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Supreme Court of Appeals of Virginia

AT RICHMOND

RECORD No. 6858

WILLIAM T. GRASTY, EXECUTOR, ETC.,
Appellant,

v.

N. HOLMES CLARE, EXECUTOR, ETC., ET AL.,
Appellees.

RECORD No. 6859

WILLIAM T. GRASTY, EXECUTOR, ETC.,
Appellant,

v.

SUZANNE D. CLARK, ET AL.,
Appellees.

RECORD No. 7024

ELIZABETH D. CLARK, ET AL.,
Appellants,

v.

WILLIAM T. GRASTY, EXECUTOR, ETC.,
Appellee.

Appendix to Briefs Submitted on Behalf of Elizabeth D. Clark, Suzanne D. Clark and N. Holmes Clare, Executor, etc.

JOHN S. BATTLE, JR.
WILLIAM R. WADDELL
McGuire, Woods & Battle
Ross Building
Richmond, Virginia 23219

THOMAS V. MONAHAN
Hall, Monahan & Engle
3 East Market Street
Leesburg, Virginia 22075

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The Decedent's Last Will and Testament

I, ROBERT VANDERPOEL CLARK, JR., presently residing in Fauquier County, Virginia, hereby revoke my former Wills and declare this to be my Last Will and Testament.

FIRST: (A) I appoint my counsel, N. HOLMES CLARE and THE CHASE MANHATTAN BANK a corporation organized under the laws of the State of New York, the Executors of this Will for all my assets, with the exception of my Virginia assets which shall consist only of any real property which I may own in the State of Virginia, any tangible personal property situated in that State, and any funds on deposit in banks located in Virginia.

(B) For my Virginia assets I appoint as Executors my counsel N. HOLMES CLARE and WILLIAM T. GRASTY. If either (or both) does not survive me, does not qualify, or is unable to act for any cause, resigns or dies I appoint in his (or their) place and stead STATE PLANTERS BANK OF COMMERCE & TRUSTS of Richmond, Virginia.

(C) I direct that no bond be required of any Executor in any jurisdiction, nor shall any Executor be required to file periodic accounts, nor shall there be any official appraisal of my estate or any part of it.

SECOND: I direct my Virginia Executors, at such time or times and at such prices as they consider reasonable, to sell my Virginia real estate which is not specifically devised and all tangible personal property located in Virginia and not specifically bequeathed, and after first paying all my debts for which claims may be filed and allowed in the State of Virginia and all expenses of administra-

tion (not including any estate or inheritance taxes) in that state, to transmit the net proceeds of sale and any net balances on deposit in banks located in Virginia to my New York Trustees.

THIRD: My property located in Fauquier County, Virginia, known as "Springfield Farm," including but not limited to the land, residence, guest and tenant houses, barns and garages and all live stock, tractors, trucks and farm implements on or used in connection with said farm, and all tangible personal property in or about the residence and other buildings, including but not limited to automobiles, television and radio sets, books, paintings, works of art, furniture, furnishings, silverware, jewelry, articles of personal adornment, clothes, and things of a like nature and all insurance policies covering such real and personal property, but not including any monies, notes, debts, stocks, bonds, mortgages, choses in action, accounts receivable or any intangible property, I give to ELIZABETH T. DUNN to whom I am presently engaged to be married, if I am married to her at the time of my death.

FOURTH: If I am married to ELIZABETH T. DUNN at the time of my death and we die in a common accident or disaster or under such circumstances that it is difficult or impractical to determine who survived the other, then for purposes of this Will, she shall be deemed to have survived me.

FIFTH: (A) If I am married to ELIZABETH T. DUNN at the time of my death, I give one-half of the balance

of my estate to my Trustees hereinafter named, IN TRUST NEVERTHELESS, for the following uses and purposes:

1. To hold, manage, invest and reinvest the same, to collect the income therefrom and to pay over or apply the net income in periodic installments each year to or for the benefit of ELIZABETH T. DUNN during her life.

2. Upon the death of ELIZABETH T. DUNN, I give the principal of said trust fund, together with all accrued income thereon, to and among such person or persons, corporation or corporations (including, but without limitation, her estate) in such shares, proportions and estates, absolute or in trust as the said ELIZABETH T. DUNN shall appoint and direct by specific reference in her Last Will and Testament. If she shall have predeceased me, or having survived me shall fail to exercise said general power of appointment herein conferred upon her, or if the exercise thereof shall be ineffective or invalid, or if she shall only partially exercise said power of appointment or said exercise shall be partially ineffective or invalid, then I direct that the principal of said trust fund or so much thereof as then remains which has not been effectively or validly appointed, together with all accrued income thereon shall be divided into as many equal parts as there may be children of the said ELIZABETH T. DUNN and me then surviving, and my Trustees shall pay over one such equal part to each such child;

3. If there be no issue of ELIZABETH T. DUNN and me then surviving the Trustees shall pay over the principal and any accrued income in equal shares per stirpes to the issue of my mother SUZANNE DE LASALLE CLARK surviving at that time.

(B) If I am not married to ELIZABETH T. DUNN at the time of my death, I give the said one-half of the balance of my estate to my surviving issue in equal shares per stirpes, and if there be none, I direct my Trustees to divide said one-half into four parts, Part One to equal one-third of said half, Part Two to equal one-third of said half, Part Three to equal one-sixth of said half, and Part Four to equal one-sixth of said half, and I give said Parts to my Trustees, IN TRUST NEVERTHELESS, for the following uses and purposes:

1. To hold, manage, invest and reinvest Part One, to collect the income therefrom and to pay over or apply the net income in periodic installments each year to or for the benefit of my sister JACQUELIN CHAMBERS WYNNE-WILSON during the term of her life, and upon her death, or if she shall predecease me then upon my death, to divide the said Part One and any accrued income into as many equal shares as there may be children of my said sister (including in the term "children," legally, or formally, or informally adopted children) then surviving and children then dead leaving issue then surviving, and the Trustees shall pay over

(a) One such equal share to the issue of each child (as above defined) of my said sister, who shall have so died in equal parts per stirpes, and

(b) One such equal share to each child (as above defined) of my said sister then surviving, and

(c) If there be no such children or issue of predeceased children then surviving, the Trustees shall pay over the principal of said Part One and any accrued income in equal parts per stirpes to the issue of my

mother SUZANNE DE LASALLE CLARK surviving at that time.

2. To hold, manage, invest and reinvest Part Two, to collect the income therefrom and to pay over or apply the net income in periodic installments each year to or for the benefit of my sister MADELEINE CHAMBERS KINZEL during the term of her life, and upon her death, or if she shall predecease me then upon my death, to divide the said Part Two and any accrued income into as many equal shares as there may be children of my said sister then surviving, and children then dead leaving issue then surviving, and the Trustees shall pay over

(a) One such equal share to the issue of each child of my said sister, who shall have so died in equal parts per stirpes, and

(b) One such equal share to each child of my said sister then surviving, and

(c) If there be no children or issue of predeceased children then surviving, the Trustees shall pay over the principal of said Part Two and any accrued income in equal parts per stirpes to the issue of my mother SUZANNE DE LASALLE CLARK surviving at that time.

3. To hold, manage, invest and reinvest Part Three, to collect the income therefrom and to pay over or apply the net income in periodic installments each year to or for the benefit of my brother ROBERT N. CHAMBERS, JR. during the term of his life, and upon his death, or if he shall predecease me then upon my death, to divide the said Part Three and any accrued income into as many equal shares as there may be children of my said brother then

surviving, and children then dead leaving issue then surviving, and the Trustees shall pay over

(a) One such equal share to the issue of each child of my said brother, who shall have so died, in equal parts per stirpes, and

(b) One such equal share to each child of my said brother then surviving, and

(c) If there be no children or issue of predeceased children then surviving, the Trustee shall pay over the principal of said Part Three and any accrued income in equal parts per stirpes to the issue of my mother SUZANNE DE LASALLE CLARK surviving at that time.

4. To hold, manage, invest and reinvest Part Four, to collect the income therefrom and to pay over or apply the net income in periodic installments each year to or for the benefit of PHILLIP SWING THOMAS and his wife RUTH WILLIAMSON THOMAS (the parents of my godson RICHARD REED THOMAS) for the term of their lives, and upon the death of one to pay over or apply the net income in periodic installments each year to or for the benefit of the survivor during the term of his or her life and upon the death of the survivor, or if both shall predecease me then upon my death, to divide the said Part Four and any accrued income into as many equal shares as there may be children of PHILLIP SWING THOMAS and RUTH WILLIAMSON THOMAS then surviving and children then dead leaving issue then surviving, and the Trustees shall pay over

(a) One such equal share to the issue of each child who shall have so died in equal parts per stirpes, and

(b) One such equal share to each child then surviving, and

(c) If there be no children or issue of predeceased children then surviving, the Trustees shall pay over the principal of said Part Four and any accrued income in equal shares per stirpes to the issue of my mother SUZANNE DE LASALLE CLARK surviving at that time.

SIXTH: All the rest, residue and remainder of my estate I give to my Trustees hereinafter named, IN TRUST NEVERTHELESS, for the following uses and purposes:

A. To hold, manage, invest and reinvest the same, to collect the income therefrom and to pay over or apply the net income in periodic installments each year to or for the benefit of my mother SUZANNE DE LASALLE CLARK during the term of her life, and upon her death, or if she shall predecease me then upon my death, to divide the rest, residue and remainder of my estate and any accrued income into two equal parts, Part One and Part Two—and

1. I give and I direct my Trustees to pay over Part One to my issue then surviving in equal shares per stirpes, and if there be none, I direct that Part One be added to and become part of Part Two—and

2(a) I give and I direct my Trustees to pay over one-half of Part Two to my sister JACQUELIN CHAMBERS WYNNE-WILSON, if she be then surviving, otherwise to her issue then surviving in equal shares per stirpes, otherwise to her sister MADELEINE CHAMBERS KINZEL, if she be then surviving, otherwise to her issue then surviving in equal shares per stirpes.

(b) The other half of Part Two I give and I direct my Trustees to pay over to my sister MADELEINE CHAMBERS KINZEL, if she be then surviving, otherwise to her issue then surviving in equal shares per stirpes, otherwise to her sister JACQUELIN CHAMBERS WYNNE-WILSON if she be then surviving, otherwise to her issue then surviving in equal shares per stirpes.

SEVENTH: The one-half of the balance of my estate referred to in Paragraph FIFTH of this Will shall be made up only of assets which qualify for the marital deduction or the proceeds of the sale or other disposition of such assets, and no property subject to any estate, inheritance, transfer or other death tax or duty in any foreign country shall be used to make up such half.

EIGHTH: If I am married to ELIZABETH T. DUNN at the date of my death, the provisions for her made in this Will are in lieu of dower.

NINTH: Any of my real or personal property to which any minor shall become entitled upon my death or any real or personal property held in the principal of any trust to which any minor shall become entitled on the termination of such trust, shall vest absolutely in such minor and be his or her property, but my Executors or Trustees shall take or retain possession of such real or personal property and shall hold, manage, lease, sell, invest and reinvest the same, collect the income thereof and pay over or apply the net income or so much thereof as may be necessary to or for the maintenance, support, education, travel, benefit and comfort of said minor, and

shall accumulate the balance of said income. If the said income is not, in the opinion of my Executors or Trustees sufficient for the above enumerated purposes, then in the sole discretion of said Executors or Trustees they may apply such part of the principal for the said purposes as they may consider necessary or advisable. My Executors or Trustees may also pay directly to any minor such part of the income as they may approve as an allowance for said minor. When any said minor attains the age of twenty-one years, all property in the hands of my Executors or Trustees including accumulated net income, if any, shall be transferred, conveyed and delivered to such minor, or if he or she shall die before reaching the age of twenty-one years, shall be transferred, conveyed and delivered to his or her executor or administrator as part of his or her estate.

My Executors or Trustees while acting under Paragraph NINTH of this Will, shall have all the powers hereafter given to said Executors or Trustees in the succeeding paragraphs of this Will.

TENTH: I authorize and empower my Executors to retain and to deliver to my Trustees and my Trustees to accept and retain as investments of the trusts all property or investments that I may leave, and I expressly direct that any loss caused my estate by such retention or acceptance shall not be charged to my Executors or Trustees or either of them.

ELEVENTH: I authorize and empower my Executors and Trustees, at any time and from time to time, at public or private sale and on such terms and conditions as to

such Executors or Trustees may seem best, to sell or exchange any and all real property of which I may die seized or possessed, and which is not specifically devised, or to mortgage or lease the same on such terms and conditions as to them may seem best, even though for a period of time exceeding five years and exceeding the duration of the trusts created herein; and to execute bonds, mortgages, extension agreements, leases and modifications and renewals thereof.

TWELFTH: I authorize and empower my Executors and Trustees at any time and from time to time, at public or private sale and on such terms and conditions as to them may seem best, to sell or exchange any and all personal property that comes into their hands, and which is not specifically bequeathed.

THIRTEENTH: I authorize and empower my Executors and Trustees to invest and reinvest in any securities or other properties without regard to the proportion which any such investment or investments may bear to each other, or to the entire amount of my estate, or to the principal of any trust, or to the principal or income of any property held under a power in trust, and without being limited to what are known as legal investments. I authorize and empower my Executors and Trustees to invest up to one hundred per cent in common stocks.

FOURTEENTH: I authorize and empower my Executors and Trustees to compromise, settle or arbitrate any claim or action in favor of or against me or my estate or any trust set up herein.

FIFTEENTH: I authorize and empower my Executors and Trustees to consent to or participate in dissolutions, reorganizations, consolidations, mergers, sales, leases, mortgages, transfers, or other changes affecting securities held by them and in such connection to delegate their discretionary powers and to pay assessments, subscription and other charges.

SIXTEENTH: I authorize and empower my Executors and Trustees to exercise all conversion, subscription, voting and other rights of whatsoever nature pertaining to any securities constituting part of my estate or any trust set up by this Will and to grant proxies, discretionary or otherwise, with respect thereto.

SEVENTEENTH: If I am married at the time of my death I authorize my executors without liability on their part to file joint income tax returns with my wife for the year in which I die.

EIGHTEENTH: I authorize and empower my Executors to estimate the total commissions which they believe will be due them for their services as such Executors, and commencing one year after my death and each year thereafter until the total commissions have been paid, to pay to each Executor one-quarter or one-third of the total estimated commissions to be due to each Executor or such part thereof as he or it may wish to have. No Executor shall be required to obtain court approval for such payment or payments, or pay interest on any amount or amounts so received, nor put up any bond or security for repayment thereof.

NINETEENTH: Any and all legacy, transfer, inheritance, estate, succession or death taxes, State or Federal based or imposed upon or measured by property that passes by my Will, or otherwise, shall be paid out of the principal of my residuary estate (referred to in Paragraph SIXTH of this Will) and shall not be apportioned. Whenever my Executor or Trustees are given a choice of dates as of which to value property for Federal estate tax purposes, they may elect such date as they in their uncontrolled discretion deem advisable regardless of the resulting effect on other provisions of this Will.

TWENTIETH: I appoint as Trustees of the trusts created herein my counsel N. HOLMES CLARE and THE CHASE MANHATTAN BANK a corporation organized under the laws of the State of New York, and I direct that no bond or undertaking be required of any Trustee in any jurisdiction and that they not be required to file or render periodic accounts in or to any court.

I further direct that any annual commissions allowable to my Trustees shall be paid from income.

TWENTY-FIRST: My individual Trustee is a resident of the State of New York, my corporate Trustee is in the State of New York, my intangible personal property is in the State of New York, and I hereby elect and direct that this Will and the testamentary dispositions in it and the trusts set up shall be construed, regulated and determined by the laws of the State of New York, and that this Will be offered for probate in the State of New York.

IN WITNESS WHEREOF I have hereunto set my hand and seal this 26th day of January in the year Nineteen Hundred and Sixty-Two.

/s/ Robert Vanderpoel Clark, Jr. (L. S.)
[Attestation Omitted]

Waivers and Consents Signed by Mr. Grasty and the Beneficiaries Respecting New York Probate (c. October 7, 1964)

State of New York
Surrogate's Court, County of New York

Probate Proceeding, Will of

ROBERT VANDERPOEL CLARK, JR.
Deceased.

Waiver and Consent
P 6356 1964

To the Surrogate's Court, New York County:

WILLIAM T. GRASTY

the undersigned, being of full age and residing at Middleburg, Virginia and being a Virginia Executor of Robert Vanderpoel Clark, Jr. late of the Middleburg, Va. deceased, does hereby waive the issue and service of a citation in the matter of proving the Last Will and Testament of said Robert Vanderpoel Clark, Jr. deceased, and consent that said instrument bearing date January 26, 1962 be admitted to probate forthwith.
Dated, October 7, 1964

/s/ William T. Grasty

[Notarization Omitted]

State of New York
Surrogate's Court, County of New York

Probate Proceedings, Will of

ROBERT VANDERPOEL CLARK, JR.
Deceased.

WAIVER & CONSENT
6356/64

To the Surrogate's Court, New York County:

SUZANNE DE LASALLE CLARK

the undersigned, being of full age and residing at Stoneleigh Farm, Middleburg, Va. distributee of Robert Vanderpoel Clark, Jr., late of Middleburg, Va., deceased, does hereby waive the issue and service of a citation in the matter of proving the Last Will and Testament of said Robert Vanderpoel Clark, Jr., deceased, and consent that said instrument bearing date January 26, 1962 be admitted to probate forthwith.

Dated, New York, N.Y. October 5, 1964

/s/ Suzanne de Lasalle Clark

[Notarization Omitted]

State of New York
Surrogate's Court, County of New York

Probate Proceedings, Will of

ROBERT VANDERPOEL CLARK, JR.
Deceased.

WAIVER & CONSENT
6356/64

To the Surrogate's Court, New York County:

ELIZABETH DUNN CLARK

the undersigned, being of full age and residing at Springfield Farm, Middleburg, Va. distributee of Robert Vanderpoel Clark, Jr., late of Middleburg, Va., deceased, does hereby waive the issue and service of a citation in the matter of proving the Last Will and Testament of said Robert Vanderpoel Clark, Jr., deceased, and consent that said instrument bearing date January 26, 1962 be admitted to probate forthwith.

Dated, New York, N.Y. October 5, 1964

/s/ Elizabeth Dunn Clark

[Notarization Omitted]

Orders of the Surrogate's Court, County of New York Entered October 16, 1964 and December 23, 1964, Admitting Will to Probate and Ordering It Transmitted to Fauquier County

At Chambers of the Surrogate's Court of the County of New York, at the Courthouse in said county, on the 16th day of October in the year 1964

Present: Honorable Joseph A. Cox, Surrogate
SURROGATE'S COURT
NEW YORK COUNTY

In the Matter of Proving the Last Will
and Testament of

ROBERT VANDERPOEL CLARK, JR.
Deceased

As a Will of Real and Personal Property

DECREE ADMITTING WILL TO PROBATE
6356 1964

The citation herein having been duly waived, the allegations of the parties appearing having been heard, and the proofs having been duly taken by the Surrogate, among other things as to the execution of said instrument bearing date January 26, 1962 and the probate of the said will not having been contested and it appearing to the Surrogate that the will was duly executed, and that the testator at the time of executing it was in all respects competent to make a will and not under restraint, it is

Ordered, Adjudged and Decreed that the instrument offered for probate herein be and the same hereby is

admitted to probate as the last will and testament of the said deceased, valid to pass real and personal property, and that letters testamentary and letters of trusteeship be issued thereon to the executors and trustees who may qualify thereunder.

/s/ Joseph A. Cox
Surrogate

At a Surrogate's Court held in and for the County of New York, at the Hall of Records, in said County on the 23rd day of December, 1964.

Present: HON. Joseph A. Cox, Surrogate.

In the Matter of
the Application of N. HOLMES CLARE
for the Transmittal of the Original
Will of ROBERT V. CLARK, JR. to the
Circuit Court of Fauquier County,
Virginia.

ORDER

TRANSMITTING WILL
6356—1964

An affidavit of N. HOLMES CLARE sworn to on the 15th day of December, 1964, having been presented to this Court, from which it appears that the decedent died on October 4, 1964 a resident of and domiciled in Fauquier County, Virginia, leaving a Will which directed that it be offered for probate in New York State, and that said Will was duly admitted to probate by the Surrogate's Court of New York County and Letters Testamentary were issued to the said N. HOLMES CLARE and THE CHASE MANHATTAN BANK on the 19th day of October, 1964, and have not been revoked and that the said N. HOLMES CLARE is the attorney for the said executors, and it further appearing that decedent at the time of his death owned real property and tangible personal property and bank accounts in Virginia, and that the Vir-

ginia attorneys for the estate of the decedent have advised the said N. HOLMES CLARE that the original Will must be produced in Virginia if it is to be probated in Virginia, and the provisions of it in regard to the Virginia assets be carried out and N. HOLMES CLARE in his said affidavit having requested this Court to forward the original Will of the decedent, ROBERT V. CLARK, JR. to Mr. H. L. Pearson, Clerk of the Circuit Court of Fauquier County, Warrenton, Virginia, and due deliberation having been had thereon, it is

ORDERED, that the original Will of ROBERT V. CLARK, JR. heretofore admitted to probate in this Court be forwarded to Mr. H. L. Pearson, Clerk of the Circuit Court of Fauquier County, Warrenton, Virginia.

ENTER

JOSEPH A. COX,
Surrogate

Orders Entered by the Trial Court February 1, 1965 and March 15, 1965, Probating Decedent's Will

PROBATE OF WILL

A paper writing bearing date the 26th day of January, 1962, purporting to be the will of Robert Vanderpoel Clark, Jr., deceased, was this day presented by N. Holmes Clare and State-Planters Bank of Commerce and Trusts, of Richmond, Virginia, named therein as Executors of the "Virginia assets" as hereinafter more fully set forth, and offered for probate. Also presented was a letter dated January 14, 1965 addressed to Mr. H. L. Pearson, Clerk of the Circuit Court of Fauquier County, from William T. Grasty, also named in said paper writing as such an executor, declining on the facts and understandings set forth therein to qualify as such an executor.

It appearing that Robert Vanderpoel Clark, Jr. resided at Middleburg, Virginia, in the County of Fauquier, within the jurisdiction of this court, and that he died October 4, 1964 and N. Holmes Clare, one of the subscribing witnesses to said paper writing, being first duly sworn, deposed and said that he and Madeleine McCarthy and John P. Boland, the other persons named as witnesses to said paper writing, were present together at the same time and in the presence of Robert Vanderpoel Clark, Jr., when he, the testator, signed the said paper writing and acknowledged it to be his will, and that they, at his request, in his presence and in the presence of each other, signed their names thereto as subscribing witnesses; and that the testator was at that time over twenty-one years of age and capable of making a will.

Thereupon the said paper writing dated January 26, 1962 consisting of eleven typewritten pages, is established and adjudged to be the last will and testament of Robert Vanderpoel Clark, Jr., deceased, and is ordered to be recorded as such upon payment of probate costs.

Enter—February 1, 1965.

RAYNER V. SNEAD,
Judge

ORDER

This matter came on this day to be heard upon the papers heretofore filed; upon the Petition of William T. Grasty, Esq. for his qualification as an executor nominated under the last will and testament of Robert Vanderpoel Clark, Jr., deceased, and, pending such qualification, for his appointment as curator of said estate; and upon answers filed by N. Holmes Clare and Elizabeth D. Clark opposing said Petition. Evidence was received, briefs submitted and the matter was argued by counsel.

Upon consideration whereof, the Court finds that the deceased Robert Vanderpoel Clark, Jr. died on October 4, 1964, a resident of and domiciled in Fauquier County, Virginia, leaving a will dated January 26, 1962; that said will was duly admitted to probate in the Surrogate's Court, New York County, New York on October 16, 1964, and The Chase Manhattan Bank and N. Holmes Clare, Esq. duly qualified as executors and trustees in accordance with said will and are now acting as such executors and trustees; that by Order of this Court entered February 1, 1965 said will was adjudged to be his last will and was ordered to be recorded as such upon

payment of probate costs; that none of the executors named in the will have yet qualified before this Court and administration of the estate has not been granted in Virginia; that Article FIRST of the will provides:

> (A) I appoint my counsel, N. HOLMES CLARE and THE CHASE MANHATTAN BANK a corporation organized under the laws of the State of New York, the Executors of this Will for all my assets, with the exception of my Virginia assets which shall consist only of any real property which I may own in the State of Virginia, any tangible personal property situated in that State, and any funds on deposit in banks located in Virginia.
>
> (B) For my Virginia assets I appoint as Executors my counsel N. HOLMES CLARE and WILLIAM T. GRASTY. If either (or both) does not survive me, does not qualify, or if unable to act for any cause, resigns or dies I appoint in his (or their) place and stead STATE PLANTERS BANK OF COMMERCE & TRUSTS of Richmond, Virginia.
>
> (C) I direct that no bond be required of any Executor in any jurisdiction, nor shall any Executor be required to file periodic accounts, nor shall there be any official appraisal of my estate or any part of it.

that William T. Grasty, Esq. has retracted his previous renunciation of his executorship under this will; that the deceased died possessed of a substantial estate, the estimated value of which is from $19,000,000 to $26,000,000, consisting of real estate, tangible and intangible personal property held by the deceased in Virginia of an estimated value of some $300,000 to $400,000, and in-

tangible personal property held by the deceased in New York of an estimated value of some $19,000,000 to $25,-600,000.

Wherefore, it is hereby,

ORDERED, ADJUDGED AND DECREED:

That William T. Grasty and N. Holmes Clare be qualified in this Court as executors in accordance with the will of Robert Vanderpoel Clark, Jr., deceased, upon paying probate tax and costs in the amount of $25,946.67, as computed by the Clerk on the basis of an estimated value of the whole estate of $19,448,000, and upon taking the oath as such executors and posting with the Clerk a bond with approved corporate surety, with a penalty in the amount of $500,000, provided that the executors named herein shall not as such take possession of more than $500,000 of property under this Order without this Court first increasing the amount of this bond, said bond to be conditioned upon the faithful performance of their duties as such executors.

Exceptions: To which action of the Court in appointing William T. Grasty, Esq. executor, counsel for respondent N. Holmes Clare, Esq. objected and excepted for the reasons stated in the record. To which action of the Court in appointing executors without first determining the extent of the assets to be administered, and in naming William T. Grasty executor, counsel for Elizabeth D. Clark objected and excepted for the reasons stated in the record.

Enter, March 15, 1965.

/s/ RAYNER V. SNEAD,
Judge

Letter from Mr. Grasty's Counsel to the Virginia Department of Taxation (June 15, 1965)

June 15, 1965

Mr. Lawrence C. Haake, Jr., Director
Division of Inheritance and Gift Taxes
Department of Taxation
Commonwealth of Virginia
Richmond, Virginia

Re: Estate of Robert Vanderpoel Clark, Jr., Deceased

Dear Mr. Haake:

Enclosed please find a copy of a letter we have written to Mr. W. J. Powell, Jr., Director, Division of Individual Taxes of the Department of Taxation.

We have set forth in detail in that letter the reasons for our position that Mr. William T. Grasty, as the only resident Virginia domiciliary co-executor of the subject estate, is jointly responsible for the preparation and submission of income tax returns in connection with the subject estate.

For substantially the same reasons, it is our position that the Department of Taxation should hold Mr. Grasty jointly responsible for the preparation and signing of the inheritance tax return for the estate and that it should reject any inheritance tax return which has not been jointly prepared and signed by Mr. Grasty.

Code of Virginia (1950) §58-166 requires "*The personal* representative of every decedent whose gross estate is in excess of $1,000" to file the inheritance tax return with the Department of Taxation. It will be noted that the statutory language is "*The personal representative*"

and not *a* personal representative. Accordingly, under the statute, if there are two or more personal representatives it is required that each shall be responsible for preparing and signing the return, at least in the absence of authorization by the several executors for one of their number to discharge this act on their behalf.

Mr. Grasty does not authorize Mr. Clare or Chase Bank to prepare and sign inheritance tax returns on his behalf and objects to their doing so. The law clearly makes this Mr. Grasty's joint responsibility with Mr. Clare.

The only provisions in the will of the deceased with reference to estate and inheritance taxes are found in "Paragraph Second" which provides that the debts and claims to be paid out of the assets of the deceased held in Virginia shall not include any estate or inheritance taxes (because of the relatively small value of assets held by the deceased in Virginia as compared with the value of those held in New York it would be impossible to pay estate and inheritance taxes from the assets held in Virginia); and in "Paragraph Nineteenth" of the will, which provides that all estate and inheritance taxes shall be paid out of the residuary estate and that

> "Whenever *my executors* or trustees are given a choice of dates as to which to value property for federal estate tax purposes, they may elect such date as they, in their uncontrolled discretion, deem advisable regardless of the resulting effect on other provisions of this Will."

It will be noted that the testator did not restrict this action with respect to estate taxes to his New York executors but included all of his executors.

Thus, there is nothing in the will of the testator indicating an intention that the New York Executors should have exclusive authority and responsibility with respect to the handling of inheritance and estate taxes. Even if such intention had been expressed, it would have been contrary to public policy in Virginia as violative of the foregoing Virginia statutes which disqualifies a non-resident executor from acting in Virginia without the joint participation of the resident Virginia co-executor.

As pointed out in the attached letter, §26-59 of the Code expressly disqualifies both Mr. Clare and The Chase Manhattan Bank from performing any act as executors of this estate in Virginia. Certainly the preparation and filing of inheritance tax returns in Virginia is action as an executor of this estate. The joint action of Mr. Clare and Mr. Grasty is mandatory under the statute.

It should also be pointed out that Mr. Grasty is the only executor against whom the mandamus procedure provided in §58-186 would be effective since he is the only executor resident in the State of Virginia and subject to process in the State of Virginia.

If it is to be your position that Mr. Grasty will be held jointly responsible for the preparation and filing of these income tax returns, we will undertake to get an order of the Circuit Court of Fauquier County, Virginia directing that Mr. Clare (and possibly The Chase Manhattan Bank, since Mr. Clare entered an appearance for that Bank in the probate proceeding) to collaborate with Mr. Grasty and to make the necessary information available to him with respect to the intangible assets in New York, in order to enable him to jointly prepare and submit an inheritance tax return.

It would be greatly appreciated if you will advise us of the position the Division of Inheritance and Gift Taxes will take in connection with the preparation and filing of inheritance tax returns for this estate.

For your information we are also enclosing a copy of a letter we have written to Mr. Veltri of the Internal Revenue Service, Estate Tax Section.

With kindest personal regards, I remain

Sincerely,
/s/ Bolling R. Powell, Jr.

Letter from Manhattan District Director to Counsel for Mr. Grasty (January 17, 1966)

January 17, 1966

Powell, Horkan & Powell
Attorneys-At-Law
815 Connecticut Ave., N.W.
Suite 1201
Washington, D. C. 20006

Attention: Bolling R. Powell, Jr., Esq.
In re: *Estate of Robert Vanderpoel Clark, Jr.*

Dear Sirs:

Thank you for your letters of November 2, 1965, and November 23, 1965, concerning the above captioned estate.

After carefully reviewing all of the information presented by the various parties in this matter, we find ourselves in agreement with the statements made by the District Director of Internal Revenue, Richmond District, to the effect that the estate tax return due from the captioned estate should be filed with this office.

For fear of influencing the litigation pending between the various executors of the estate, we are unwilling, at this time, to outline the responsibility to which each of the various executors will be held by the Federal Government in connection with the filing of the income and estate tax returns due from the captioned estate. In this regard, however, we do feel free to state that no executor will be held to a duty that is greater than would be reasonable or possible under the physical circumstances or

inconsistent with any holding that may be rendered in connection with the pending state court litigation.

If we may be of further assistance in this matter, please feel free to call upon us.

Very truly yours,

/s/ E. J. Fitzgerald, Jr.
District Director

Letter from Commissioner Morrissett to Mr. Grasty's Counsel (August 27, 1965)

August 27, 1965

Mr. Bolling R. Powell, Jr.
Attorney at Law
Gloucester, Virginia

Re: Estate of Robert Vanderpoel Clark, Jr.

Dear Mr. Powell:

I regret that I was out of the office when you called on the telephone.

On July 20, 1965 Mr. Lawrence C. Haake, Jr., Director of our Division of Inheritance and Gift Taxes, wrote you and stated that "It appears to Mr. Powell and myself that the Department of Taxation could not reject a tax return filed by a co-executor duly appointed by a Virginia court."

This view of Messrs. Haake and Powell is concurred in by me. Moreover, I am compelled to add that, in my opinion, it would be out of order for the Department of Taxation to become a party to any disagreement which may exist between one co-executor and another with respect to their respective powers and duties involving an estate. In addition, your attention is called to the fact that on page 9 of our Inheritance Tax Form 44 the following is stated: "If there are two or more Personal Representatives, the oath of one will be sufficient."

With best wishes, I am,

Very truly yours,
/s/ C. H. Morrissett
State Tax Commissioner

Letters from Mr. Grasty's Counsel to Commissioner Morrissett and the Manhattan District Director (March 14, 1966)

Gloucester, Virginia
March 14, 1966

Mr. H. C. Morrissett
State Tax Commissioner
Commonwealth of Virginia
Department of Taxation
State Office Building
Richmond, Virginia

Re: Estate of Robert Vanderpoel Clark, Jr.
(Date of death October 4, 1964)

N. Holmes Clare, Co-Executor of Estate of Robert Vanderpoel Clark, Jr., Complainant and Cross-Respondent v. William T. Grasty, Co-Executor of the Estate of Robert Vanderpoel Clark, Jr., Respondent and Cross-Complainant—

In Chancery No. 3183 in the Circuit Court of Fauquier County, Virginia

Dear Mr. Morrissett:

In connection with pre-trial procedures in the subject suit before the Circuit Court of Fauquier County, we have just learned that Mr. Clare has undertaken to file income and inheritance tax returns for the deceased and for the estate.

For the reasons we have previously outlined to you, it is Mr. Grasty's contention that these tax returns filed by

Mr. Clare are invalid, of no legal effect, and not binding upon the estate or its executors, being in violation of applicable statutes and regulations.

The validity of these tax returns is being challenged by Mr. Grasty as co-executor of the estate of Robert Vanderpoel Clark, Jr. in the subject litigation, which will doubtless go to the Supreme Court of Appeals of Virginia before it is terminated.

The present posture of this suit before the Circuit Court of Fauquier County is that it is in the settlement of pleadings status and pre-trial stage. We will keep you advised of developments in this litigation.

Very truly yours,

/s/ Bolling R. Powell, Jr.

Gloucester, Virginia
March 14, 1966

Mr. Edward J. Fitzgerald, Jr.
District Director
Internal Revenue Service
U. S. Treasury Department
120 Church Street
New York, New York 10007

Re: Estate of Robert V. Clark, Jr.
(Date of death October 4, 1964)

N. Holmes Clare, Co-Executor of Estate of Robert Vanderpoel Clark, Jr., Complainant and Cross-Respondent v. William T. Grasty, Co-Executor of the Estate of Robert Vanderpoel Clark, Jr., Respondent and Cross-Complainant—

In Chancery No. 3183 in the Circuit Court of Fauquier County, Virginia.

Dear Mr. Fitzgerald:

In connection with pre-trial procedures in the subject suit before the Circuit Court of Fauquier County, we have just learned that Mr. Clare has undertaken to file income and estate tax returns for the deceased and for the estate.

For the reasons we have previously outlined to you, it is Mr. Grasty's contention that these tax returns filed by Mr. Clare are invalid, of no legal effect, and not binding

upon the estate or its executors, being in violation of applicable statutes and regulations.

The validity of these tax returns is being challenged by Mr. Grasty as co-executor of the estate of Robert Vanderpoel Clark, Jr. in the subject litigation, which will doubtless go to the Supreme Court of Appeals of Virginia before it is terminated.

The present posture of this suit before the Circuit Court of Fauquier County is that it is in the settlement of pleadings status and pre-trial stage. We will keep you advised of development in this litigation.

Very truly yours,

/s/ Bolling R. Powell, Jr.

Inventory Prepared by Counsel for Mr. Clare and Transmitted to Counsel for Mr. Grasty, with Handwritten Notes Placed Thereon by Counsel for Mr. Grasty

Real Estate:

1. 350.2031 acres, more or less, with all improvements thereon and appurtenances thereunto belonging, known as Springfield Farm, lying and being in Scott Magisterial District, Fauquier County, Virginia, as appraised by John W Mulvey in an appraisal report dated _____ $200,000.00

2. 5,548 square feet of land, with all improvements thereon and appurtenances thereunto belonging, known as "The Saddlery," located at the corner of Madison and Federal Streets, in the town of Middleburg, Loudoun County, Va, as approved by John W. Mulvey in an appraisal report dated _____ 24,950.00

3. .38 acre of land, with all improvements thereon and appurtenances thereunto belonging, fronting 134 feet 6 inches on Federal Street, town of Middleburg, Loudoun County, Virginia, as approved by John W. Mulvey in an appraisal report dated _____ 18,550.00

Tangible Personal Property:

#3 Furniture, fixtures, jewelry, and other miscellaneous household and personal belongings located in the main residence and servants' wing of Springfield Farm, as ~~itemized on~~ inventoried and approved by ~~appraisal of~~ William H. O'Reilly, a copy of which is attached hereto. 25,485.00

1. Springfield Farm Livestock, machinery, equipment and supplies

2. a. Livestock at Springfield Farm:

2 hogs at approximately 300 pounds each at $45.00 each.	90.00
30 angus cows (Grade) at $75 00 each	2,250.00

3. a. Machinery at Springfield Farm:

International "C" tractor (old)	600.00
Feed cart - tow-wheeled	25.00
Farmall Diesel "460" (3 years)	2,000.00
Snow blade	200.00
Tractor wood saw	20.00
Lawn mowers	200.00
Shop contents (small tools, hoses, etc.)	200.00
New Idea Manure Spreader	250.00
Tractor mower	150.00
Horse corn planter	100.00
New Holland Baler	1,200.00
Post hole digger	100.00
Cultivator	30.00
Sub-Total	$276,400.00

as inventoried and approved James B Skinner and Paul A Adams in an inventory and appraisal report Dated December 8, 1964.

	Brought Forward	$276,400.00
Machinery, continued:		
Cyclone seed sower		75.00
Ford bush hog		200.00
International three-disc plow		250.00
2 International farm wagons at $150 each		300.00
Feed scales		15.00
Feed mill		30.00
Garden cultivator (Chore Master)		75.00
McCormack disc harrow		25.00
Gang mowers (triple)		25.00
Cutting box and blower (silage)		150.00
Extension ladder		20.00
C Feed at Springfield Farm:		
250 bushels of old corn at $1.50 each		375.00
75 barrels of corn (new crop on ear) at $6.00 each		450.00
5.2 New Merchandise, Furniture, Fixtures, and Supplies located at "The Saddlery," Middleburg, Virginia, and itemized in appraisal of William H. O'Reilly attached hereto.		26,933.10
6. 5.1 Bank Accounts:		
Middleburg National Bank		6,187.56
Marshall National Bank and Trust Company		1,000.00
~~OTHER ASSETS IN VIRGINIA~~		
5.2 Net current assets at "The Saddlery" as of October 3, 1964:		
Cash	$4,913.33	
Accounts Receivable	4,445.46	
Total	$9,358.79	
~~Less current liabilities~~	~~(5,027.87)~~	
~~Total net~~		~~4,330.92~~
5.3 Receivable from William T. Grasty (plus interest at the rate of 6% per annum from December 18, 1963).		5,000.00
	~~Total Virginia Assets~~	$321,841.58

Yount & Hyde — Hecht

Intangible Personal Property

4.

Inventory Prepared and Submitted by Counsel for Mr. Grasty

INTERIM INVENTORY AND
APPRAISEMENT OF ESTATE

Real Estate:

1. 350.2031 acres, more or less, with all improvements thereon and appurtenances thereunto belonging, known as Springfield Farm, lying and being in Scott Magisterial District, Fauquier County, Virginia, as appraised by John W. Mulroy in an appraisal report made in May, 1965.	$ 200,000.00
2. 5,548 square feet of land, with all improvements thereon and appurtenances thereunto belonging, known as "The Saddlery", located at the corner of Madison and Federal Streets, in the town of Middleburg, Loudoun County, Virginia as appraised by John W. Mulroy in an appraisal report made in May 1965.	24,950.00
3. .38 acre of land, with all improvements thereon and appurtenances thereunto belonging, fronting 134 feet 6 inches on Federal Street, town of Middleburg, Loudoun County, Virginia, as appraised by John W. Mulroy in an appraisal report made in May 1965.	18,550.00

Tangible Personal Property:

1. Springfield Farm livestock, machinery, equipment and supplies as inventoried and appraised by James B. Skinner and Paul A. Adams in an inventory and appraisal report dated December 8, 1964.

a. Livestock at Springfield Farm:	
2 hogs at approximately 300 pounds each at $45.00 each	90.00
30 angus cows (Grade) at $75.00 each	2,250.00

b. Machinery at Springfield Farm:

International "C" tractor (old)	600.00
Feed cart—tow-wheeled	25.00
Farmall Diesel "460" (3 years)	2,000.00
Snow blade	200.00
Tractor wood saw	20.00
Lawn mowers	200.00
Shop contents (small tools, hoses, etc.)	200.00
New Idea Manure Spreader	250.00
Tractor mower	150.00
Horse corn planter	100.00
New Holland Baler	1,200.00
Post Hole digger	100.00
Cultivator	30.00
Cyclone seed sower	75.00
Ford bush hog	200.00
International three-disc plow	250.00
2 International farm wagons at $150 each	300.00
Feed scales	15.00
Feed mill	30.00
Garden cultivator (Chore Master)	75.00
McCormack disc harrow	25.00
Gang mowers (triple)	25.00
Cutting box and blower (silage)	150.00
Extension ladder	20.00

c. Feed at Springfield Farm:

250 bushels of old corn at $1.50 each	375.00
75 barrels of corn (new crop on ear) at $6.00 each	450.00

2. New Merchandise, Furniture, Fixtures, and Supplies located at "The Saddlery," Middleburg, Virginia, and itemized in appraisal of William H. O'Reilly attached hereto. 26,933.10

3. Furniture, fixtures, jewelry, and other miscellaneous household and personal belongings located in the main residence and servants' wing of Spring-

field Farm, as inventoried and appraised by William H. O'Reilly, a copy of which is attached hereto.		25,485.00

Intangible Personal Property:

1. Bank Accounts:		
Middleburg National Bank		6,187.56
Marshall National Bank and Trust Company		1,000.00
2. Net current assets at "The Saddlery" as of October 3, 1964:		
Cash	$4,913.33	
Accounts Receivable	4,445.46	
Total		9,358.79
3. Receivable from William T. Grasty (plus interest at the rate of 6% per annum from December 18, 1963)		5,000.00
4. "Custody account, Chemical Bank, New York Trust Company		$ 8,200,000.00"
5. "Remainder interests in certain New York trusts which terminated February 26, 1964, on the death of Frederick Ambrose Clark, the great uncle of the decedent (the value of these interests depends upon tax situation in the Frederick Ambrose Clark estate and such value could be substantially higher than the figure used here).		10,000.00.00 to 15,150,000.00"
6. "Reversionary interest in inter *vivos trust* made by decedent for benefit of his mother with Chemical Bank, New York Trust Company		700,000.00"
7. "Note from Trustees of said trust for benefit of decedent's mother		213,000.00"

8. "*Inter vivos* trust made by decedent for his own benefit.	0 to 2,000,000.00"
9. "New York City bank accounts	10,000.00"
Grand Total	$19,449,869.45 to 26,599,869.45

Pretrial Order Entered by the Trial Court in the Construction Suit (May 24, 1966)

PRETRIAL ORDER

A pretrial conference in this cause, pursuant to Rule 4:1, Rules of the Supreme Court of Appeals of Virginia, was held on April 29, 1966, and was attended by counsel for the complainant and cross-respondent, N. Holmes Clare; for the respondent and cross-complainant, William T. Grasty; and for Elizabeth D. Clark and Suzanne D. Clark, Intervenors.

After due consideration of the matters discussed and agreed to by counsel at the pretrial conference it is hereby ORDERED, that the following shall control the subsequent conduct of this case on both the Bill of Complaint and Answer thereto and on the Cross-Bill and Answer thereto and on the pleadings of the intervenors, unless modified before or at the trial or hearing to present manifest injustice:

A. *Statement of Issues.* The issues raised by the bill and the cross-bill, and the only issues to be decided herein, are the following (transcript of pretrial conference held April 29, 1966, at pages 13, 15, 16 and 30):

Issue No. 1: What was the intent of the testator, Robert Vanderpoel Clark, in appointing New York executors to handle his New York estate and appointing Virginia executors to handle or settle his Virginia estate as spelled out in the Will?

Issue No. 2: If the Court determines that the testator, Robert Vanderpoel Clark, Jr., desired that his New York assets, set forth in his Will, be administered, handled only by his New York executors, and that his Virginia assets be

administered only by the Virginia executors, as set forth in the Will; is there any Virginia statute or law that would prevent that policy being carried out in all phases of the administration of the estate?

B. *Stipulations.* The following facts are admitted or stipulated:

(1) Robert Vanderpoel Clark, Jr., Deceased, died on October 4, 1964, in the twenty-fourth year of his life, in New York, New York.

(2) The said decedent was a resident of and domiciled in Fauquier County, Virginia at the time of his death.

(3) The said decedent died testate. Exhibit "1" hereto is a true copy of the said decedent's Will. The said Will, dated January 26, 1962, is referred to herein for convenience as the "Will." The Will was drawn by the complainant and cross-respondent, N. Holmes Clare, as counsel for the Testator, and the original executed copy of the Will was in the possession of N. Holmes Clare in New York at the time of the death of the Testator.

(4) On or about October 13, 1964, N. Holmes Clare offered the original Will for probate, and the original Will was admitted to probate, in the Surrogate's Court of New York County, New York (hereinafter referred to for convenience as the "Surrogate's Court"), on October 16, 1964. Exhibit 5 hereto is a true copy of the decree of the Surrogate's Court admitting the original Will to probate in the Surrogate's Court. The Chase Manhattan Bank and N. Holmes Clare qualified as executors and trustees in the Surrogate's Court in accordance with the Will on or about October 19, 1964. The Chase Manhattan Bank is not qualified to do business in Virginia and its principal place of business is in New York City.

(5) On or about October 5, 1964, the Testator's widow, Elizabeth D. Clark, and his mother, Suzanne D. Clark, executed at the request of N. Holmes Clare, waivers of service of citation and consents to probate of the Will in the Surrogate's Court of the County of New York, New York, true copies of which are attached hereto as Exhibits 2 and 3, respectively. On or about October 7, 1964, N. Holmes Clare was in Middleburg, Virginia, and requested that William T. Grasty execute a waiver of service of citation and consent to probate of the Will in the Surrogate's Court of the County of New York. A true copy thereof is attached hereto as Exhibit 4. Mr. Grasty executed and acknowledged this waiver and consent on or about October 7, 1964.

(6) Complainant N. Holmes Clare is a resident of and domiciled in the State of New York, practicing law in that state, and respondent William T. Grasty is a resident of and domiciled in Fauquier County, Virginia, practicing law in that State.

(7) On December 23, 1964 on the application of N. Holmes Clare, the original Will was ordered by the Surrogate's Court to be transmitted to the Circuit Court of Fauquier County. A true copy of the application and order is annexed as Exhibits 6 and 6A hereto. On February 1, 1965, the original Will was adjudged by this Court to be the decedent's last will and ordered to be recorded in the office of the Clerk of this Court on payment of probate costs. A true copy of the said order is annexed as Exhibit 7 hereto and a true copy of the letter of the Clerk advising Mr. Clare of the amount of the Probate Tax payable is attached hereto as Exhibit 8.

(8) On March 15, 1965, the original Will was admitted to probate and recorded in the office of the Clerk of this Court and complainant N. Holmes Clare, and respondent William T. Grasty qualified in this Court as executors as provided in the Will and in the Order of this Court, a true copy of which is annexed as Exhibit 9 hereto. The probate tax was computed and paid on the value of the entire estate of the Deceased passing by his Will, and of all real estate of the Deceased situated in Virginia, all in accordance with Sections 58-66 and 58-67 of the Code of Virginia.

(9) Respondents Elizabeth D. Clark, (sometimes referred to as Elizabeth Dunn Clark) and Suzanne D. Clark (sometimes referred to as Suzanne de Lasalle Clark) are, respectively, the widow and the mother of the Decedent, are the principal beneficiaries under the Will, and are residents of and domiciled in Virginia.

(10) The Decedent left no issue surviving him.

(11) On April 1, 1965, respondent Elizabeth D. Clark filed an instrument in the Surrogate's Court electing to take against the Will. A true copy of such instrument is annexed as Exhibit 10 hereto. The Chase Manhattan Bank and N. Holmes Clare as executors under the Will qualified in the Surrogate's Court deny that said Elizabeth D. Clark has the legal right to elect to take against the Will under New York law.

(12) On October 4, 1965, respondent Elizabeth D. Clark filed an instrument in the office of the Clerk of this Court renouncing the Will. A true copy thereof is annexed as Exhibit 11 hereto.

(13) For purposes of computing the probate tax, the real estate, tangible personal property and bank accounts

held by the deceased in Virginia, were estimated to have a value of $320,000 and the intangible personal property held by the deceased in New York was estimated to have a value of $19,128,000.

(14) Since their qualification as executors in New York, N. Holmes Clare and the Chase Manhattan Bank have exercised exclusive and plenary authority over substantially all intangible personal property of the Testator except his bank accounts with Virginia banks. This intangible personal property at the time of the death of the Testator was substantially as follows:

A custody account maintained by the Testator at Chemical Bank New York Trust Company

Value (estimated by Mr. Clare) $8,200,000

Remainder interests in certain trusts created in New York by the Testator's great uncle Frederick Ambrose Clark

Value (estimated by Mr. Clare) $10,000,000 to $15,150,000

Inter vivos trust created by the Testator, with Testator, Chase Manhattan Bank of New York and N. Holmes Clare as trustee

Value (estimated by Mr. Clare) $2,000,000

Reversionary interest in *inter vivos* trust created by Testator for benefit of his mother with Testator and N. Holmes Clare as trustee

Value (estimated by Mr. Clare) $ 700,000

Note from trustees of Testator's *inter vivos* trust for mother

Face value stated by Mr. Clare $ 213,000

Testator's New York City bank accounts $ 10,000

(15) To the best of the knowledge, information and

belief of respondent and cross-complainant, William T. Grasty, and complainant and cross-respondent, N. Holmes Clare, all creditors who might be entitled to file claims in Virginia against the estate of Robert Vanderpoel Clark, Jr., deceased, have been paid, and all expenses of administration in Virginia have been paid or provided for.

C. Exhibits 1 through 11 hereto are hereby admitted into evidence in these proceedings.

D. The caption of the Answer and Cross-Bill of William T. Grasty and all other pleadings herein shall be deemed amended to conform to the caption of this pretrial order.

E. There being no objection thereto, the Petition To Intervene With Respect To The Cross-Bill, filed by Elizabeth D. Clark, was granted, and her Demurrer to the Cross-Bill and her answer to the same were received.

F. Respondent and cross-complainant, William T. Grasty, offers each of the following documents (annexed as Exhibits 12 through 53 hereto) into evidence herein; it is stipulated and agreed that each such document is a true copy of the document of which it purports to be a copy (save for any underscoring of certain portions thereof and the handwritten notations and other markings on Exhibit 24 placed thereon by counsel for said respondent and cross-complainant); and it is stipulated and agreed that the originals of such documents, such copies of which purport to be signed or executed by or on behalf of any person or acknowledged, were in fact thus signed, executed or acknowledged; and each such document will be admitted into evidence unless any objection thereto, on grounds other than authenticity, made by or on behalf of complainant and cross-respondent, N. Holmes Clare, or by

either of the respondents and cross-respondents, Elizabeth D. Clark and Suzanne D. Clark, shall be sustained.

[Exhibit list and exhibit sections G and H omitted]

I. (1) Counsel for each of the parties hereto is to give notice to all counsel of record, on or before June 1, 1966, of the persons he wishes to examine upon deposition. Such notice shall be either delivered by hand, or mailed so as to reach its destination in the due course of mails, on or before such date.

(2) Such depositions as are designated pursuant to paragraph (1) shall, unless otherwise agreed by the parties, be taken at the offices of Messrs. Battle, Neal, Harris, Minor & Williams, 1400 Ross Building, Richmond, Virginia, commencing at 10:00 a.m. on June 9, 1966.

(3) Memoranda of law by counsel for each of the parties hereto shall be submitted to the Court, and to each counsel of record, on or before July 15, 1966. Such memoranda shall be either delivered by hand, or mailed so as to reach the Court and counsel in the due course of mails, on or before such date; reply memoranda of law shall be so submitted and delivered on or before July 25, 1966.

(4) Argument on the merits will be heard before the Court on September 14, 1966; one hour each shall be allowed to counsel for Complainant and Cross-Respondent N. Holmes Clare, to counsel for Respondent and Cross-Complainant William T. Grasty, and to counsel for Respondent and Cross-Respondent Elizabeth D. Clark and Suzanne D. Clark.

ENTER: May 24, 1966.

RAYNER V. SNEAD, Judge

Transcript of Trial Court's Oral Ruling in the Construction Suit (October 11, 1966)

THE COURT: The Court has considered the pleadings in this case and the evidence, as well as the memoranda and the argument of counsel. The Court is ready to give a brief ruling in this case.

The Bill of Complaint was filed by the complainant, N. Holmes Clare, asking the Court to construe the will of Robert Vanderpoel Clark. The defendant, Mr. William Grasty, the co-executor, has filed an answer to this bill, and the two principal beneficiaries under the will have also filed answers, and they join in the prayer of the Bill of Complaint filed by Mr. Clare.

The cross-bill was filed by the co-executor, Mr. Grasty. This was answered. The defendants have filed certain motions and demurrers.

The issues in the case have been defined by pretrial order, which sets forth two issues to be decided by the Court. The first: What was the intent of the testator in appointing New York executors to settle his New York estate, appointing Virginia executors to settle his Virginia estate, as spelled out in the will?

Second: If the Court determines that the testator desired that his New York assets be administered only by his New York executors, and that his Virginia assets be administered only by his Virginia executors, as set forth in the will, is there any Virginia statute or law that would prevent that policy from being carried out in all phases of the administration of the estate.

The Court has considered these issues, and it determines that the first issue has practically been agreed upon by counsel. Not altogether, but it is apparent that there

is really no dispute. The will speaks for itself. The polar star in construing the will is to determine what is the intent of the testator; and in this case, the intent is plain. It may be given in the four corners of the will, in the very language of the will itself, without regard to any construing evidence. It is obvious that the testator intended as to the disposition of his estate from the very language that he used. He intended, of course, as the will said, that all of his assets would be administered under the law of New York, except for the Virginia assets, which he defined.

Now, as to issue No. 2, the two arguments that counsel for Mr. Grasty made, that the doctrine of *mobilia sequuntur personam* should be followed, and that 64-131 of the Virginia Code governs the disposition of this case.

Now, these two arguments are answered quite ably by the plaintiff's reply brief. Reference is made to his reply brief. Reference is made to 10 through 16, the cases that are cited.

Now, the primary purpose of the administration of an estate, it seems to me, is to pay the debts, taxes of the decedent, to pay a balance over to the beneficiaries of the testator, as set forth in his will; and counsel for the co-executor, Mr. Grasty, is arguing that the rights of the widow, the Commonwealth of Virginia, the United States will be adversely affected if his position is not upheld.

It seems a complete answer to this is that, first, the widow is very ably represented by counsel, and she is able to state through her counsel what she wants, what her desires are. The Court sees no reason why it should not respect those wishes and desires.

As to the Commonwealth of Virginia, the Common-

wealth of Virginia is not adversely affected by this ruling, as I see it; and the Commonwealth of Virginia is quite able to protect its interest in this respect. The evidence is that the Tax Department is quite satisfied with the tax returns that have been filed. That same statement would seem to apply to the United States Government. It is not a party to the proceedings, and it is quite able to protect its own interest. And the Court has to decide the rights of parties that are before the Court, and the issues that are presented. We cannot adjudicate issues that are not before the Court—cannot adjudicate the rights of parties who are not before the Court.

As to jointly filing the inventory, the Commissioner of Accounts is an officer of the Court. The inventory as directed by him, which is not in conflict with the ruling made here, should be acceptable to an officer of the Court.

Now, the Virginia executor is, naturally, concerned to see that the estate is properly settled and all parties in interest are protected. The Court is convinced that this case—that the evidence and the records show that the estate should be settled in accordance with the will of the testator and the wishes of the beneficiaries. It is apparent that if this is done, that no creditor or other person can be heard to complain.

So counsel for the complainant and for the defendants, Clark, may present a decree in accordance with this rule.

The exception of the defendant?

MR. HORKAN: Yes, sir. We wish that our exception be noted.

THE COURT: Yes, sir.

Decree Entered by the Trial Court in the Construction Suit (November 15, 1966)

DECREE

This cause, having been set for hearing and docketed, came on to be again heard on October 11, 1966, upon the following pleadings and proceedings filed and had herein:

The Bill of Complaint of the complainant and cross-respondent, N. Holmes Clare (hereinafter for convenience sometimes referred to as the Complainant);

The Answer and the Cross-Bill of the respondent and cross-complainant, William T. Grasty (hereinafter for convenience sometimes referred to as the Respondent);

The Complainant's Answer to the Cross-Bill;

The Answers to the Bill of Complaint and to the Cross-Bill of the respondents and cross-respondents, Elizabeth D. Clark and Suzanne D. Clark (said respondents and cross-respondents being hereinafter for convenience sometimes referred to as the Beneficiaries);

The Pre-Trial Order entered herein May 24, 1966 (wherein among other things, this Court framed the issues herein in lieu of ruling upon the Complainant's and the Beneficiaries' demurrers to the Respondent's Cross-Bill and their motions to strike the Respondent's Answer);

The hearings held herein on April 29, May 24 and June 9, 1966, and the depositions of Nancy Crocket Harrison taken June 9, 1966, and of the Complainant taken July 27, 1966, transcripts of such hearings and depositions having been filed in the Clerk's Office;

And all matters other than those dealt with in this decree having been heretofore finally concluded;

And the cause and the issues therein raised having been argued fully both by briefs and orally by counsel for all parties hereto (Messrs. McGuire, Woods & Battle on behalf of the Complainant, Messrs. Powell, Horkan & Powell on behalf of the Respondent, and Messrs. Hall & Monahan on behalf of the Beneficiaries);

And the Court having considered the foregoing, including the aforementioned depositions, and the exhibits thereto and to the Pre-Trial Order, offered by the Respondent, deems it unnecessary to rule on the objections of the Complainant and of the Beneficiaries to such depositions and exhibits, and reserves until the final accounting its ruling on the request of the Complainant and of the Beneficiaries, made in connection with their motions to vacate, suppress and quash the aforementioned depositions, to assess against William T. Grasty the reasonable costs of such depositions, including counsel fees;

And the Court being of the opinion that it was the intention of the testator, Robert Vanderpoel Clark, Jr., that all of his assets be administered in, and under the law of, the State of New York by N. Holmes Clare and The Chase Manhattan Bank as his executors qualified in New York, except his Virginia assets as defined in Article FIRST (A) of the Will and that the said testator intended that the Complainant and the Respondent administer such Virginia assets only; that there is no statute or law of the Commonwealth of Virginia which prohibits such intention from being carried out; and that the relief sought by the Respondent in his Cross-Bill should be denied;

The Court doth accordingly FIND, ADJUDGE, ORDER and DECREE as follows:

A. In addition to the matters stated in the said Pre-Trial Order, it appears to the Court, and the Court doth FIND:

1. That with respect to Issue No. 1 as framed by this Court in the Pre-Trial order, it was the intention of the testator, Robert Vanderpoel Clark, Jr.:

(i) that N. Holmes Clare and The Chase Manhattan Bank qualify in the State of New York as the Executors of, and administer there in accordance with the laws of New York, all of the testator's assets, with the exception of those assets which the testator referred to in his Will and which are hereinafter referred to as the Virginia assets (for convenience the testator's Will being sometimes referred to herein as the Will and the said bank as the Bank);

(ii) that such Virginia assets consist only of the testator's real property, tangible personal property, and funds on deposit in banks, located in Virginia;

(iii) that the Complainant N. Holmes Clare and the Respondent William T. Grasty qualify in the Commonwealth of Virginia as executors of such Virginia assets only;

(iv) that the powers, responsibilities and authority of the Complainant and the Respondent as executors of such Virginia assets extend only to such Virginia assets and to performing such acts as may be required to carry out the provisions of Article SECOND of the Will, including as contemplated in said Article SECOND, distributing to the testator's widow, the respondent and cross-respondent, Elizabeth D. Clark, the tangible personal property specifically bequeathed to her in Article THIRD of the Will.

2. That the Will was admitted to probate in the Surrogate's Court of New York County, New York, on October 16, 1964, with the consent of the Respondent and of the Beneficiaries, and the said N. Holmes Clare and The Chase Manhattan Bank qualified in the said Surrogate's Court as such executors under the Will and are administering in New York all of the testator's assets other than his said Virginia assets; and that said N. Holmes Clare and said Bank as such executors have not appeared herein and are not parties hereto.

3. That the rights of creditors of the testator and of his estate and the rights of the Commonwealth of Virginia and of the United States will not be affected adversely by carrying out the testator's intention as expressed in the Will.

4. That the Virginia and federal income tax returns of the testator's estate and the final returns of the testator, the Virginia inheritance tax return, and the federal estate tax return have been filed, all taxes shown to be due on the face of all such returns have been paid, such returns and payment have been accepted by the Virginia and federal tax authorities notwithstanding the objections thereto filed by the Respondent with the Virginia and federal tax authorities.

5. That the items, and the values of the items, set out in the inventories certified and filed by the Complainant and by the Respondent with the Commissioner of Accounts of this Court in October of 1965 are identical, and such inventories are identical in substance and substantially identical in form, the inventory filed by the Respondent being substantially a copy of that filed by the Complainant.

6. That as shown by the said inventories: the value of the testator's entire estate was over $21,000,000; the value of the said Virginia assets was $321,841.58, of which $200,000 consisted of realty and $34,890 of personalty which the testator specifically devised and bequeathed to the testator's widow; and the value of the balance of the said Virginia assets which the testator directed be administered by the Complainant and the Respondent as provided in Article SECOND of the Will was $86,951.58 of which $56,214.02 consisted of realty and personalty used in connection with the operation of The Saddlery, a retail store in Middleburg, Virginia, owned by the testator and sold by the Complainant and Respondent in December of 1965.

7. That the beneficiaries under the Will (sometimes referred to herein as the Beneficiaries) are the respondents and cross-respondents, Elizabeth D. Clark, and Suzanne D. Clark, respectively the widow and the mother of the testator; the Beneficiaries desire that the relief prayed for by the Complainant in his Bill of Complaint be granted and the relief prayed for by the Respondent in his Cross-Bill be denied; the testator's said widow, who has filed an instrument in the Office of the Clerk of this Court renouncing the Will, has elected to pursue in New York by counsel of her choice whatever rights she may have with respect thereto pursuant to such renunciation filed in the said Clerk's Office and to the election filed by the said widow in New York pursuant to the laws of that State to take against the Will (without prejudice to pursuing by counsel of her choice in Virginia whatever rights she may have with respect to the testator's Virginia assets); she opposes all claims by the Respon-

dent that he is responsible for marshalling and delivering to her pursuant to such renunciation any part of the testator's estate, other than those Virginia assets, or the proceeds from the sale of those Virginia assets, to which she may be entitled, and she has relieved the Respondent from any responsibility which he may claim to have with respect to the foregoing.

B. And the Court being of such opinion doth ADJUDGE, ORDER and DECREE:

1. That with respect to Issue No. 2 as framed by this Court, there is no Virginia statute or law which would prevent the testator's intention, expressed in his Will and as heretofore found, from being carried out in all phases of the administration of the testator's estate.

2. The Respondent has no power or authority over, or responsibility or accountability for, the testator's assets other than the said Virginia assets and, in addition, the following intangible assets of the testator, the physical evidences of which are located in Virginia and which have been administered by the Complainant and the Respondent with the consent of all of the parties; $4,445.46 in accounts receivable of The Saddlery and $5,000.00 receivable from William T. Grasty, plus interest at the rate of 6% per annum from December 18, 1963, which were listed among the assets of the testator in the aforementioned inventories; and the parties having stipulated that counsel for the Respondent has in his possession, and has had since April 11, 1966, a promissory note payable to the testator made by William G. Waters, dated February 20, 1964, in the original principal amount of $7,000.00, and bearing interest on the unpaid principal balance at the rate of 6% per annum, on which the un-

paid principal balance on October 4, 1964 (the date on which the testator died) was $6390.44 plus accrued interest from August 15, 1964, and the unpaid principal balance on March 15, 1965, the date on which the Complainant and the Respondent qualified in this Court, was $5762.35 plus accrued interest at the rate of 6% per annum from February 24, 1965, such unpaid balance and the interest thereon evidenced by the said note (hereinafter called the Waters Note) shall be included among the assets of the testator for which the Complainant and the Respondent are accountable.

3. The Complainant and the Respondent have no duty or responsibility to attempt to obtain the transfer to Virginia of the assets being administered by the Executors of the testator duly qualified in New York; and the complainant and the Respondent are responsible only for performing such acts as may be required to carry out the provisions of Article SECOND of the Will and as provided herein.

4. The Complainant and Respondent are not responsible for marshalling and delivering to the said widow of the testator, pursuant to her renunciation of the Will filed in this Court or her election to take against the Will filed in New York, any part of the testator's estate, other than those Virginia assets, or the proceeds from the sale of those Virginia assets, to which she may be entitled.

5. The Respondent is not responsible to the estate or the Beneficiaries for the preparation and filing of the Virginia and federal income tax returns of the testator's estate and the final returns of the testator, the Virginia inheritance tax return, and the federal estate tax return, or for the payment of such taxes; subject, however, to the

obligations of the Complainant and the Respondent set out in §§ 58-871 and 58-872 of the Code of Virginia (1950) as amended and in 31 U.S.C. § 192.

6. The inventories filed with the Commissioner of Accounts of this Court by the Complainant and the Respondent, collectively constitute a joint inventory sufficient in form and substance to comply with the requirements of § 26-12 of the Code of Virginia (1950) as amended; and an appropriate notation reflecting the indebtedness evidenced by the said Waters Note shall be added to the said inventories.

C. Pursuant to the foregoing findings and conclusions, the Court doth further ADJUDGE, ORDER and DECREE that the relief prayed for by the Bill of Complaint, wherein the Beneficiaries have joined, is hereby granted, and the relief prayed for in the Respondent's Cross-Bill is hereby denied.

D. It is further ORDERED that, except as they may be required for use in any appeal herefrom:

(i) The Clerk of this Court shall place all copies of the Virginia inheritance and income tax returns and of the United States estate and income tax returns, produced and filed herein, in a sealed file and such file shall not be opened nor made available to any person without an order of this Court entered after reasonable notice to the parties herein and an opportunity for them to be heard.

(ii) The Respondent and Cross-Complainant, William T. Grasty, and counsel for the said Respondent, shall maintain in confidence and shall not without a prior order of this Court, entered after reasonable notice to the parties herein and the opportunity for them to be heard,

disclose to anyone nor use in any fashion the information set out in the Virginia inheritance and income tax returns and the United States estate and income tax returns filed on behalf of the testator and his estate; they shall make no copies of such tax returns and shall forthwith deliver all copies of said returns as are in their possession or subject to their control to this Court to be placed by the Clerk in such sealed file.

E. It is further ORDERED that all questions concerning the assessment of costs and attorneys' fees be reserved for the final accounting of the executors.

ENTER: November 15, 1966.

RAYNER V. SNEAD, Judge

Petition for Mandamus Filed by Mr. Grasty Against Commissioner Morrissett, and Commissioner Morrissett's Answer Thereto (November 1, 1966)

PETITION FOR WRIT OF MANDAMUS

To: The Honorable Circuit Court of the City of Richmond, Virginia:

Your petitioner, William T. Grasty, respectfully represents:

1. The Court has jurisdiction of this action under Code of Virginia (1950) Section 17-123.

2. The plaintiff is a resident of Fauquier County, Virginia, and has been duly qualified by the Circuit Court of Fauquier County, as a co-executor under the Will of Robert Vanderpoel Clark, Jr., deceased, who died October 4, 1964, domiciled in and a resident of Fauquier

County, Virginia. The other co-executor qualified jointly with the plaintiff by the Circuit Court of Fauquier County, under Code of Virginia (1950, as amended) Section 26-59, is N. Holmes Clare, a non-resident of Virginia, who resides in the State of New York.

3. The defendant C. H. Morrissett is the State Tax Commissioner of the Commonwealth of Virginia.

4. The deceased Robert Vanderpoel Clark, Jr. died possessed of a large fortune, the gross amount of which has been appraised at $26,616,887. The bulk of said deceased testator's estate was in the form of intangible personal property, the physical evidence of which had been held by him in New York.

5. Among the duties imposed by the law of Virginia (Code of Virginia (1950) Sections 26-59; 58-119; 58-122; 58-166) upon the plaintiff, as said resident domiciliary co-executor, is, jointly with said non-resident co-executor, to prepare and file with the defendant, as State Tax Commissioner, complete and accurate Virginia inheritance tax returns and Virginia income tax returns for the last year of the deceased testator's life, as well as for each year of the administration of the es- as said resident domiciliary co-executor, the personal tate. The law of Virginia also imposes upon the plaintiff, responsibility and liability to see that all said inheritance and income taxes due the State of Virginia are paid, insofar as there is sufficient property in the estate with which to pay them.

6. The law of Virginia (Code of Virginia (1950, as amended) Sections 26-59; 58-119; 58-166) imposes upon the defendant, as State Tax Commissioner, the duty to

require that the said Virginia income and inheritance tax returns be jointly made, signed under oath and filed by the plaintiff, as the resident Virginia co-executor, and by the non-resident Virginia co-executor. The plaintiff has demanded that the defendant, as State Tax Commissioner, perform this statutory imposed duty, but the defendant has wrongfully refused to do so. Instead, the defendant, in wrongful breach of his statutory duty, is permitting the filing of said Virginia income tax returns by the Chase Manhattan Bank, a foreign corporate fiduciary not qualified as an executor of this estate in Virginia, and not qualified to do business in Virginia and prohibited from performing these, or any other, acts of administration of this estate in Virginia by Code of Virginia (1950, as amended) Sections 6-9 and 26-59. Also, in wrongful breach of his statutory duty, the defendant is permitting the filing of said Virginia inheritance tax return by the non-resident Virginia co-executor alone and to the exclusion of the plaintiff, as the resident Virginia domiciliary co-executor.

7. By reason of said unlawful behavior of the defendant as State Tax Commissioner, the plaintiff is being wrongfully prevented from performing his aforesaid statutory imposed duties to the State of Virginia and other creditors of this estate and to the heirs and devisees of the deceased testator in the administration of this estate in Virginia, notwithstanding said statutes imposed upon plaintiff personal responsibility and liability to do so.

8. Plaintiff is without any adequate ordinary legal remedy to compel the defendant to perform his aforesaid

statutory duty as State Tax Commissioner by requiring the aforesaid Virginia income and inheritance tax returns to be jointly made, signed under oath and filed by the plaintiff, as the resident Virginia co-executor, and by the non-resident Virginia co-executor.

WHEREFORE, the plaintiff, being without any adequate ordinary legal remedy, prays that a peremptory writ of mandamus be issued by this honorable Court, directed to said defendant as State Tax Commissioner, compelling him:

(1) To require that all Virginia income and inheritance tax returns filed on behalf of the Estate of Robert Vanderpoel Clark, Jr., deceased, be jointly made, signed under oath and filed by the plaintiff, as the resident Virginia co-executor, and the non-resident Virginia co-executor; and

(2) To reject as a nullity the Virginia income tax returns filed by the foreign corporate fiduciary not qualified as an executor of this estate in Virginia and not qualified to do business in Virginia; and

(3) To reject as a nullity the Virginia inheritance tax return filed by the non-resident Virginia co-executor alone to the exclusion of the plaintiff as the resident Virginia co-executor.

Plaintiff also prays that all such other, further and general relief be granted him as the nature of his case may require.

/s/ William T. Grasty
William T. Grasty, Co-Executor, the Estate of Robert Vanderpoel Clark, Jr., deceased

State of Virginia

County of Loudoun, To-wit:

This day William T. Grasty, the petitioner named in the foregoing petition, being duly sworn, says that the facts and allegations therein contained are true, except as they are therein stated to be on information, and that, so far as they are therein stated to be on information, he believes them to be true.

/s/ William T. Grasty

[Notarization Omitted]

ANSWER

Now comes C. H. Morrisette, State Tax Commissioner, by the Attorney General of Virginia, and, for his answer to the Petition for a Writ of Mandamus filed herein, states as follows:

1. The allegations of paragraph 1 of the Petition are denied.

2. The defendant is not advised as to the truth or falsity of the allegations in paragraph 2 of the Petition and, therefore, neither admits nor denies those allegations, but calls for strict proof thereof.

3. The allegations of paragraph 3 of the Petition are admitted.

4. The defendant is not advised as to the truth or falsity of the allegations in paragraph 4 of the Petition and, therefore, neitre admits nor denies those allegations, but calls for strict proof thereof.

5. The allegations of paragraphs 5, 6, 7 and 8 of the Petition are denied.

6. The defendant alleges and avers that the matters alleged and the relief sought by the Plaintiff herein were matters alleged and a portion of the relief sought by the Plaintiff in a Cross-Bill in a certain action in the Circuit Court of Fauquier County, in which the Plaintiff was respondent and cross-complainant and N. Holmes Clare, Co-executor of the Estate of Robert Vanderpoel Clark, Jr., was complainant and cross-respondent, styled N. Holmes Clare, Executor, etc., v. William T. Grasty, Executor, etc., in which action said allegations and the relief sought by the Plaintiff herein were denied by decree of that court, dated November 15, 1966.

7. The defendant denies that among the duties imposed upon him are those alleged by the Plaintiff; the defendant denies that he has wrongfully prevented the Plaintiff from performing his statutory duties as a fiduciary; and the defendant avers that the relief sought by the Petition herein is detrimental to the best interests of the estate which Plaintiff represents.

WHEREFORE, it is respectfully demanded that this action be dismissed, the defendant being awarded his costs in this behalf expended.

Respectfully submitted,

C. H. MORRISSETT,
State Tax Commissioner
Commonwealth of Virginia

BY: /s/ Richard N. Harris
Assistant Attorney General

Letter from Mr. Grasty's Counsel to Manhattan District Director with Enclosed Affidavit and Power of Attorney Signed by Mr. Grasty (November 9, 1966)

Upperville, Virginia
November 9, 1966

District Director of Internal Revenue
P. O. Box 3100, Church Street Station
New York, N. Y. 10015

Attn: Field Audit Group # 508, Mr. Louis Bindell
RE: Estate of Robert V. Clark, Jr.

Dear Mr. Bindell:

Following up my meeting with you and Mr. Saltzman and other officials of the New York District Director's office, I am enclosing herewith an affidavit executed by William T. Grasty setting forth his objections to the present handling of the tax returns of the Estate of Robert Vanderpoel Clark, Jr. There is attached to this affidavit, all true copies of previous correspondence with the District Directors in Richmond and in New York on this matter and a copy of Mr. Grasty's qualification as resident domiciliary executor of the Estate of Robert Vanderpoel Clark, Jr.

Also enclosed is a power of attorney, in duplicate, executed by Mr. Grasty, authorizing Bolling R. Powell, Jr. and myself to represent Mr. Grasty in all tax matters in connection with the administration of this Estate.

With the filing of this affidavit and supporting documents, I believe you now have the full picture of the

problems which I discussed with you in New York. I am hopeful that with this information you will be able to act upon the situation in which Mr. Grasty now finds himself so as to avoid the necessity of Court action on his behalf. You will note that Mr. Boyle, in his letter of December 16th, 1965, has stated: "I wish to call your attention again to the joint responsibility of all executors in the filing of this return. For reference see Regulations Section 20.2002-1 and 20.6018.2."

I have been advised by the Bureau of Internal Revenue in Washington, D. C. that since the facts in this case are not in dispute, this is a matter upon which the Revenue Agent in charge might well seek technical advice from the Commissioner. Needless to say, we want to cooperate with you in every way possible in expediting a solution to Mr. Grasty's problems. In this connection, pending a decision in this matter, we request to be included in all audit procedures in connection with the tax returns filed on behalf of this Estate.

Finally, in compliance with the recently enacted provisions of Public Law 39-382 (Qualifications of attorneys), this is to advise that both Mr. Powell and myself are attorneys at law admitted to practice and in good standing before the U. S. Court of Appeals for the District of Columbia and before the Supreme Court of Appeals of the Commonwealth of Virginia.

Sincerely yours,

/s/ G. A. Horkan, Jr.

Commonwealth of Virginia
County of Loudoun) to-wit:

Personally appeared before me, the undersigned Notary Public for Loudoun County, Virginia, on November 9th, 1966, in my office in Loudoun County, William T. Grasty, Esquire, known to me, and after being duly sworn, he deposed and said:

1. He is a resident of and domiciled in Fauquier County, Virginia; that he has duly qualified, and is acting, as the Virginia resident domiciliary co-executor of the Estate of Robert Vanderpoel Clark, Jr.; that N. Holmes Clare of New York has duly qualified, and is acting, as the non-resident domiciliary co-executor of said Estate in Virginia; and that attached to this affidavit as Exhibit 1 is certificate of the Clerk of the Circuit Court of Fauquier County, Virginia, certifying this qualification of the deponent and N. Holmes Clare.

2. The deceased, Robert Vanderpoel Clark, Jr., died testate on October 4th, 1964, a resident of and domiciled in Fauquier County, Virginia, leaving a substantial estate, the value of which has been estimated at around $25,000,000.00, consisting of real and personal property in Virginia, and of intangible personal property, the evidence of which the deceased held in New York.

3. Ancillary administration of this intangible personal property of the deceased is being had in New York, where the said N. Holmes Clare and Chase Manhattan Bank have qualified as executors.

4. Under Income Tax Regulations § 1.6012-3 (a) (3), as the deponent understands it, he, as one of the domi-

ciliary executors of this Estate, is charged with the joint obligation of, and with personal liability for, preparing and filing of income tax returns with Internal Revenue Service for this Estate and for the last year of the life of the deceased, and for the payment of the tax due.

5. Under the Internal Revenue Code of 1954, § 2002, and applicable Estate Tax Regulations § 20.2002-1:20-6011 (1) and 20-6018 (2), as the deponent understands it, he, as one of the domiciliary co-executors, is charged with the joint obligation of, and with personal liability for, preparing and filing the estate tax return with Internal Revenue Service for this Estate, and for the payment of the tax due.

6. As shown by the true copies of the letters attached hereto as Exhibits 2 through 15, inclusive, the deponent has attempted in good faith to discharge his responsibility for the preparation and filing of these income and estate tax returns, but he has been prevented from doing so by the wrongful act of the New York executors in refusing to allow deponent, as a domiciliary co-executor of the Estate, to participate with them in the preparation and filing of these returns.

7. That in violation of the requirements of Internal Revenue Code (1954) § 2002 (26 USCA § 2002) and § 6012 (b) (26 USCA § 6012 (b) and Federal Tax Regulations § 20.2002 (1); 20-6001; 20.6018 (2). 1.6012 (3) (a) (3), the said N. Holmes Clare and Chase Manhattan Bank have wrongfully arrogated to themselves the exclusive authority to prepare and file the aforesaid tax returns, and, notwithstanding your deponent's personal liability under the Internal Revenue Code and Regula-

tions for filing these returns and paying these taxes, they have excluded him from any participation therein.

8. Your deponent believes that the income and estate tax returns for this Estate, which said N. Holmes Clare and Chase Manhattan Bank have wrongfully undertaken to file to the exclusion of deponent, as aforesaid, are a nullity; that these returns should be rejected by Internal Revenue Service as not being in compliance with the above cited provisions of the Internal Revenue Code and Regulations; and that a directive should be issued by Internal Revenue Service to the deponent, N. Holmes Clare and Chase Manhattan Bank to act jointly in the preparation and filing of these returns.

FURTHER THE DEPONENT SAITH NOT.

/s/ William T. Grasty

[Notarization Omitted]

POWER OF ATTORNEY

William T. Grasty, an individual residing at Middleburg, Virginia, hereby makes, constitutes, and appoints George A. Horkan, Jr. and Bolling R. Powell, Jr., of the firm of POWELL, HORKAN & POWELL, 816 Connecticut Avenue, N.W., Washington, D. C. 20006, and each of them my attorneys for me and in my name to represent me before the Treasury Department of the United States, any bureau or official thereof, the Tax Court of the United States, and in all appropriate courts including the Court of Claims of the United States in all matters pertaining to the determination, assessment, collection or payment of any taxes imposed by the Internal Revenue

laws of the United States relating to or arising from the administration of the estate of Robert Vanderpoel Clark, Jr., who died on October 4, 1964, a resident of the State of Virginia, and to all claims for abatement, refund, or credit based on the assessment or payment of any such taxes and without limiting the foregoing powers, to examine and to request and receive copies of all returns, claims, and other documents, to execute consents agreeing to a later determination and assessment of taxes than that provided by the Statute of Limitations, to verify petitions to the Tax Court of the United States and pleadings in the various courts, to execute and file claims for refund, credit or abatement in my behalf, to receive and receipt for, in my behalf, but not to endorse all checks and warrants made by the United States on account of any refunds and interest payments, to execute closing agreements and generally to do, execute, and perform all acts and things necessary or convenient in the premises with full power of delegation, substitution, and revocation, hereby ratifying and confirming all that my attorneys and substitutes from time to time shall do or cause to be done by virtue hereof.

It is requested that a copy of all communications regarding any matter in which the said attorneys are hereby authorized to act, be addressed to the attorney first named above.

All powers of attorney for this purpose heretofore filed or executed by the undersigned are hereby revoked.

SIGNED, SEALED AND DELIVERED this 9th day of November, 1966.

/s/ William T. Grasty (SEAL)

[Notarization Omitted]

Mr. Grasty's Answer in the Injunction Suit (December 15, 1966)

ANSWER

The defendant William T. Grasty, Executor, by counsel, in answer to the Petition filed in this cause states:

1. The said defendant admits the allegations contained in Paragraphs "1"; "3"; and "4" of said Petition.

2. The said defendant denies the allegations contained in Paragraphs "2"; "5" and "6".

3. By way of further answer to said Petition defendant alleges:

(a) In the *mandamus* proceeding he instituted in the Circuit Court of the City of Richmond on November 1, 1966, the said defendant as co-executor seeks an adjudication of his responsibilities and liability to the Commonwealth of Virginia for filing Virginia income and inheritance tax returns, a question not adjudicated by this Court in its ruling of October 11, 1966 or in its Decree of November 15, 1966 in Chancery Cause No. 3183.

(b) In the administrative proceeding he instituted in the Internal Revenue Service, the said defendant, as co-executor, seeks an adjudication of his responsibilities and liability to the United States for filing Federal income and estate tax returns, a question not adjudicated by this Court in its ruling of October 11, 1966 or in its Decree of November 15, 1966 in Chancery Cause No. 3183.

(c) The aforesaid *mandamus* proceeding and administrative proceeding are in the best interests of the estate and those entitled thereto in that the adjudication of the issues therein presented are necessary to determine whether

the estate is being properly administered with respect to the taxes involved and whether the tax returns required by law and regulations have been, and are being, filed.

(d) Should the Circuit Court for the City of Richmond and/or the Internal Revenue Service sustain the defendant, William T. Grasty's contention that the tax returns required by law and regulations have not been filed, it will be because of the misfeasance of the defendant N. Holmes Clare, co-executor, and The Chase Manhattan Bank, co-executor, who filed the tax returns ininvolved notwithstanding the objections thereto of the defendant William T. Grasty, co-executor; and should the estate be subjected to penalties, interest and other charges or be prejudiced in any other way by such illegal action of N. Holmes Clare, co-executor, and The Chase Manhattan Bank, co-executor, in undertaking to file tax returns not complying with the requirements of law and regulations, the Petitioners herein will have a completely adequate legal remedy to surcharge said N. Holmes Clare, co-executor, and The Chase Manhattan Bank, co-executor, and recover any such damages from them and the securities on their bonds as co-executors.

(e) The Court does not have jurisdiction to enjoin the defendant from pursuing his legal remedies before the Circuit Court for the City of Richmond or before the Internal Revenue Service of the United States.

/s/ Bolling R. Powell, Jr.
/s/ George A. Horkan, Jr.
Counsels for Defendant William T. Grasty, Executor

Excerpts from Hearing Held December 20, 1966, in Injunction Suit

THE COURT: Now, it seems only reasonable for this Court to take whatever action is necessary to see that its decrees are carried into effect until they are reversed by the Court of Appeals.

It seems to me that in taking these actions against the Federal authorities and against the state tax authorities, that you are trying to go beyond the terms of this decree of November 15, 1966 which attempted to define our authority.

So, it seems only reasonable that you defer any attack on these returns until your rights are adjudicated by the Court of Appeals in some manner differently from the way this Court has adjudicated them.

This injunction seems only reasonable and necessary to uphold a decree entered in this Court on November 15, 1966.

Now, I am not making any final adjudication on the injunction suit, of course, until I hear the evidence or until I rule on the demurrers; but certainly, temporarily until we can get a more definitive action or definitive ruling, certainly you shouldn't proceed to attack these returns that have been regularly and duly filed and regularly and duly accepted by the tax authorities.

If you point out something to the Court that shows that they are erroneous or fraudulently filed or that they will be costly to the estate, of course you should proceed; but simply because Mr. Grasty hasn't signed them, that is ridiculous to this Court.

* * *

THE COURT: I will tell you how I would suggest that you proceed.

I would proceed with all due speed to get before the Court of Appeals in Chancery 3183.

MR. POWELL: We will do that, Your Honor.

THE COURT: Then you may have some more authoritative guidelines. But until you do that; there is a ruling in the Court of Appeals, the injunction will continue in effect.

* * *

THE COURT: This is a temporary injunction. I will hear all of these other matters when you get a ruling on this in the master case, 3183.

This is a temporary injunction. I am not entering any permanent injunction on this.

MR. POWELL: Now, is the Court now entering an injunction at this point of the proceeding? I am a little confused.

THE COURT: Yes, there is no question about that. I am asking that you proceed regularly and not attack the estate and not cause it burdens of defending all of these suits until you know what your authority is. Let the Court of Appeals direct you as to what your authority is and how far you can go. Then you will know; you will know what you are supposed to do when you get a ruling in this suit for the construction of the will.

* * *

MR. POWELL: I take it, then, it is the disposition of the Court this morning, simply to enter a temporary restraining order.

THE COURT: That's correct.

MR. POWELL: Now, can we define—of course, we will note our objection and exception to entering such an order to protect our position on the record. There are several features of the order—

THE COURT: This should have been done. If I had had any idea you were planning to attack this estate in the manner that has been alleged here, or without ruling on the merits of the case, I would have made this part of the November 15, 1966 decree.

MR. POWELL: Then, the motion for removal and the petition for permanent injunction, then, as I understand it, will be held in abeyance?

THE COURT: I would think it might be more expeditious if we could make this petition for an injunction part of the master suit.

MR. POWELL: 3183?

MR. MONAHAN: Speaking in terms of the removal proceeding, also?

THE COURT: No, not that. That is going to be held in abeyance. I am not going to consider that at this time.

MR. MONAHAN: I meant, are you speaking of consolidating all three so the Supreme Court can see the full picture?

MR. POWELL: If Your Honor please, in this posture of the matter, I fail to see how it can be consolidated. I don't know of any rule of procedure—neither of the other two have been heard on the merits by the Court—

all the Court is doing in advance of a hearing, on the merits of the injunction or the removal, is simply entering a temporary restraining order.

THE COURT: That's correct. If there is any objection—

MR. POWELL: I would have no objection whatever to the temporary restraining order being made a part of the record on appeal in 3183 if it is possible to do that. I don't know—twenty-one days having elapsed, whether this Court has any further control over that matter or under the rules of Court.

THE COURT: I think you are perhaps correct.

MR. POWELL: Perhaps we could attack it as an appendix or something like that to bring it to the attention of the Court in Richmond, but I fail to see how it could be a part of that record though I would have no objection to its being.

Well, if Your Honor please, now there are two or three features of the temporary restraining order I would like to have clarified, please:

One, will be the period of time under the statute as you know, a time must be set in a temporary restraining order. The statute requires that. What period of time would Your Honor have in mind?

THE COURT: I had in mind until the Supreme Court of Appeals rules on this case.

MR. POWELL: Then, also, the question—

THE COURT: You could go before one of the justices today and have it dissolved, I take it, if it is not proper.

MR. POWELL: I suppose we could.

Now, another feature would be, what about a bond? Normally when a temporary restraining order is entered, bond is required.

THE COURT: The executor has executed a bond.

MR. MONAHAN: The executor has executed the bond and the only possible damage is to my clients so I hardly see that a bond—

MR. POWELL: That is precisely the point. The parties moving for the injunction are not executors. They are beneficiaries. They have not posted bond.

THE COURT: One of the executors is moving forward.

MR. POWELL: He has joined in. It is understood that his bond would stand for any damages Mr. Grasty may suffer by virtue of the temporary restraining order—that is Mr. Clare's bond, is that correct?

THE COURT: Will that be agreeable?

MR. MONAHAN: As I point out to the Court, the only position that Mr. Grasty is prosecuting these actions in is as executor of the estate which we represent. The statute requiring bond says if, in the discretion of the Court, it is not necessary, there be no bond. Since we are the only ones who can be injured, I certainly think that ought to more than cover it.

MR. GREENBAUM: Presumably, Mr. Grasty's bond will stand for the damages he has been causing to the estate.

MR. POWELL: Of course, it is our position, Your Honor, that there is no basis even for a temporary restraining order because the estate cannot be injured.

If Mr. Clare and the Chase Bank have done the wrong thing and interests or penalties should be assessed, their bonds as executors will protect the estate. If Mr. Grasty has caused damage, his bond will protect the estate. There is no irreparable damage which is necessary.

THE COURT: Mr. Grasty is not suing in his individual capacity, is he?

MR. POWELL: No, sir; he is appearing as executor qualified by this Court.

So then, I take it, you will undertake to draft a restraining order, Mr. Monahan, temporary restraining order?

MR. MONAHAN: May I suggest, because I know we will have difficulty if we don't agree on the language, that it be in the language of the motion which I filed which I believe covers it. That is, that the Court enjoins Mr. Grasty, his agents, servants, and employees, from proceeding further with efforts to prosecute the proceeding of a writ of mandamus against C. H. Morrissette, State Tax Commissioner, instituted on the 29th of October, 1966, by Mr. Grasty in the Circuit Court of the Richmond; and further enjoins Mr. Grasty, his agents, servants and employees, from proceeding further with any effort to carry on any judicial, administrative or other proceeding or action designed to question the validity of Federal or Virginia state income estate or inheritance tax returns heretofore filed on behalf of the estate of Robert Vanderpoel Clark, Jr. until the determination of the appeal in Chancery Number 3183, I believe, as to which Mr. Grasty has indicated he intends to prosecute and appeal.

Of course, this is to extend to Mr. Grasty in his individual capacity and in his capacity as executor. I think that language—

MR. POWELL: What were you reading from? I was trying to pick it up here.

MR. MONAHAN: The notice given.

MR. POWELL: Original notice?

MR. MONAHAN: It is the same as in the order.

MR. POWELL: Is this it? Excuse me.

MR. MONAHAN: Yes.

THE COURT: This would be pursuant to section 8-614 of the Virginia Code which prescribes the duration of temporary injunction?

MR. POWELL: Yes, sir.

THE COURT: May I take it there is nothing else to be done by the Court at this time?

Injunction Decree Entered by Trial Court (December 20, 1966)

This cause having come on to be heard on petitioner's petition for an injunction, this 20th day of December 1966, upon the appearance of all parties by counsel, and of the defendants in person, and having been argued by counsel, and it appearing to the court that a temporary injunction should issue, it is hereby

ORDERED, ADJUDGED AND DECREED, That the defendant, William T. Grasty, individually and as an executor in accordance with the will of Robert Vanderpoel Clark,

Jr., deceased, and the order of the court entered March 15, 1965, his agents, attorneys, servants, employees, and all other persons acting on his behalf, directly or indirectly, be, and they hereby are, enjoined from:

(a) prosecuting his action seeking a writ of *mandamus* against C. H. Morrissette, the state tax commissioner of Virginia, instituted by said William T. Grasty as executor in civil action A-1910, on or about November 1, 1966, in the circuit court for the City of Richmond, Virginia; and

(b) prosecuting other proceedings described by the said defendant, William T. Grasty, executor, as administrative proceedings instituted before the Internal Revenue Service of the United States, on or about November 9, 1966, and in the national office of said service; and

(c) instituting or prosecuting any other judicial, administrative or other proceedings or action relating to the Federal or Virginia estate or inheritance tax returns, filed or to be filed by or on behalf of the estate of said Robert Vanderpoel Clark, Jr., or seeking a ruling or other determination or guidance, formal or informal, with respect thereto.

And this injunction shall remain in full force and effect until such time as any appeal in Chancery Number 3183 in this court is finally determined or disposed of by the Supreme Court of Appeals of Virginia and the record thereof shall have been returned to and filed in this court, and thereafter until such time as the said defendant, William T. Grasty, shall have given all of the other parties hereto by their respective counsel reasonable notice that he intends to ask that this injunction be dissolved, so that the matter may be heard and a determination made by

this court as to whether this injunction shall be dissolved or made permanent.

To all of which the defendant, William T. Grasty, executor, by counsel noted his objections and exceptions.

ENTERED: This 20th day of December, 1966.

RAYNER V. SNEAD, Judge

Written Opinion of the Trial Court in the Injunction Suit Relating Also to Removal (June 5, 1967)

MEMORANDUM OPINION

The questions presently before the Court in these two cases concern the administration of the estate of Robert Vanderpoel Clark, Jr. To answer these questions necessitates a review of the records in these cases and the records of other proceedings involving this estate.

Robert Vanderpoel Clark, Jr., hereinafter called testator, a resident of Fauquier County, Virginia, died testate in New York City October 4, 1964, leaving an estate valued at from nineteen to twenty-six million dollars of which $300,000.00 to $400,000.00 of real estate, tangible and intangible personal property was in Fauquier County, Virginia. The great bulk of the estate consisting of intangible personal property was held by the testator in New York. His will was dated January 26, 1962, and probated in the Surrogate Court of the County of New York on October 16, 1964, and in this Court on February 1, 1965.

Testator's mother, Suzanne D. Clark and his widow, Elizabeth D. Clark, hereinafter called beneficiaries, are

the principal beneficiaries of the estate and both are parties in these proceedings. The testator in his will named The Chase Manhattan Bank and N. Holmes Clare, a New York attorney and his former counsel and draftsman of the will executors "of all my assets with the exception of my Virginia assets which will consist only of my real property in Virginia, any tangible personal property situated in that State, and any funds on deposit in banks located in Virginia". He named N. Holmes Clare and William T. Grasty hereinafter called Clare and Grasty respectively, executors "for my Virginia assets". "Letters testamentary and letters of trusteeship" were directed to be issued to the executors and trustees by the Surrogate's probate order of October 14, 1964, and pursuant to said order Clare and The Chase Manhattan Bank qualified as executors and trustees under the will in New York. Grasty signed waiver of citation in connection with the New York probate. By letter of January 14 ,1965, to the Clerk of this Court, Grasty renounced his right to qualify "as an Executor of the Virginia assets". This letter evidently was written as the result of an agreement between Grasty and the firm of Caplin, Battle and Harris dated November 18, 1964, which recited that Grasty considered primary probate should be in Virginia but Clare would not modify probate proceedings in New York. This agreement which was signed by Caplin and Grasty provided that Grasty will renounce the executorship in Virginia and will not qualify as executor, and if asked by the estate, Caplin will act as attorney for the estate in Virginia. It further provided that in consideration for services already rendered by Grasty, and upon Grasty's agreement to give further assistance "Caplin will remit to

Grasty 50% of any net fee (i.e. total fee, less any unreimbursed out-of-pocket expenditures) received by Caplin from the aforesaid estate; *provided, however,* that in no event will Caplin be obligated to pay, nor shall he pay, Grasty more than $20,000.00".

It was also agreed $5000.00 would be withheld by Caplin to cover indebtedness of Grasty to the testator. By letter of February 2nd, to the Clerk of this Court Grasty retracted the renunciation and asked to be permitted to qualify on the estate. By letter of February 1, 1965, and check the agreed fee of $20,000.00 less $5000.00 and interest was forwarded to Grasty by the Battle firm. By letter of February 8, 1965, G. A. Horkan, Jr., counsel for Grasty returned the said check to the Battle firm.

Over the objections of the beneficiaries and Clare, Grasty was allowed to qualify with Clare as executor in this Court by order of March 15, 1965, upon payment of probate taxes and costs of $25,946.67 on the total estate estimated at $19,448,000.00. No appeal was taken from this order.

Virginia inheritance taxes of over one million dollars on the total estate have been paid; state and federal income taxes have been paid; federal estate taxes of over 5½ million have been paid.

There was renunciation of the will by Elizabeth D. Clark on October 2, 1965.

The principal and controlling issue in these proceedings arises out of the dispute between Grasty and Clare as to whether the whole estate should be administered under the laws of Virginia because of the doctrine of *mobilia sequuntur personam* and Virginia Code Section

64-131, or whether the intent of the testator as set forth in his will should govern and the "Virginia assets" be administered in Virginia and all other assets in New York pursuant to the *lex situs* doctrine.

The Court has resolved this issue in Chancery Cause 3183, by decree dated November 15, 1966, from which Grasty seeks an appeal. In this nine page decree, the Court spelled out the intent of the testator and the duties and obligations of the executors with respect to the administration of the estate.

The intent of the testator as set forth in his will was imminently plain that he desired all of his estate except his "Virginia assets" administered under the laws of New York. This Court so adjudicating then determined there was no policy or statute that prohibited this intent from being carried out by the executors under the terms of the will.

In this respect it is important to remember that no creditor, or other person was found to be prejudiced by this ruling and the beneficiaries of the estate expressly requested that the testator's intent in this regard be affirmed.

The doctrine of *mobilia sequuntur personam* which counsel for executor Grasty so strongly urged the Court to consider and follow by bringing the New York assets to Virginia is meant to aid in the administration of estates and to assist in carrying out the testator's intent and not to frustrate or thwart that intent. In my opinion to have applied the doctrine to the administration of this estate would have meant that the intent of the testator would have been ignored and the estate would have undergone burdensome expenses for no benefit to anyone. See the

excellent article on "Conflict of Laws and The Administration of Decedent's Personal Property" in Virginia Law Review, Volume 46, page 1345.

Before the conclusion of the proceeding involving the construction of the will, Grasty attempted to have certain of the federal and state tax returns declared null and void because he had not signed these returns although the tax authorities had indicated no dissatisfaction with them. In this regard he filed a proceeding in the Circuit Court of the City of Richmond on November 1, 1966, asking that Court to issue a writ of *mandamus* against C. H. Morrissette, the State Tax Commissioner, compelling him to

(1) require all tax returns of the Clark estate be jointly made and signed by both Clare and Grasty;

(2 & 3) to reject as nullities the Virginia income tax return and the Virginia inheritance tax return filed by Clare.

Deeming this and the similar requests to the Internal Revenue Department to be in derogation of the decree of this Court of November 15, 1966, without benefit of the estate and in fact detrimental thereto and perceiving no useful purpose to be served thereby this Court on the petition of the beneficiaries of the estate in its discretion enjoined Grasty from prosecuting the *mandamus* proceeding and administrative proceedings instituted before the Internal Revenue Service and from instituting other judicial, administrative or other proceedings relating to the federal or Virginia estate or inheritance tax returns. The injunction of December 20, 1966, is to remain in

effect until Chancery Cause 3183 is finally determined by the Supreme Court of Appeals of Virginia.

On February 15, 1967, Grasty by counsel filed a motion to vacate and dissolve the temporary injunction previously entered alleging the grounds therefor. It appearing to the Court that the injunction was temporary, that a final determination of all questions in the cause could be made at a later time, that it was beneficial for the estate for the injunction to remain in full force and effect and that the rights of no person would be prejudiced by having the injunction remain in effect until such time as there is a final determination of the question as to whether Grasty is a limited or general executor, the motion to dissolve was denied.

The present motion for a limited dissolution of the injunction by Grasty so that he might determine his responsibility in regard to filing tax returns for the estate is denied for the following reasons:

1. There would be no benefit to the estate by a limited dissolution of the injunction.

2. The decree of November 15, 1966, and Virginia statutes defined Grasty's responsibility.

3. Federal law and instructions issued by the Internal Revenue Department also sufficiently delineate his responsibility in regard to the federal estate taxes.

4. It would be a detriment to the estate and the beneficiaries thereof for him to continue to litigate and appear in administrative proceedings to have his responsibilities defined when they have already been defined.

The beneficiaries of the estate filed a suit to remove

Grasty as executor of the estate on November 21, 1966, alleging substantially the same grounds as in the injunction petition they filed against him; i.e. his (Grasty's) activities relating to tax matters. There was a motion by the beneficiaries to consolidate this with the injunction suit, Chancery Cause 3295. The matter was continued by order of November 29, 1966. On December 15, 1966, counsel for Grasty filed a motion to quash service of motion for his removal. On December 20, 1966 counsel for Grasty filed a motion for a continuance which was granted. On January 20, 1967, an amended motion to quash service of motion for removal was filed by counsel for Grasty. On February 13, 1967, counsel for Clare moved that the motion to remove be consolidated with Probate File 382. On February 15, 1967, after considering briefs and argument of counsel the Court denied the motion of Grasty to quash service and denied the motion of the beneficiaries to remove him as executor. On March 3, 1967, the Court took under advisement the motion of beneficiaries and Clare to vacate the decree of February 15, 1967; the motion to consolidate and the motion to remove Grasty. On March 27, 1967, the Court considering there was no objection by counsel for Grasty scheduled the cause for further hearing on all issues raised by the pleadings.

Reasons for the adverse ruling on the objections made by counsel for Grasty to procedural matters need not be outlined since the motion for removal is denied.

The motion to consolidate with probate proceedings number 382 is denied because:

(1) This is within the discretion of the Court and no sufficient reason to consolidate has been shown.

(2) Probate procedure 382 is made an exhibit in Chancery Cause No. 3296 which in effect makes it a part of Chancery Cause No. 3296.

The motion to remove Grasty as an executor is denied for the following reasons:

(1) He was enjoined from doing the acts which the beneficiaries now state are grounds for his removal. Having obtained the relief by the injunction which they now seek in this suit, complainants have no good cause to seek the removal of Grasty as executor.

(2) The estate is being administered pursuant to previous directions of this Court which has continuing jurisdiction to see that these directions are carried out.

(3) Although the record indicates there is friction between the two executors this alone is not grounds for removal of one. There is no allegation or evidence that Grasty is guilty of any fraud, breach of trust or gross neglect that would justify removal. See *Wilson* v. *Kable,* 177 Va. 668. This case and the citations therein set forth some of the grounds for removal of a fiduciary none of which appear in the case at bar.

In all of these proceedings involving this estate there seems to be little if any conflict in the evidence and not great enough conflict in the law to justify the extensive litigation that has taken place. The executors should cease and desist from bickering between themselves, resolve any disagreements they have and proceed to administer this estate as expeditiously and economically as possible for the benefit of any creditors and the beneficiaries.

The decrees previously presented will be entered this 1st day of June, 1967.

RAYNER V. SNEAD, Judge

Letter from Mr. Grasty's Counsel to Manhattan District Director (Enclosures Omitted)

Upperville, Virginia
December 14, 1967

Mr. E. J. Fitzgerald, Jr.
District Director
Internal Revenue Service
P. O. Box 3100
New York, N. Y. 10015

RE: Estate of Robert Vanderpoel Clark, Jr.
Date of Death—10-4-64 AU:F:503:LB

Dear Mr. Fitzgerald:

Enclosed herewith are copies of the certificates from the Clerk of the Supreme Court of Appeals of Virginia advising that on December 4th, 1967, an appeal and supersedeas was awarded to William T. Grasty, Esquire, in connection with the Decrees of the Circuit Court of Fauquier County, Virginia, in the basic construction case and in the injunction proceedings. The effect of the supersedeas' awarded is to supersede the Decrees of the lower Court in both proceedings pending a final determination of the issues by the Virginia Court of Appeals.

Accordingly, Mr. Grasty is now free to participate in any determination by the Internal Revenue Service, including the National Office, on whether a complete and

timely return, Form 706, was filed on behalf of the subject estate.

Would you please be good enough to advise me of the present state of the proceedings and if the matter has been referred to the National Office.

Very truly yours,

/s/ G. A. Horkan, Jr.

Letter from Mr. Grasty's Counsel to Commissioner Morrissett's Counsel and Enclosed Motion

Gloucester, Virginia
December 18, 1967

Richard N. Harris, Esq.
Assistant Attorney General
Supreme Court Building
Richmond, Virginia 23219

Re: Grasty, Executor, vs. *Morrissett*
CA-1910 Circuit Court
City of Richmond

Dear Mr. Harris:

You will recall that in January of 1967 we agreed to a Consent Order continuing the subject proceeding generally on the docket of the Circuit Court of the City of Richmond pending a subsequent motion of counsel for rescheduling it.

This Consent Order was entered because the Circuit Court of Fauquier County enjoined Mr. Grasty, as Executor, from going forward with the subject mandamus proceeding against the State Tax Commissioner.

On the date of December 4, 1967, the Supreme Court of Appeals awarded Mr. Grasty, Executor, an appeal and supersedeas from the Injunction Decree of the Circuit Court of Fauquier County. The Supreme Court of Appeals also awarded an appeal and supersedeas to Mr. Grasty from the decree of the Circuit Court of Fauquier County construing the will and pertinent statutes of Virginia.

Photocopies of the Supreme Court's orders and the Certificates of the Clerk are enclosed.

In view of this action of the Supreme Court of Appeals Mr. Grasty is now free to go forward with the mandamus proceeding. To that end I have drafted, and enclose herewith, a copy of a Motion to reschedule the case. I have also drafted for your consideration a proposed sketch of an order rescheduling the case. I left blank the dates for the accomplishment of the further procedural steps in order to get your suggestions as to a time schedule that would be convenient with you.

You will recall that I had drafted and forwarded to you a proposed Order filing stipulation of facts, complete with documentary exhibits. At your convenience I would like to come to Richmond and discuss this proposed Order filing stipulation of facts with you in an effort to see if we could not arrive at a consent order and thereby avoid the necessity for the pre-trial conference.

Perhaps we could agree upon a consent order stipulating facts by the 10th of January. Assuming we could ac-

complish this by the 10th of January, I would be able to prepare and file our Brief on behalf of Mr. Grasty by January 31st.

If you could prepare and file your Brief by March 1st we might be able to schedule the case for final arguments before Judge Hening during the month of March.

Extending you every good wish for a Merry Christmas,
I remain

Sincerely,

/s/ Bolling R. Powell, Jr.

MOTION TO RE-SCHEDULE CAUSE

The plaintiff, William T. Grasty, Co-Executor, by counsel, moves the Court to re-schedule this cause on its docket for pre-trial conference for the filing and briefs and for final hearing and argument on the merits.

As grounds for this Motion the plaintiff states:

1. This cause was previously scheduled on the docket of the Court for pre-trial, for filing of briefs, and for final hearing and argument, but was continued generally when the Circuit Court of Fauquier County enjoined the plaintiff from going forward with this mandamus proceeding.

2. Under date of December 4, 1967, the Supreme Court of Appeals of Virginia granted William T. Grasty, Executor, an appeal and supersedeas from the Injunction Decree of the Circuit Court of Fauquier County.

3. The Injunction Decree of the Circuit Court of Fauquier County having been superseded by the order of the Supreme Court of Appeals, the plaintiff herein, William T. Grasty, Executor, is now free to go forward

with this cause, and is desirous of doing so in order to have adjudicated as expeditiously as possible certain very important questions involved in the administration of the estate of Robert Vanderpoel Clark, Jr., Deceased.

Respectfully submitted,

/s/ Bolling R. Powell, Jr.

Initial Pleading Filed by Mr. Clare and the Beneficiaries in the Removal Suit (Record No. 7024) (January 17, 1968)

MOTION FOR RULE TO SHOW CAUSE

Elizabeth D. Clark and Suzanne D. Clark, principal beneficiaries under the will of the above-named testator, state unto this honorable court the following:

1. By order entered March 15, 1965, by this Court, William T. Grasty was appointed as an executor in accordance with the will of the above-named testator and still holds such office.

2. On December 20, 1966, an order was entered in Chancery Number 3295 in this Court enjoining William T. Grasty, individually and as such executor, and his agents, attorneys, servants, employees and all other persons acting on his behalf directly or indirectly, from (i) prosecuting the administrative proceedings he instituted before the Internal Revenue Service of the United States on or about November 9, 1966, and in the national office of said Service; (ii) prosecuting the action seeking a writ of mandamus against C. H. Morrissett, State Tax Commissioner of Virginia, instituted by William T. Grasty as executor in civil action A-1910 on or about November

1, 1966 in the Circuit Court for the City of Richmond, Virginia; and (iii) instituting or prosecuting any other judicial, administrative or other proceedings or action relating to the Federal or Virginia estate or inheritance tax returns, filed or to be filed by or on behalf of the estate of said Robert Vanderpoel Clark, Jr., or seeking a ruling or other determination or guidance, formal or informal with respect thereto. A true copy of the order is attached hereto as Exhibit A.

3. The order provides that the injunction is to remain in full force and effect until such time as any appeal in Chancery Number 3183 in this court is finally determined or disposed of by the Supreme Court of Appeals of Virginia and the record thereof shall have been returned to and filed in this Court, and thereafter until such time as the said William T. Grasty shall have given all of the other parties notice that he intends to ask that the said injunction be dissolved.

4. The appeal in Chancery Number 3183 has been granted but has not been determined or disposed of, the record thereof has not been returned to or filed in this Court, and William T. Grasty has not given any party notice that he intends to ask that the injunction be dissolved. In granting an appeal from the injunction, the Supreme Court of Appeals also granted Supersedeas and thereby postponed payment of costs. However the injunction itself has not been suspended, stayed or dissolved, by this Court or by any other court, and is still in full force and effect.

5. By motion filed November 21, 1966, the undersigned instituted proceedings requesting the removal of William

T. Grasty because of his disloyal and detrimental actions with respect to the estate's federal and state tax returns. By order entered and opinion filed June 1, 1967 this Court declined to remove William T. Grasty, stating as its reasons the following:

"(1) [William T. Grasty] was enjoined from doing the acts which the beneficiaries now state are grounds for his removal. Having obtained the relief by the injunction which they now seek in this suit, complainants have no good cause to seek the removal of Grasty as executor.

(2) The estate is being administered pursuant to previous directions of this Court which has continuing jurisdiction to see that these directions are carried out."

6. By letter dated December 14, 1967, George A. Horkan, Jr., attorney for William T. Grasty, and with his authority, attempted to prosecute and did prosecute the abovementioned administrative proceedings instituted before the Internal Revenue Service of the United States, for the purpose of having tax returns filed on behalf of said estate declared a nullity, and by the same letter sought a ruling or other determination or guidance, formal or informal with respect to the federal estate tax return filed on behalf of the estate. A true copy of such letter is attached hereto as Exhibit B.

7. By letter dated December 18, 1967, and by motion filed in the Circuit Court for the City of Richmond, Virginia on or about December 19, 1967, Bolling R. Powell, Jr., attorney for William T. Grasty, and with his authority, attempted to prosecute and did prosecute his abovementioned action seeking a writ of mandamus

against C. H. Morrissett, State Tax Commissioner of Virginia for the purpose of having tax returns filed on behalf of said estate declared a nullity. True copies of such letter and motion are attached hereto collectively as Exhibit C.

8. The above actions taken by William T. Grasty are in flagrant violation of the said injunction entered December 20, 1966; and at the time such actions were taken William T. Grasty had full notice and actual knowledge of the injunction and of the fact that his actions were in direct violation thereof.

9. The actions stated herein, and other actions taken by William T. Grasty and his attorneys, are in direct violation of the fiduciary duties owed by William T. Grasty to the estate of the above-named testator and cannot possibly result in any benefit to the estate but on the contrary are harmful thereto; William T. Grasty has been made fully aware of the detrimental consequences thereof, but nevertheless has continued and still continues to take such detrimental actions.

10. By his own acts as herein alleged William T. Grasty has demonstrated that the injunction order entered by this Court is not adequate to protect the estate from damage and that the only adequate relief now available to the beneficiaries of the estate is his removal.

WHEREFORE the undersigned move this Court to issue a Rule requiring William T. Grasty, executor, etc., to appear before this Court and show cause, if any he can, why he should not be removed as such executor and made to account within 30 days of such removal.

Technical Advice Opinion Rendered by the Internal Revenue National Office to Manhattan District Director and Forwarded to Messrs. Grasty and Clare

February 28, 1968

District Director
Manhattan District
National Office
Internal Revenue Service
Estate of Robert V. Clark, Jr.
Date of Death: October 4, 1964

Attention: AU:R:S:SZ

This is in reply to your memorandum of August 14, 1967, requesting advice whether the Federal Estate Tax return, Form 706, filed by N. Holmes Clare and The Chase Manhattan Bank, as executors of the Estate of Robert V. Clark, Jr., is the required and valid return for Federal estate tax purposes.

The facts and circumstances comprising the record in this matter, as revealed by the information furnished by you and the administrative file, shows that the following factual situation developed with respect thereto.

Robert Vanderpoel Clark, Jr., died testate on October 4, 1964, in Middleburg, Virginia. Pertinent provisions of his Last Will and Testament (as disclosed by the copy thereof contained in the administrative file) are as follows:

"FIRST: (A) I appoint my counsel, N. HOLMES CLARE AND THE CHASE MANHATTAN BANK, a corporation organized under the laws of the State of New York, the Executors of this Will for all my assets, with the exception

of my Virginia assets which shall consist only of any real property which I may own in the State of Virginia, any tangible personal property situated in that State, and any funds on deposit in banks located in Virginia.

(B) For my Virginia assets I appoint as Executors my counsel N. HOLMES CLARE and WILLIAM T. GRASTY. If either (or both) does not survive me, does not qualify, or is unable to act for any cause, resigns or dies I appoint in his (or their) place and stead STATE-PLANTERS BANK OF COMMERCE & TRUSTS of Richmond, Virginia.

(C) * * *

"SECOND: I direct my Virginia Executors, at such time or times and at such prices as they consider reasonable, to sell my Virginia real estate which is not specifically devised and all tangible personal property located in Virginia and not specifically bequeathed, and after first paying all my debts for which claims may be filed and allowed in the State of Virginia and all expenses of administration (not including any estate or inheritance taxes) in that State, to transmit the net proceeds of sale and any net balances on deposit in banks located in Virginia to my New York Trustees.

"THIRD: My property located in Fauquier County, Virginia, known as "Springfield Farm," including but not limited to the land, *** and all tangible personal property in or about the residence and other buildings. *** I give to ELIZABETH T. DUNN to whom I am presently engaged to be married, if I am married to her at the time of my death.

* * *

"NINETEENTH: Any and all legacy, transfer, inheritance, estate, succession or death taxes, State or Federal based or imposed upon or measured by property that passes by my will, or otherwise, shall be paid out of the principal of my residuary estate (referred to in Paragraph SIXTH of this Will) and shall not be apportioned. Whenever my Executors or Trustees are given a choice of dates as of which to value property for Federal estate tax purposes, they may elect such date as they in their uncontrolled discretion deem advisable regardless of the resulting effect on other provisions of this will.

"TWENTIETH: I appoint as Trustees of the trusts created herein my counsel N. HOLMES CLARE and THE CHASE MANHATTAN BANK a corporation organized under the laws of the State of New York and I direct that no bond or undertaking be required of any Trustee in any jurisdiction and that they not be required to file or render periodic accounts in or to any court.

I further direct that any annual commissions allowable to my Trustee shall be paid from income.

"TWENTY-FIRST: My individual Trustee is a resident of the State of New York, my corporate Trustee is in the State of New York, my intangible personal property is in the State of New York, and I hereby elect and direct that this Will and the testamentary dispositions in it and the trusts set up shall be construed, regulated and determined by the laws of the State of New York, and that this Will be offered for probate in the State of New York."

Decedent's Last Will and Testament was executed in New York City on January 16, 1962. It was admitted to probate by the Surrogate's Court of New York County,

N.Y. on October 16, 1964; William T. Grasty having waived the issue and service of a citation and consented that the Will be admitted to probate; and Letters Testamentary issued on October 19, 1964 to The Chase Manhattan Bank and N. Holmes Clare.

Thereafter on or about March 15, 1965, the Will was offered for probate in the Circuit Court of Fauquier County, Virginia, and on April 1, 1965 Letters Testamentary were issued to N. Holmes Clare and William T. Grasty.

The gross value of the decedent's estate for Virginia probate tax purposes was estimated at $19,218,000; (in the Federal Tax return the gross is shown as $23,615,-031.21) the value of the New York assets being approximately $18,808,000; the value of the Virginia assets $235,000 represents the value of those specifically devised to the widow, leaving assets by the terms of the Will of about $85,000 to be administered by N. Holmes Clare and Mr. Grasty as Virginia executors—this represents less than one-half of 1% of the total estate.

The first question as to procedure raised in regard to the instant matter was *where* to file the estate tax return. Upon agreement between the District Directors for the Richmond and Manhattan districts, and consent pursuant to the section 20.6091-2 of the Estate Tax Regulations, it was decided that the return should be filed with the District Director for the Manhattan District. Accordingly, the return was so filed December 30, 1965, by N. Holmes Clare and The Chase Manhattan Bank as Executors, and the tax shown thereon, in the amount of $5,511,367.51, was paid at that time.

Both before and since the filing of the return in this case, Mr. William T. Grasty, through his attorney, has attempted to have the Service declare him to be the general executor of the decedent's estate, i.e., the party charged with the primary responsibility for administration of the estate, on the ground that he is the domiciliary executor and that the New York executors are, therefore, ancillary executors. In accordance with this purpose Mr. Grasty has attempted to have the estate tax return filed by the New York executors declared a nullity (since it was not prepared and executed by *all* the executors, among which he considers himself the principal) and to have the Service issue a directive to Mr. Clare, The Chase Manhattan Bank and himself to act jointly in the preparation and filing of a return. See letter dated November 9, 1966, and attachments, from Attorney Horkan to District Director, administrative file.

The New York executors, N. Holmes Clare and Chase Manhattan Bank, maintain that theirs is the general executorship in this case, and have submitted various and extensive legal memoranda in support of their position. See letter dated June 14, 1967, and attachments, from Mr. Clare to the District Director for the Manhattan District, administrative file. They also maintain that theirs is the responsibility for reporting and paying all taxes involved, and cite the first, second, nineteenth, twentieth and twenty-first articles of the decedent's will in support of their position.

In the above-described situation your question has been further simplified, in effect, to determine whether the Federal Estate Tax return filed by the New York executors should be treated as a *valid* return.

This office does not believe it necessary to consider at length the litigation in state courts that has developed in this case, since the matter of filing Federal estate tax returns (and of the liability for the tax) is governed by the applicable provisions of the Internal Revenue Code and the regulations promulgated thereunder.

The provisions of law and regulations pertinent and controlling in this matter are sections 2002, 2203, 6001, 6011, and 6018 of the Internal Revenue Code of 1954, and the regulations promulgated thereunder. Of particular pertinence in the instant case are sections 20.2002-1 and 20.6018-2 of the Estate Tax Regulations, which read, in part, as follows:

> "Section 20.2002-1. *Liability for payment of tax.* The Federal estate tax imposed both with respect to the estates of citizens or residents and with respect to estates of nonresidents not citizens is payable by the executor or administrator of the decedent's estate. This duty applies to the entire tax regardless of the fact that the gross estate consists in part of property which does not come within the possession of the executor or administrator. If there is no executor or administrator appointed, qualified and acting in the United States, any person in actual or constructive possession of any property of the decedent is required to pay the entire tax to the extent of the value of the property in his possession. See section 2203, defining the term "executor." ***"
>
> "20.6018-2. *Returns: person required to file return.* It is required that the duly qualified executor or administrator shall file the return. If there is more than one executor or administrator, the return must be made jointly by all. If there is no executor or administrator appointed, qualified and

> acting within the United States, every person in actual or constructive possession of any property of the decedent situated in the United States, is constituted an executor for purposes of the tax (see §20.2203-1), and is required to make and file a return. If in any case the executor is unable to make a complete return as to any part of the gross estate, he is required to give all the information he has as to such property, including a full description and the name of every person holding a legal or beneficial interest in the property. If the executor is unable to make a return as to any property, every person holding a legal or beneficial interest therein shall, upon notice from the district director, make a return as to that part of the gross estate. ***"

The duties and responsibilities of executors and administrators with respect to the Federal estate tax are imposed and clearly defined by the above-cited sections of the Code and regulations. It will be noted from careful examination thereof, and from analysis of their interrelation, that three general requirements are imposed in terms which indicate their application in specific factual situations. First, *any person* having possession or control of any part of the assets constituting the estate of a decedent is in effect made an executor or administrator of that estate, for purposes of filing returns and paying tax. Second, any such executor is required, in connection with the return which he is required to file, to furnish the Service with all the information he may have with respect to those parts of the estate which are *not* in his possession or under his control. Third, any such executor is *liable* for payment of the entire estate tax, *to the extent of the value of the property* in his possession or under his control.

It is obvious from the nature of those three general requirements that "possession and control of assets of the estate are the elements constituting the basis upon which the obligation to file a return and pay the tax is imposed." It is equally clear that more than one return may in fact be voluntarily filed pursuant to sections 2203 and 6018 of the Code and the regulations thereunder, in any situation in which no executor or administrator has been appointed and various parties in various states hold assets comprising a decedent's estate, and that more than one return may be required to be filed in such situation whenever the information to be obtained from such returns is essential to a district director's determination of the correct amount of tax imposed on the estate. Cf. *Estate of Henry Wilson* 2 T.C. 1059, at 1084. Accordingly, it appears that the fact that more than one return may be required where various parties hold assets of an estate negates any *obligation* of each of such parties to join in a single Federal estate tax return. These rules would appear to be equally applicable to those executors and administrators, either general or ancillary, who are duly appointed, qualified and required under the law of various states to administer the *parts* of a decedent's estate located in such various states for state death or inheritance tax purposes.

The statutes and the regulations were, of course, designed to secure the making of a single return by all executors or administrators involved whenever such is possible, since the filing of more than one return undoubtedly would present the Service with difficult problems in coordinating the returns in such a way as to prevent fragmentation of the estate or duplication in

determination of the tax imposed. Nevertheless, the very fact that more than one return may be filed, or may be required to be filed, in cases where various persons (including executors or administrators) have possession and control of various parts of an estate precludes any determination that a return filed by executors *having* possession and control of a part of that estate is invalid if not signed by an executor having possession and control of a different part of that estate.

Upon applying the provisions of the statutes and the regulations to the facts of the instant case, it becomes entirely clear that the New York executors were *required* to file a return and pay the tax, since they *were* in control of the assets of the estate located in New York. It is not at all clear that the Virginia executors were required to file a return and pay the tax, since their control of assets of the estate located in Virginia had been severely limited by the second and nineteenth articles of the decedent's will. Furthermore, one of the New York executors, Mr. N. Holmes Clare, is also a Virginia executor. Apparently, he was able to render an accurate and complete accounting for the Virginia assets in making the return which was filed with your District. In any event, you have not found it necessary to require any additional return.

Under the circumstances of this case, as described hereinabove, it is concluded that the return filed by the New York executors should be treated as a required and valid return for all legal purposes.

—END—

Motion Filed by Mr. Grasty in This Court in Injunction Suit (April 25, 1968)

MOTION FOR CLARIFICATION OF EFFECT OF AWARD OF APPEAL AND SUPERSEDEAS ON TEMPORARY INJUNCTION

The Appellant, William T. Grasty, Executor, etc., respectfully moves the Court for instructions as to the effect of the award of the appeal and supersedeas herein on the temporary injunction decreed by the lower Court, from which Decree this appeal was taken.

As grounds for this Motion the Appellant stated:

1. Prior to the entry of the temporary mandatory injunction Decree by the lower Court on December 20, 1966, the Appellant had instituted and was actively engaged in prosecuting an administrative proceeding before the United States Internal Revenue Service to determine his responsibility as the Virginia resident domiciliary co-executor of this Estate for preparing and filing United States estate tax returns and income tax returns on behalf of the Estate. This became an adversary proceeding by the New York executors entering an appearance and opposing Appellant's contention that he was jointly responsible for the filing of the United States estate and income tax returns.

2. The temporary mandatory injunction appealed from required Appellant to take the necessary affirmative procedural steps to discontinue his participation in this administrative tax proceeding. In compliance with this mandatory requirement of the temporary injunction, Appellant took the necessary affirmative steps to accomplish this end.

3. The New York executors, however, continued their active participation in this tax proceeding before Internal Revenue Service. The Appellant moved the Circuit Court of Fauquier County for a limited dissolution of the temporary restraining order so that he could resume his participation in the proceeding but his Motion was denied.

4. On March 28, 1968, the Appellant was notified by Internal Revenue Service that its National Office had rendered an opinion in the tax proceeding. Under Internal Revenue procedures the Appellant has the right to a conference in the National Office to present his exceptions to the opinion rendered. Appellant desires to exercise his right to a conference in order to argue his exceptions to the opinion and preserve his right to further appellate procedures in Internal Revenue Service. Appellant desires to note exceptions on the grounds, among others:

a. The National Office erred in going forward with the adversary administrative proceeding when the appellant was temporarily restrained from continuing his participation therein, thereby denying Appellant basic procedural fair play and due process of law.

b. The National Office opinion is not dispositive of the basic estate tax question presented by Appellant in initiating the administrative proceeding, i.e. whether, under the Internal Revenue Code and the Estate Tax Regulations, Appellant as the resident domiciliary coexecutor of the Estate is jointly responsible for preparing and filing the estate tax return and for paying the tax under the Regulation which provides, "If there is more than one

executor or administrator, the return must be made jointly by all."

c. The National Office opinion does not even deal with the income tax question presented by Appellant in initiating the administrative proceeding, i.e. whether, under the Internal Revenue Code and the Income Tax Regulations, Appellant as the Virginia resident domiciliary coexecutor of the Estate is jointly responsible for preparing and filing the income tax returns and for paying the income tax under the Regulation which provides that in the case of an estate which has both domiciliary and ancillary representatives, the domiciliary and ancillary representatives must each file an income tax return and, "the domiciliary representative is required to include in the return, rendered by him as such domiciliary representative, the entire income of the estate."

5. In its opinion the National Office ruled that the Internal Revenue Service would not be bound by any decision of the Virginia Supreme Court of Appeals in the presently pending appeals presenting the foregoing questions, among others.

6. It is Appellant's understanding that the granting of this appeal and supersedeas by the Supreme Court of Appeals had the effect of suspending the efficacy of this temporary mandatory injunction, thereby restoring Appellant to his status quo as an active participant in the administrative tax proceeding, and that thereafter he was free to resume his prosecution thereof. He promptly undertook to do this in order to expedite the resolution of these important tax questions in the administration of this large estate.

7. Thereupon, the Appellees moved the lower Court for an order holding the Appellant and his attorneys in contempt for violation of this temporary injunction. The Appellant and his attorneys advised the lower Court of their understanding of the effect of the award of the appeal and supersedeas but volunteered to cease and desist in their further prosecution of the tax proceedings until the Supreme Court of Appeals ruled upon the effect of the award of the appeal and supersedeas upon the efficacy of this temporary injunction. (See copy of the lower Court's Order attached.)

8. In the injunction Decree appealed from the lower Court temporarily enjoined Appellant from continuing his prosecution of this tax proceeding notwithstanding the Court's previous refusal to rule upon the questions Appellant seeks to have adjudicated therein. (See pp. 22-25, Petition for Appeal and Supersedeas, filed by Appellant herein.) This so-called temporary injunction was in effect for a year before the appeal and supersedeas was granted, and, if its effect is not suspended by the award of the appeal and supersedeas, will remain in effect for more than two years before this Court has the opportunity to hear and adjudicate this appeal on its merits, due to its crowded docket. Such an undue delay in the resolution of these tax questions prejudices the efficient and effective administration of this large estate and denies to Appellant a timely and authoritative adjudication of his responsibilities for returning and paying the more than five million dollars of taxes involved.

9. This Court's only expression of the law on the point here involved is by way of dictum in *Aetna Casualty*

etc. Co. v. *Board of Supervisors,* 160 Va. 11, 168 SE 617 (1933), where it was stated in a footnote to the opinion:

> "See to the effect that a supersedeas to a decree granting a prohibitory injunction does not have the effect of suspending the operation of the injunction pending a decision by the Appellate Court, so as to permit the doing of the act prohibited, *though it does have the effect of suspending the efficacy of a mandatory injunction.* 2 High on Injunctions (4th ed.) section 1698 and section 1698a." (other foreign citations) "See also *Layne* v. *Comm.* 144 Va. 684, 732 SE 306." "It has been held in Virginia and West Virginia that an appeal from and supersedeas to a decree dissolving a preliminary injunction has the effect of keeping the injunction in effect pending appeal. *Turner* v. *Scott,* 5 Rand (26 Va.) 532." (p. 51, emphasis supplied.)

That this is the generally recognized law on the point is illustrated in *Powell* vs. *Florida Land Co.,* 41 Fla. 494, 26 So. 700; *Blondheim* v. *Moore,* 11 Md. 365; *Helbig* v. *Phillips,* 109 N.J. Eq. 546, 158 A. 441. In these cases the Courts held the efficacy of mandatory injunctions was suspended and the lower Court was without jurisdiction to punish for contempt a disobedience of the injunction pending appeal.

10. There can be no doubt but that the temporary injunction here involved is a mandatory injunction because its effect was to require the Appellant to take the necessary procedural steps to discontinue his prosecution of the two tax proceedings which he was actively engaged in prosecuting at the time the injunction was issued. In compliance with the injunction the Appellant took this

affirmative procedural action necessary to accomplish this. A mandatory injunction is defined in Blacks, Law Dictionary as one which: "Restrains the defendant from permitting his previous wrongful act to continue operative."

11. The incorporation of prohibitory language in the form of the injunction decree is not determinative of whether it is mandatory or prohibitory. It is the effect of the decree that determines whether it is a mandatory or prohibitory injunction. Thus it was held in *Stewart* v. *Superior Court*, 100 Cal. 543, 35 P. 156 (1893) that the effect of an appeal from a decree granting an injunction as a supersedeas is not determined by the form of the decree, but by its effect. An injunction may be prohibitory in form, but mandatory in effect; and the rule that taking an appeal and giving bond operate as a supersedeas will be applicable. *Stewart* v. *Superior Ct.* (1893) 100 Cal. 543, 35 P. 156.

12. The suspension of the effect of the temporary injunction is necessary to restore the appellant to his previous status quo as an active participant in the Internal Revenue Service administrative proceeding so that he will not be denied the procedural due process of law granted him by the United States Internal Revenue Code and Regulations.

Respectfully submitted:

/s/ Bolling R. Powell, Jr.
Counsel for Appellant