him their interest in said land, dated July 20th, 1940, and petitioner J. W. Frazier asserts title to an one-half undivided interest in said land under a deed he holds from Carrie A. Spence, (nee Leece) dated February 17, 1941, both of deeds being filed as exhibits to the complainants petition.

The defendant Betty Jane Wood Merson asserts that she is the fee simple owner of said land in controversy by reason of the fact that the said John S. Leece and Clyde Leece, his wife, by an order of the County Court of Sullivan County, State of Tennessee, duly and entered by said court, on the 22nd day of October, 1949, adopted her, said Betty Jane Wood Merson, as their child and foster daughter and by reason thereof she became the legal heir of the said John S. Leece and wife, and on the death of the said John S. Leece, which occurred in March, 1958, she became vested in fee simple to the said tract of land. She files as an exhibit the record of the county Court of Sullivan County, Tennessee, showing her adoption as the child and foster daughter of the said John S. Leece and wife.

No child or children were born to the said John S. Leece and his wife, who at his death left surviving his wife and adopted daughter as his heirs and distributees, he having died intestate.

The dominant questions presented are: (a) Upon the death of her son, said John S. Leece, did his adopted daughter become entitled by inheritance from him to the fee in the real estate devised under the 2nd Item of the testatrix's will, or are the grand children, namely: Carrie A. Leece (now Spence), Geneva A. Wood and Henry K. Wood, grand children of the testatrix, or the latters vendees (P. M. Wood and

J. W. Frazier), now entitled to the fee in the real estate as devisee under that clause or item of said will.

Item 2nd of the will of Annie C. Leece is as follows:

"Item 2nd: I give and bequeath to my son John S. Leece all of my land which I am in possession of and on page 47 } which I now live during his life time, and if he dies without heirs, I devise that the land then be sold and divided between my three grand children, Carrie A. Leece, Geneva A. Wood and Henry H. Wood, Carrie A. Leece to receive one half of the purchase money and Geneva A. Wood and Henry H. Wood the other half equally between them."

"Item 3rd: I give and bequeath to my grand daughter, Carrie A. Leece two beds and bed clothing also one two year old mare, and one cow."

"Item 4th. If Carrie A. Leece should die before marriage the money which I bequeath her and which is herein mentioned shall go to Geneva Wood and H. K. Wood,"

"I Annie C. Leece do annex this codicile to my within will. I will that my grand daughter Carrie C. Leece free access to the home in which I now live and occupy as a dwelling house so long as she lives single, and further more I give and bequeath unto my daughter in law (now Sallie F. Jordon) one dollar."

Under the 2nd Item or paragraph of the will of the said Ann C. Leece, she uses this language, "I give and bequeath to my son John S. Leece all of my land which I am now in possession of and on which I now live during his life time, and if he dies without heirs, I devise that the land be then sold and divided between my three grand children, Carrie A. Leece, Geneva A. Wood and Henry H. Wood, Carrie A. Leece to receive one half of the purshase money and Geneva A. Wood and Henry H. Wood the other half equally between them. "The 4th Item: If Carrie A. Leece should die before marriage the money which I bequeath her and which is herein mentioned shall go to Geneva Wood and H. K. Wood."

The record show when Annie C. Leece executed her will July 27th, 1907, and when same was probated January 12, 1912, she left surviving her daughter, Lillian C. Wood, her sons, James Leece and John S. Leece, and three grand children, namely: Geneva A. Wood, Henry H. Wood and Carrie A. Leece; that at that time the said son, John S. Leece, was unmarried; that when the petition of the said John S.

Leece and wife was filed in the County Court of
page 48 } Sullivan County, Tennessee, on October 22, 1949,
wherein he and his wife adopted the said Betty Jane Wood Merson as their child and foster daughter, which is exhibited with the latters answer, contains the following allegations, "Petitioner, John S. Leece, age 78, and wife Clyde Leece, age 62, respectfully show unto the court that they were married in Scott County, Virginia, on July 21, 1941, that they have no children of their own, and owing to the age of your petitioners, it is doubtful that they will ever have any children of their own; that petitioners are possessed of a 100 acre farm which they wish to leave to their grand niece Betty Jane Wood, sought to be adopted herein." It will be observed that the said John S. Leece remained unmarried from the date of the execution of said will in 1907, until July, 1941, when he was married approximately 34 years, and the adoption order was entered on October 22, 194*k*, some 42 years after the execution of said will, when he was then 78 years of age, and his adopted child, Betty Jane Wood, (now Merson) was 24 years of age.

In the case of *Newsome* v. *Scott*, 200 Va. P. 833, the Supreme Court of Virginia, had before it for construction a will containing this language, "The remainder of my estate I give to Violet Merritt Johnson, but if she should die without heir, then I want it to go to the children of Wm. H. Johnson and Ruth Johnson, but to no others except the children of William H. Johnson and Ruth Johnson." The Court in its opinion states that the testator was survived by his wife and two children, Ruth Johnson, who married William H. Johnson, June 14, 1906, and Violet Merritt Johnson, who married William P. Newsome, June 19, 1929, as his heirs at law. Said Wm. H. and Ruth Johnson are both deceased, but they left surviving ten children, all of whom are living, except one.

No children were born to Violet and William P. Newsome, but on the 5th day of September, 1950, thirty two years after the death of Merritt Johnson, the testator, they adopted a
child who was then twenty years of age. Violet
page 49 } died intestate June 7, 1955, survived by her hus-
band, William P. Newsome, and their adopted son, Clarence Rudolph Preston Newsome.

The facts in the present case now being considered are quiet similar as will be observed by a brief statement, which are as follows: Annie C. Leece, executed her will July 27, 1907, which was probated January 23, 1912, by which she devised a tract of land she owned, using the following language: "Item 2nd: I give and bequeath to my son John S. Leece all of my land which I am now in possession of and

on which I now live during his life time, and if he dies without heirs, I devise that the land then be sold and divided between my three grand children, Carrie A. Leece, Geneva A. Wood and Henry H. Wood, Carrie A. Leece to receive one half of the purchase money and Geneva A. Wood and Henry H. Wood the other half equally between them."

At the time Annie C. Leece executed her will the said John S. Leece was unmarried, and never married until 21st day of July, 1941, some thirty four years after the execution of said will. No child or issue was born to the said John S. Leece and wife, Clyde Leece, as a result of said marriage, but on October 22nd, 1949, forty-two years after the execution of said will, then the said John S. Leece and Clyde Leece, his wife, adopted the defendant, Betty Jane Wood (now Betty Jane Wood Merson), as their child, who, at the time of said adoption was an adult 24 years of age. Petitioners allege in their petition "that they have no children of their own, and owing to their age, it is doubtful that they will ever have any children of their own; that petitioners are possessed of a 100 acre farm, (the land in controversy in this case) which they wish to leave to their grand niece, Betty Jane Wood, sought to be adopted herein."

It appears that the said John S. Leece departed this life in March, 1958, intestate, leaving surviving his adopted child, Betty Jane Wood (now Betty Jane Wood Merson), the defendant.

page 50 } No serious question to regularity of the adoption proceedings wherein Betty Jane Wood was adopted as the child of the said John S. Leece and wife, has been raised, the Court holds that said proceedings are legal and that the said Betty Jane Wood thereby, became the adopted child of the said John S. Leece and wife.

The Court has reviewed the Virginia Statutes on the subject of adoption and carefully considered the cases of *Dickenson* v. *Buck*, 169 Va. P. 192, *Newsome* v. *Scott*, 200 Va. P. 833, as well as the cases cited in the latter case, and other cases deemed *relivent* to the issue involved in the instant case. The facts and language under consideration in the case of *Newsome* v. *Scott,* are *quiet* similar to the facts and language under consideration in the instant case; their is no substantial difference in the two cases. The language used in the Newsome Case: "The remainder of my estate I give to Violet Merritt Johnson, but if she should die without heir, then I want it to go to the children of William H. Johnson and Ruth Johnson but to no others except the children of William H. Johnson and Ruth Johnson." The language in the will under consideration in the instance is as follows: "Item 2nd:

I give and bequeath to my son John S. Leece all of the land which I am now in possession of and on which I now live during his life time, and if he dies without heirs, I devise that the land then be sold and divided between my three grand children Carrie A. Leece Geneva A. Wood and Henry H. Wood, Carrie Leece to receive one half of the purchase price money and Geneva A. Wood and Henry H. Wood the other half equally between them." "Item 4th: If Carrie A. Leece should die before marriage the money which I bequeath her and which is herein mentioned shall go to Geneva and H. K. Wood."

In the case of *Newsome* v. *Scott,* P. 835, we find this statement: "The Court decreed that (1) under the fourth clause of the said will providing that the remainder of my estate I give to Violet Merritt Johnson, but if she should die without heir, then I want it to go to the children of Wm. H. Johnson and Ruth Johnson but to no others except the page 51 } children of William H. Johnson and Ruth Johnson, "the Court held that the words "without heir" as used by the testator did not include a child by adoption (2) Violet Merritt Johnson Newsome took a defeasible fee under the fourth clause of said will which was terminated by her death without issue or heir of her body, (3) Upon the death of Violet Merritt Johnson Newsome, the children of William H. Johnson and Ruth Johnson took the gift over, a fee simple estate, as an executory devise."

When Annie C. Leece executed her will, she had in mind her three children Lillian C. Wood, James Leece and John S. Leece, and her three grand children, Geneva A. Wood, Henry H. Wood, and Carrie A. Leece. John S. Leece to whom she devised the land in controversy was unmarried and was about thirty years of age, had no children, the other son and daughter were married and had children.

The sole question in this case, is: Upon the death of the said John S. Leece, did his adopted daughter become entitled by inheritance from him to the fee in the property devised under the 2nd Item of the will of the said Annie C. Leece, or do the grand children Geneva A. Wood, Henry H. Wood and Carrie A. Leece become entitled to the fee in the property as devisees under the 2nd Item under said will. In *Newsome* v. *Scott*, 200 Va. P. 837, the court states "Here testator recognized and provided for the contingency of Voilet dying without "an heir" by gift over to the children of Ruth and William H. Johnson, who were the testator's grand children. Employment of the word "heir or heirs" in a devise may or may not include those who constitute "legal heirs" under the

statute of descent and distribution. When these terms are used, the testator may not intend that they include heirs general or an adopted child. Here it is manifest, in fact conceded, that the testator did not mean "heirs" general by the use of the words "die without heir" for no one can die without an heir general whilest he has any collateral relatives to succeed him. Likewise, the context of the will and the use of the phrase "die without heir," with limitation over upon the happening of the contingency to the grand children page 52 } of testator and "no others" by plain implication show intent to imply the words "die without heir" in the sense of "heir of the body or "issue."

The facts in the case at bar are strikingly similar to the above cited, in fact the court can see no substantial difference in the cases. Annie C. Leece executed her will July 27, 1907, and in the 2nd Item, thereof she uses this language "I give and bequeath to my son John S. Leece all of my land during his life time, and if he dies without heirs, I devise that the land be then sold and divided between my three grand children, Carrie A. Leece, Geneva A. Wood and Henry H. Wood, Carrie A. Leece to receive one half of the purchase money and Geneva A. Wood and Henry H. Wood the other half equally between them. "In the 4th Item of said will we find this language "If Carrie A. Leece should die before marriage the money which I bequeath to her and which is herein mentioned shall go to Geneva and H. K. Wood." When the will was executed Annie C. Leece had three children, a daughter, Lillian C. Wood, James Leece and John S. Leece, and three grand children, Geneva A. Wood, Henry H. Wood and Carrie A. Leece; the daughter Lillian Wood and son James were married and living children, but the son John S. Leece, who was about 35 years of age, was unmarried and had no children, and was not married until July 21, 1941; he had no children born of his marriage, but on October 22, 1949, he adopted Betty Jane Wood, now Betty Jane Wood Merson, the defendant as his adopted child, some 42 years after the said will was executed, and departed this life, intestate, in March, 1958, leaving his widow and adopted child as his only heirs and distributees. Said John S. Leece alleges in his petition for adoption that he and his wife are old, have no children born of their marriage, and owing to their age, doubts that they will ever have any children; that he owns a farm that he wants to go to his grand niece Betty Jane Wood, whom he is seeking to adopt.

After a careful consideration of the facts and circumstances disclosed by the record, the court is of opinion that the

page 53 } phrase "die without Heirs," used by the testatrix in her will, she did not intend that an adopted child by her son John S. Leece, after the latters death, should become the fee simple owner of the property in question. The devise reads "I give and bequeath to my son John S. Leece all of my land during his life time, and if he dies without heirs, I devise that the land be then sold and divided between my three grand children, Carrie A. Leece, Geneva A. Wood and Henry H. Wood, Carrie A. Leece to receive one half of the purchase money and Geneva A. Wood and Henry H. Wood the other half equally between them "Item 4th of the will reads "If Carrie A. Leece should die before marriage the *momwy* which I bequeath to her which is herein mentioned shall go to Geneva and H. K. Wood."

The Court is of opinion that Annie C. Leece used the phrase contained in her will "die without heirs" in the sense of "heirs of the body, or "issue of the body," and that it was never her intention by the use of said phrase "die without heirs" in her will, to vest a fee simple title, after the death of the said John S. Leece, in his adopted child, Betty Jane Wood Merson, the defendant in this case, but by plain implication she employed the phrase "die without heirs" in the sense of "heirs of the body" or issue of the body." The court is of opinion that the reversion in the property in controversy, after the death of the said John S. Leece, became, and is vested in fee simple, in the said Carrie A. Leece, Geneva A. Wood and Henry H. Wood, or their vendees, and will so decree.

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FINAL DECREE.

This cause came on this day to be heard upon the Petition for Declaratory Judgment, the Answer and Cross-Bill of Betty Jane Wood Merson, motion to strike out portions of the Answer and Cross-Bill, replication of P. M. Wood and J. W. Frazier to the Answer and Cross-Bill, Stipulation filed on August 15, 1958, Stipulation filed November 19, 1958, former orders and decrees, and was argued by Counsel.

Upon consideration of all of which the Court is of opinion that the plaintiffs are entitled to the relief prayed in their Petition and doth so ADJUDGE, ORDER and DECREE that (1) under Item 2nd. of the last will and testament of Ann C. Leece or Annie C. Leece providing as follows: "I give

and bequeath to my son John S. Leece all my land which I am now in possession of and on which I now live during his lifetime, and if he dies without heirs, I devise that the land be then sold and divided between my three Grandchildren Carrie A. Leece, Geneva A. Wood and Henry H. Wood, Carrie A. Leece to receive one-half of the purchase money and Geneva A. Wood and Henry H. Wood the other half equally between them," the words "without heirs" as used

page 55 } by the testatrix did not include a child of John S. Leece by adoption; (2) John S. Leece took a defeasible fee under Item 2nd. of the said will which was terminated by his death without issue or heir of the body; (3) upon the death of John S. Leece, the vendees of Carrie A. Leece, Geneva A. Wood and Henry H. Wood, took the gift over, a fee simple estate, as an executory devise; and (4) that P. M. Wood and J. W. Frazier, the vendees or grantees of Carrie A. Spence (nee Leece), Geneva A. Wood and Henry H. Wood, are vested with the fee simple title in said tract of land and are entitled to the possession thereof, for which the Clerk shall issue writ of possession upon request.

And it further appearing to the Court that Walter L. Wood, who was appointed Special Receiver by Decree herein dated February 6, 1959, has in his hands certain funds realized from the renting of said real estate for the crop year of 1959, and that the plaintiffs are entitled to said funds after deducting therefrom the expenses and commissions due the said Walter L. Wood, it is ADJUDGED, ORDERED and DECREED that the said Walter L. Wood shall deduct his expenses and commissions therefrom and pay the remainder of said funds to the plaintiffs.

And the Court doth further ADJUDGE, ORDER and DECREE that the plaintiffs recover of the defendant the costs of this suit.

And nothing further remaining to be done in this cause it is ordered stricken from the docket.

The defendant signifying her intention of applying to the Supreme Court of Appeals of Virginia for an appeal in this cause doth hereby except to the entry of this Decree.

Enter this Decree this the 18 day of September, 1959.

E. T. CARTER, Judge.

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NOTICE OF APPEAL AND ASSIGNMENT OF ERROR.

The defendant, Betty Jane Wood Merson, by her counsel, hereby gives notice of appeal from the decree entered in the above styled case by the Circuit Court of Scott County, Virginia, on the 18th day of September, 1959, and sets forth the following assignments of error:

1.

That the Court erred in holding that John S. Leece took a defeasible fee under item 2nd under the last will and testament of Annie C. Leece which was terminated by the death of John S. Leece without issue or heir of the body.

2.

That the Court erred in holding that the words "without heirs" as used by the testatrix did not include a child of John S. Leece by adoption.

3.

That the Court erred in holding that P. M. Wood and J. W. Frazier, the vendees and grantees of Carrie A. Spence (nee Leece) Geneva A. Wood and Henry H. Wood were vested in fee simple title in the land mentioned and described in these proceedings.

4.

That the Court erred in construing item 2nd of the last will and testament of Annie C. Leece in holding page 58 } that the adopted child of John S. Leece was not the fee simple owner of the real estate mentioned and described in these proceedings.

5.

That the Court erred in holding that John S. Leece under item 2nd of the last will and testament of Annie C. Leece did not have a life estate with the remainder to his heir or adopted child, Betty Jane Wood Merson.

BETTY JANE WOOD MERSON
By Counsel.

ROY V. WOLFE, JR.
Gate City, Virginia,
Attorney for Betty Jane Wood Merson.

E. H. RICHMOND
Gate City, Virginia,
Attorney for Betty Jane Wood Merson

FULLER AND WEST
Kingsport, Tennessee,
Attorneys for Betty Jane Wood Merson.

Received and filed Nov. 10, 1959.

FERUA DARNELL, D. Clerk.

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NOTICE.

To C. B. McConnell, Clerk of the Circuit Court of Scott County, Virginia:

You are hereby notified that Betty Jane Wood Merson, the defendant in the above styled cause, will apply for an appeal to the Supreme Court of Appeals of Virginia, in the above styled cause from a decree of September 18, 1959, entered by the Honorable E. T. Carter, Judge of the Circuit Court of Scott County, Virginia, and you are hereby respectfully requested to make up the record in the above styled cause and transmit the same and take such action as may be required in order to enable the defendant to properly present and prosecute her appeal in the Supreme Court of Appeals of Virginia.

Given under our hands this the 10th day of November, 1959.

BETTY JANE WOOD MERSON
By Counsel.

E. T. RICHMOND
Gate City, Virginia,
Attorney for Betty Jane Wood Merson.

ROY V. WOLFE, JR.
Gate City, Virginia,
Attorney for Betty Jane Wood Merson.

FULLER AND WEST
Kingsport, Tennessee,
Attorneys for Betty Jane Wood Merson.

Received and filed Nov. 10, 1959.

FERUA DARNELL, D. Clerk.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

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