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Clerk, Supreme Court of Appeals
Richmond, Va.

Record No. 7359

In the
Supreme Court of Appeals of Virginia
at Richmond

W. R. CARPER, JR., ETC.

v.

RAYMOND GUY REYNOLDS, ET AL.

FROM THE CIRCUIT COURT OF CRAIG COUNTY

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

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

HOWARD G. TURNER, Clerk.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 7359

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 26th day of November, 1969.

W. R. CARPER, JR., IN HIS OWN RIGHT AND AS ADMINISTRATOR, C.T.A., OF THE ESTATE OF WALTER EDGAR REYNOLDS, DECEASED, Appellant,

against

RAYMOND GUY REYNOLDS; MRS. ELLA REYNOLDS CALDWELL; MRS. MINNIE REYNOLDS LEE; MRS. BERTHA REYNOLDS McDANIEL; LLOYD C. CARPER; RICHARD A. CARPER; CHARLES F. CARPER; MRS. JoANNE CARPER ROCK; ROBERT REYNOLDS; WILLIAM REYNOLDS; DOUGLAS ALAN REYNOLDS; MRS. MARGARET REYNOLDS BRICKEY; MRS. MARTHA REYNOLDS JENNINGS; TONY LEE REYNOLDS; MRS. BARBARA REYNOLDS BURROWS; JUNE LUGAR; THE FARMERS & MERCHANTS BANK, A CORPORATION; W. R. CARPER; KATHLEEN REYNOLDS; AND DELPHIA REYNOLDS, Appellees.

From the Circuit Court of Craig County
Earl L. Abbott, Judge

Upon the petition of W. R. Carper, Jr., in his own right and as administrator, c.t.a., of the estate of Walter Edgar

Reynolds, deceased, an appeal is awarded him from a decree entered by the Circuit Court of Craig County on the 12th day of May, 1969, in a certain chancery cause then therein depending, wherein the said petitioner was plaintiff and Raymond Guy Reynolds and others were defendants; upon W. R. Carper, Jr., in his own right, or some one for him, entering into bond with sufficient security before the clerk of the said court below in the penalty of $300, with condition as the law directs; no bond being required of the administrator.

RECORD

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page 1 }

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BILL IN CHANCERY

page 2 }

* * * * *

1- THAT Walter Edgar Reynolds, a resident of Craig County, Virginia, died testate on December 16, 1967. The Will of the deceased was admitted to probate in the Clerk's Office of the Circuit Court of Craig County, Virginia, on January 27, 1968, Will Book "F", Page 408. A Certified Copy of said Will is filed herewith as "Exhibit A" and by this reference made a part hereof as fully and completely as though set out herein in *haec verba.*

2- THAT on January 27, 1968, your Complainant qualified as Administrator c.t.a., of the Estate of Walter Edgar Reynolds, in the Clerk's Office of the Circuit Court of Craig County, Virginia; the Executor named in the Will, W. P. Tatum, Jr., having declined to act, your Complainant was appointed Administrator c.t.a., and duly qualified by executing the required bond and ever since has acted as said
page 3 } personal representative.

3- THAT the said Will of the testator does not vest the personal representative with a power of disposition.

4- THAT the 1st Clause of said Will devised a one-half undivided interest in and to 245 acres of land situated in Craig County, Virginia, unto June Lugar, in fee simple and absolutely, but stipulates that any mortgage, deed of trust or indebtedness upon said tract of land, so far as it effects his estate would be a primary obligation and a charge upon the one-half undivided interest he owned at the time the Will was executed, which Will was dated October 26, 1956.

5- THAT the 245 Acre tract was conveyed September 13, 1956, by Dollie L. Leffel, widow, and Earl F. Huffman, executor of the estate of C. E. Leffel, deceased, to Russell B. Lugar and June A. Lugar, husband and wife as tenants by the entireties, with the right of survivorship and to W. E. Reynolds, single, by a deed of record in Deed Book 16, Page 124, of the Clerk's Office of the Circuit Court of Craig County, Virginia.

6- HOWEVER, on April 29, 1967, by a deed from Russell B. Lugar and June A. Lugar, each in his and her own right and as husband and wife, to W. E. Reynolds, acknowledged April 29, 1967, and recorded May 2, 1967, in Deed Book 27, Page 227 of said Clerk's Office conveyed all their rights, title and interest in the aforementioned tract to W. E. Reynolds.

7- BY a deed of trust dated, acknowledged and recorded on May 2, 1967, from W. E. Reynolds, single, to W. H. Abbott and Charles L. Ross, Trustees, of record in Deed Book 27, Page 229, of said Clerk's Office the aforesaid tract or land was conveyed in trust to secure a Note of Five Thousand ($5,000.00) Dollars and interest at 6% payable in annual installments of One Thousand ($1,000.00) Dollars each, beginning November 15, 1967, and annually to The Farmers & Merchants Bank of New Castle, Virginia, and further to secure such sums of money as the beneficiary may advance to the grantor or the grantor's successors in title.

8- THUS, on the date of the death of Walter Edgar Reynolds he owned the said tract of land in fee simple,
page 4 } subject only to the lien of said deed of trust, which deed of trust is unreleased of record.

9- THAT certain questions have arisen relative to the interpretation of the 1st Clause of said Will. That is, there is a question as to whether June Lugar is vested with a fee simple interest in the 245 acres or whether she is vested with only a one-half undivided interest and the effect of the charge contained in the Will on the one-half undivided interest of the lien indebtedness, in view of the fact that The Farmers & Merchants Bank by operation of the deed of trust has a lien on the entire tract in fee simple. This Bill in Chancery is filed for the purpose of seeking the instruction of the Court in construing the Will, so that your Complainant may administer the estate with safety and according to law and for partition.

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page 5 }

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15- THAT Walter Edgar Reynolds in addition to the 245 acre tract aforementioned died seised and possessed of three (3) other tracts or parcels of land in Craig County, Virginia; namely, 138 acres on Meadow Creek, twelve (12) acres on Meadow Creek and 0.48 acres in "New" Town of New Castle, Virginia. The said real estate in the aggregate

is reported to be worth $17,480.00 according to the Probate Records and the testator also left personal property of the value of $9,197.03, according to the Probate Records.

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page 8 }

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21- Your Complainant states that all of the aforementioned Defendants are over the age of twenty-one years and *sui juris.*

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page 9 }

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that partition of all the said lands may be made and decreed in some manner prescribed by statute, preferably by sale of the whole thereof and division of the proceeds amongst the parties according to their respective interests; that all proper accounts and inquiries may be directed and taken; that the Will of the deceased may be construed; that your Complainant may have all such other and further general relief as to equity may seem meet, and the nature of his case may require.

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page 45 }

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ANSWER OF JUNE LUGAR

* * * * *

3) And further answering said Bill of Complaint this Defendant answers and says that there maybe a question in the minds of some of the Complainants in this Cause as to whether this Defendant became vested with the fee simple interest in the 245 acre tract of land commonly called "The Leffell Farm" by provisions of the Will of Walter Edgar Reynolds, deceased, but this Defendant answers

page 46 } and says that she is *intitled* to the fee simple interest in the 245 acre tract, commonly called "The Leffell Farm", pursuant to the provisions of the Will of the said decedent.

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page 47 }

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Filed April 30, 1968.

W. J. Oliver, Clerk.

page 48 }

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PETITION AND MOTION

* * * * *

3- THAT the late Walter Edgar Reynolds was unmarried and his father and mother both predeceased him; that his said Will provided that the bulk of his estate would pass under the Descent & Distribution statutes of Virginia, and consequently his living brothers and sisters; and, the living issue of his deceased brothers and sisters are his devisees, distributees and next of kin; all of whom are over Twenty-one years of age and *sui juris*.

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page 50 }

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Filed May 9, 1968.

W. J. Oliver, Clerk.

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page 112 }

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COMMISSIONER'S REPORT

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page 115 }

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The Commissioner is of the opinion that the fee simple value and the rental value of each of the above described properties is as follows:

Parcel No. 1 (containing 245 acres, more or less, and known as the Leffel farm) has a fee simple value of approximately $15,500.00. The farm property has an annual rental value of approximately $250.00 and the tenantable house located upon the property has an annual rental value of slightly in excess of $400.00 a year, or approximately $35.00 a month.

Parcel No. 2 (containing 138 acres, more or less, and *Parcel No.* 4 (containing 12 acres, more or less) have a combined fee simple value of approximately $9,000.00. The farm property has a negligible rental value. The properties have no improvements which would produce any income.

Parcel No. 3 (containing 0.48 acre, more or less) has a fee simple value of approximately $500.00. The lot is unimproved and has no annual rental value.

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page 117 }

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Inquiry Number Four

To construe the will of the late
Walter Edgar Reynolds and determine
what interest, if any, June Lugar has
as a devisee under the will of the
said testator.

The facts of the case under consideration here need not be repeated in detail. The problem is basically a legal one. It resulted from the testator writing his will in the year 1956

devising "all of my right, title and interest (being a one-half undivided interest) in and to that certain farm or tract of land, situate in Craig County, Virginia, containing approximately 245 acres, recently purchased by me and Russell Lugar and his wife from the estate of C. E. Leffel, and which deed is now recorded in the Clerk's Office of the Circuit Court of the County of Craig, Virginia, unto June Lugar, wife of the said Russell Lugar, in fee simple and absolutely". Subsequent to the time of the execution of his will the testator acquired the remaining one-half interest in the farm and at the time of his death he was the owner in fee simple of the property designated as Parcel Number One in this report and as more fully described under Inquiry Number One hereinabove. After the testator's death the question arose as to what interest June Lugar takes in the farm as a devisee under the will of the testator.

In attempting to construe the testator's will we can readily acknowledge certain principles of law which appear to be well settled in Virginia. First, it is true that a will generally is to be construed to speak and take effect as of the time of death of the testator unless a contrary intention appears. It is also generally true that real property acquired by the testator after the date of execution of the will in Virginia will pass to the devisee when it fairly appears that the testator intended to dispose of such after acquired property. It must be bourne in mind that the true inquiry in matters of this kind is what the words which the testator used do express. We are not to rewrite the testator's will to produce a result which we think he may have intended or which he may not have intended and we cannot permit the application of any rule of construction which will produce a result which, from the language of the testator's will, he did not intend.

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But the foregoing are generalizations. There are finer considerations to be examined. A broad rule which states that after acquired property will or will not pass to a devisee over simplifies the problem. It may be more important to consider the precise terms of the will and to determine whether the devise in question is general or specific. It is possible that the dispositive language of the will may be specific to such a degree as to exclude the after acquired interest. It would certainly seem to be pertinent, too, to consider with what care and precision the will was drawn, whether or not the will generally shows any plan of scheme of distribution, whether or not the will contains a residuary clause disposing of other real property, and finally, whether or not the testator had kinfolk who would share under the residuary clause of the will.

In the instant case it is evident that the will of the testator was drawn with care and that the testator had given at least some thought to the disposition of his estate and the values of the various assets which then comprised it. It seems evident to the Commissioner that the will attempts to some degree to apportion his assets among his friend, June Lugar, and his next of kin, who were his brother, his sisters and his nieces and nephews of whom there were many.

If the will is examined in the light of these considerations it becomes more apparent to the Commissioner that the testator intended to devise unto June Lugar a one-half interest in the Leffel farm which he owned at the time of the execution of the will and that interest only. The will clearly reveals the care taken in its drafting and the Commissioner believes that the testator was aware of its content, that he knew the language employed therein and that he understood its import. He knew that under the residuary clause of his will, Paragraph Second, which was carefully couched in legal terminology, all of the rest and residue of his estate of every nature and kind passed unto his heirs at law as set forth in the Statutes of Descent and Distribution of the Commonwealth of Virginia. Though the testator acquired the other one half interest in the farm from June Lugar and her husband less than eight months prior to his death, there is nothing to indicate either within the will or from any other source that he intended for Mrs. Lugar to take the entire interest in the property rather than the specific one half interest which he owned at the time the will was drawn and which he so plainly delineated in the first paragraph of his will. In the light of the foregoing it would not seem proper to the Commissioner to uphold the contention of the defendant and to award unto her the full interest in the subject property when the will specifically devises a one half interest therein. Any such finding would thwart the stated intention of the testator and upset to a considerable degree the plan of distribution which the testator set forth in his will. In essence, the Commissioner believes that after acquired property will *not* pass to a named devisee when the devise is not sufficiently broad to include the after acquired interest. The Commissioner sees nothing which would warrant giving the words of the will a meaning different from their plain and natural meaning and it is, therefore, the opinion of the Commissioner that June Lugar holds a one half undivided interest in the subject property, the Leffel farm, which she took under Paragraph First of the testator's will.

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Had the devise to June Lugar merely read " . . . .all of my right, title and interest in and to that certain farm . . . ."

and this only, then the result might well have been different. The defendant ably recited a case in her memorandum setting forth a similar state of facts and the court there found that the after acquired interest of the testator passed to the devisee. But the wording of the devise in that case is distinguishable from the wording of the devise here. The language here is plain and specific. To say that the testator intended to give the after acquired interest in this case to June Lugar, in effect doubling her devise and removing the one half interest from the residuary clause under which the testator's next of kin are the beneficiaries, would be equivalent to writing a codicil for the testator which he himself, for some reason, did not see fit to do. And this the Court cannot do.

With regard to the existing deed of trust upon the subject property the Commissioner is of the opinion that the will of the testator directs that the one half interest in the said property which he devised unto June Lugar should be charged with the payment of "my portion of *any indebtedness* existing as a lien upon said farm." The Commissioner deems it consistent with the prior findings herein and consistent as well with the provision of the will itself in finding that the one half interest in the farm which was devised unto June Lugar shall bear one half of the total existing indebtedness and the remaining one half interest in the farm which passed unto the heirs at law of the testator under the residuary clause of his will shall bear the remaining one half of said indebtedness.

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page 123 }

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EXCEPTIONS OF COMPLAINANT TO THE REPORT OF THE SPECIAL COMMISSIONER

* * * * *

First Exception: Under Inquiry Number Four, Page 8, of the Commissioner's Report, the Commissioner held that June Lugar holds a one-half undivided interest in the Leffel farm of 245 acres, whereas June A. Lugar and Russell B. Lugar, by a deed executed and acknowledged on April 29, 1967, and recorded May 2, 1967, in Deed Book 27, page 227,

of the Clerk's Office of the Circuit Court of Craig County, Virginia, conveyed all of their right, title, and interest in and to the aforementioned tract to W. E. Reynolds; that where there has been such an ademption, the will is to be read as though the bequest had been expunged from it.

Second Exception: That the Commissioner erred in holding that June Lugar has any interest in the said real estate; that she is estopped by her deed executed subsequent to the date of the will, and that she should not be permitted to gainsay what she has solemnly averred in her deed, and said deed is filed herewith as Exhibit "A" and asked

page 124 } to be read as a part of these exceptions as fully and completely as though set out herein in *haec verba.*

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Filed April 15, 1969.

Earl L. Abbott, Judge

page 130 }

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EXCEPTION OF JUNE LUGAR, DEFENDANT, TO THE REPORT OF THE SPECIAL COMMISSIONER.

* * * * *

This Defendant, June Lugar, excepts to a certain portion of the Report of S. L. Fellers, Jr., Special Commissioner, filed in this cause on March 10, 1969, made under a Decree of reference entered herein on June 27, 1968, and sets forth her Exception as follows:

EXCEPTION: Under Inquiry No. 4 the Special Commissioner concluded that June Lugar holds only a one-half undivided interest in the Leffel Farm of approximately 245 acres, whereas this Defendant, June Lugar, contends that she is entitled to the entire interest in said Leffel property. The words of the devise used by the Testator in the First Item of his Will clearly shows that he intended that "all of my right, title and interest" * * * in and to the Leffel property is devised in fee to June Lugar. It is submitted that the words used by the Testator in his Will "(being a one-half undivided interest)" are not "words of the devise". The

phrase "(being a one-half undivided interest)" were words of ownership of the interest of the Testator in the Leffel property at the time the Will was drafted. It is respectfully submitted that after acquired interest passed under the words of the devise * * * "I hereby give and devise all my right, title and interest" in the Leffel Farm to

page 131 } June Lugar.

Respectfully submitted this 12th day of May 1969.

June Lugar, Defendant,

By Benj. E. Chapman, her Attorney.

* * * * *

Sustained May 12, 1969.

Earl L. Abbott, Judge.

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page 133 }

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DECREE

This cause came on this 12th day of May, 1969, to be heard upon the papers formerly read and proceedings had in said cause; upon the Report of S. L. Fellers, Jr., Commissioner, dated and filed on the 10th day of March, 1969; upon the exceptions of the Complainant to said report; upon the exceptions of June Lugar, one of the defendants; upon the depositions taken before said Commissioner and filed with his report; and was argued by counsel.

On consideration whereof, the Court doth overrule all exceptions of the said Complainant to the said report, other than the exception relative to attorney's fee for Complainant's attorney for instituting and conducting this suit, which is hereby fixed by the Court in the sum of $500.00, as a part of the costs of this proceeding, and the Court doth sustain all of the exceptions filed by the respondent, June Lugar, and it is so ADJUDGED, ORDERED, and DECREED and the Report of said Commissioner, with the exception of the modifications hereinbefore referred to, be and it is hereby RATIFIED, APPROVED and CONFIRMED.

And from said Report, it doth appear and it is so ADJUDGED, ORDERED and DECREED as follows:-

1- Walter Edgar Reynolds died testate on December 16, 1967, a resident of Craig County, Virginia. His
page 134 } will was duly admitted to probate in the Circuit Court of Craig County, Virginia, on January 27, 1968, and now appears of record in the Clerk's Office of the Circuit Court of Craig County, Virginia in Will Book F, page 408.

At the time of his death the testator was seised and possessed of the following described real properties all of which are situate in Craig County, Virginia:

Parcel-Number One (containing 245 acres, more or less, and situate on the waters of Meador Creek and known as the Leffel farm)

BEGINNING at a point in the main turnpike 3 poles below a red oak on *somthside* of said turnpike, a corner to Lot No. 2 (F. B. Leffel in this partition), and also a corner to Carper's land; thence down the said turnpike with Lot No. 2, leaving the said Carper's land N. 87°45′ E. 23 poles; N. 54 E. 15 poles; N. 28°30 E. 4 poles to the center of said turnpike; thence leaving same and with said Lot No. 2 (division line) S. 41° 45′ E. 11 poles to a stake on east side of a hollow; thence with same S. 5 E. 44 1/5 poles to walnut; thence with same S. 3 E. 63 1/5 poles to an old walnut corner to same; and thence with same S. 48°15′ E. 47 1/2 poles to an ash by an old fence at edge of woodland; thence with same N. 56°45′ E. 42 poles to a red oak on a ridge; thence with same and up northside of mountain S. 84°30′ E. 96 poles to a small gum with sarvis and maple pointers, corner to same below cliffs on north from top of mountain; thence leaving Lot No. 2 and with or nearly with top of big mountain N. 26°30′ E. 48 poles and 8 links to a birch, a corner to the Looney land; thence with same running north down the side of said mountain N. 57°30′ W. passing four lynns and a cucumber at 63 poles, in all 88 1/2 poles to a stake 6 feet east of a locust; thence with same N. 27°30′ W. 12 poles to a walnut (down); thence with same down a hollow N. 18 W. 13 poles to a stake in a hollow; thence with same N. 1° 30′ E. 28 poles to a stake in said hollow and with same N. 21° W. 28 poles to a stake in said hollow; thence with same N. 2°30′ E. 7 1/2 poles to a post at end of wire fence at corner of meador; thence with said Looney crossing Meador Creek and the turnpike N. 15 W. 114 4/5 poles to 2 white oaks (1 down); thence with big survey leaving Looney N. 21° W. 20 1/5 poles to a chestnut oak; thence N. 17° 15′ W. 47 poles to a chestnut oak; thence No. 28°15′ W. 36 1/2 poles to a chestnut oak; thence with same N. 32°15′ W. 17

poles to 2 chestnut oaks and a gum; thence crossing a hollow S. 35 W. 52 poles to a chestnut, oak, red oak, and 2 locusts on south from top of little mountain, a corner to Carper; thence with his line S. 3°30′ W. 175 poles crossing Meador Creek to a sugar tree on east side of said creek; thence crossing back road and with Carper S. 24°45′ W. 62 poles to the BEGINNING, and containing 255.85 acres, more or less.

There is, however, excepted from this conveyance the following tracts or parcels of land.

First: 1. The Leffel Spring, or Big Spring, Reference is here made to Deed Book "W", page 335 for privileges, restrictions and reservations as set out pertaining to the use of the spring herein referred to.

2. Two adjoining tracts or parcels of land containing 3 acres and 110 poles, as set forth and described page 135 } in plat and survey of same made by F. H. Huffman, surveyor, dated September 24, 1928, and recorded in Deed Book "W", at pages 335-7, and it being the same property, along with the easements, conveyed in the deed from C. E. Leffel and wife to the Commonwealth of Virginia, by deed dated December 1, 1938, and recorded in Deed Book "W", at page 335, of the records of the Clerk's Office of the Circuit Court of Craig County, Virginia.

Second: BEGINNING in the center of old Route 42, common corner to B. O. Carper parcel; thence N. 22 E. 376.4 feet with said Carper line and with wire fence to an iron pipe driven in said fence; thence leaving Carper line S. 85 E. 458.2 feet to an iron pipe driven in wire fence; thence N. 22 E. 169.1 feet with said fence; thence N. 40 E. 34.7 feet leaving said fence to right of way of Route 42; thence with said right of way 42 S. 12°15′ W. 88.4 feet; thence S. 4°45′ W. 120 feet; thence S. 7 W. 70 feet to a point in wire fence, line of B. O. Carper; thence with Carper land leaving right of way of Route 42 N. 44 W. 67.3 feet to the center of old Route 42 and continuing with center of old Route 42 and Carper land, S. 35°42′ W. 113.6 feet; thence S. 50°45′ W. 194.1 feet; thence S. 84 W. 385.7 feet to the BEGINNING, containing 2.6 acres, more or less, and being the same property conveyed by deed from C. E. Leffel and wife to B. O. Carper and wife dated April 10, 1953, and recorded in Deed Book 13, page 417, of said records.

Parcel Number Two (containing 138 acres, more or less, situate on the waters of Meador Creek)

All of that certain tract, piece or parcel of land, situate on the waters of Meador Creek, in Craig County, Virginia,

adjoining the lands formerly owned by the late B. C. Givens, W. C. Myers and others, and embracing an area of One Hundred and Thirty-eight (138) acres, more or less; and being the same land which was conveyed to N. W. Howe by T. A. Lemaster and Margaret L. Lemaster, his wife, by deed dated December 29, 1914, and recorded in the Clerk's Office of the Circuit Court of Craig County, Virginia, in Deed Book "Q", page 85.

Parcel Number Three (containing 0.48 acre, more or less, situate in the "new" town of New Castle)

BEGINNING at a stake in the east edge of Marshall Avenue, said stake being a corner to lot No. 8, Willow Brook Subdivision; thence S. 14°50′ E. 84 feet to a stake on Lizzie Mae Duncan's line; thence N. 87 E. 245 feet with the lands of Lizzie Mae Duncan to a stake; thence N. 04 W. 83 feet with the lands of Lizzie Mae Duncan to a stake, said stake being a corner to Lot No. 8, Willow Brook Subdivision, to the BEGINNING.

Parcel Number Four (containing 12 acres, more or less, situate on Meador Creek)

A tract of land containing twelve (12) acres, more or less, lying on Meador Creek, in Craig County, Virginia, and being a part of a 202 acre tract of land known as the John W. Lipes farm, which 12 acres of land, more or less, lies wholly on the south side of State Highway Route No. 624, and adjoins the lands of the grantee, herein and others; and which 12 acres of land is a part of the said 202 acre tract which was conveyed to Frank H. Huffman by R. R. Kerr and wife, by deed dated August 15, 1941, and recorded in the Clerk's Office of the Circuit Court of Craig County, Virginia, in Deed Book No. 6, page 210.

page 136 } 2- THAT the said Commissioner has heard evidence of appraisers and has established the fee simple value and the rental value of each of the above described properties, as follows:-

Parcel Number One (containing 245 acres, more or less, and known as the Leffel farm) has a fee simple value of approximately $15,500.00. The farm property has an annual rental value of approximately $250.00 and the tenantable house located upon the property has an annual rental value of slightly in excess of $400.00 a year, or approximately $35.00 a month.

Parcel Number Two (containing 138 acres, more or less,

and *Parcel No.* 4 (containing 12 acres, more or less) have a combined fee simple value of approximately $9,000.00. The farm property has a negligible rental value. The properties have no improvements which would produce any income.

Parcel Number Three (containing 0.48 acre, more or less) has a fee simple value of approximately $500.00. The lot is unimproved and has no annual rental value.

3- THAT the said Commissioner has recited in his report that *their* are certain liens on the properties, as follows:-

For the year 1968: (penalties to be added thereto)

Parcel Number One (245 acre tract)	$84.48
Parcel Number Two (138 acre tract)	51.81
Parcel Number Three (0.48 acre tract)	1.98
Parcel Number Four (12 acre tract)	5.94

The following taxes have been assessed against the subject properties for the year 1969: (based upon 1968 assessments)

Parcel Number One (245 acre tract)	84.48
Parcel Number Two (138 acre tract)	51.81
Parcel Number Three (0.48 acre tract)	1.98
Parcel Number Four (12 acre tract)	5.94

The only lien of record against any of the subject property and of which the Commissioner has knowledge is as follows:-

(1) Deed of trust dated May 2, 1967 and recorded in the Clerk's Office of the Circuit Court of Craig County, Virginia in Deed Book 27, page 229, wherein W. E. Reynolds, single, conveyed unto W. H. Abbott and Charles L. Ross, Trustees, certain acreage as therein described (being a tract containing 255.85 acres, less the several parcels therein described and excepted therefrom and being the same 245 acre tract as more fully described herein under Inquiry Number One and known as the Leffel farm) in trust to secure the beneficiary, The Farmers and Merchants Bank of Craig County, Virginia the payment of the sum of $5,000.00, said indebtedness being evidenced by one negotiable note, bearing
page 137 } interest at 6% per annum of even date and payable in yearly installments of $1,000.00, the first payment coming due in the amount of $1,000.00 on November 15, 1967 and a like payment of $1,000.00 becoming due on the 15th day of each November thereafter until the entire debt, including principal and interest, is fully paid.

This deed of trust is not released.

4- It appears to the Court that the testator intended to devise unto June Lugar a fee simple interest in the 245 acre tract hereinbefore described as Parcel No. 1, also known as the Leffel farm; however, the entire farm is chargeable with the outstanding balance on the Deed of Trust hereinbefore referred to, and the entire farm is chargeable with all the taxes on said tract of land, and it is so ADJUDGED, ORDERED, and DECREED.

5- And the Commissioner's Report has established that the following are the residuary legatees, under the second paragraph of the testator's will, and each of said legatees and devisees is over the age of twenty-one years and their respective interests are averred opposite their respective names, and it is so ADJUDGED, ORDERED, and DECREED, to-wit:-

1. Raymond Guy Reynolds, brother, New Castle, Virginia, a one-seventh (1/7) interest.
2. Ella Reynolds Caldwell, sister, Roanoke, Virginia a one-seventh (1/7) interest.
3. Minnie Reynolds Lee, sister, Roanoke, Virginia, a one-seventh (1/7) interest.
4. Bertha Reynolds McDaniel, sister, Roanoke, Virginia, a one-seventh (1/7) interest.

The following are the children of a deceased sister, Sally Reynolds Carper, who died in the year 1951:

5. W. R. Carper, Jr., nephew, New Castle, Virginia, a one-forty second (1/42) interest.
6. Lloyd C. Carper, nephew, Roanoke, Va., a one-forty second (1/42) interest.
7. Richard A. Carper, nephew, Roanoke, Va., a one-*forth* second (1/42) interest.
8. Charles F. Carper, nephew, Albuquerque, New Mexico, a one-forty second (1/42) interest.
9. Jo Anne Carper Rock, niece, New Castle, Va., a one-forty second (1/42) interest.
10. Peggy Carper Zeffel, niece, Denver, Colorado, a one-forty second (1/42) interest.

page 138 } The following are the children of a deceased brother, Clarence Roscoe Reynolds, who died in the year 1947:

11. Robert Reynolds, nephew, New Castle, Va., a one-thirty fifth interest (1/35)
12. William Reynolds, nephew, New Castle, Virginia, a one-thirty fifth interest (1/35)
13. Douglas Alan Reynolds, nephew, New Castle, Virginia, a one-thirty fifth interest. (1/35)
14. Margaret Reynolds Brickey, niece, New Castle, Virginia, a one-thirty fifth interest. (1/35)

15. Martha Reynolds Jennings, niece, New Castle, Virginia, a one-thirty fifth interest. (1/35)

The following are the children of a deceased brother, Roy Lee Reynolds, who died in the year 1967, prior to the death of the testator:

16. Tony Lee Reynolds, nephew, New Castle, Virginia, a one-fourteenth interest (1/14).

17. Barbara Reynolds Burrows, niece, Laurel, Maryland, a one-fourteenth interest (1/14).

It is to be noted that the surviving widower and widows of Sally Reynolds Carper, Clarence Roscoe Reynolds and Roy Lee Reynolds, all deceased, who are W. R. Carper, Kathleen Reynolds and Delphia Reynolds, respectively, hold no interest in the subject property inasmuch as their respective spouses died prior to the death of the testator.

6- And it appearing to the Court, from the evidence and from the report of the Commissioner, that Parcel No. 2, 3, and 4, because of their diversity in value and size, and their topographical arrangements and the large number of devisees who are vested with varying interests therein, the said parcels of land are not susceptible of partition in kind and no one or more of the parties in interest has expressed a willingness to accept any of the parcels aforesaid and to pay therefor to the other parties in interest such sums of money as their interests therein may entitle them to receive; it is, therefore, ADJUDGED, ORDERED, and DECREED that the parcels herein referred to as Parcels 2, 3 and 4, be sold at public auction to the highest bidder, for cash, at the Front Door of the Courthouse, at New Castle, Virginia, and for the purpose of making said sale, it is ADJUDGED, ORDERED and DECREED that Thomas J. Surface be, and he is hereby appointed Special Commissioner,

page 139 } but before he shall act, he shall qualify by giving bond in the penalty of $10,000.00, with corporate surety, before the Clerk of this Court, conditioned for the faithful performance of his duties as such Special Commissioner, and to account for and pay over all monies which may come into his hands by virtue of his appointment as such Commissioner, and after executing bond, he shall advertise the date, time, terms and place of sale of said realty, before making sale thereof, once a week for four successive weeks, in *The New Castle Record,* a newspaper published in Craig County, and by posting a notice thereof for a like period at the Front Door of said Courthouse, and by handbills, and the said Commissioner is authorized to auction said tracts separately and to employ an auctioneer for that purpose.

And it is further ADJUDGED, ORDERED, and DECREED that the said Special Commissioner, upon collecting

the proceeds of sale as aforesaid, shall open a Special Account in The First National Bank of New Castle, Virginia, and deposit said funds to his credit as Special Commissioner, and hold the same subject to further Order of this Court, and what he shall do hereunder, he shall report to the next Term of this Court.

And to said adjudication, in paragraph four (4) *supra,* granting a fee simple interest in Parcel No. 1 to June Lugar, Complainant, by counsel, excepts.

And this cause is continued.

ENTER: May 12, 1969

Earl L. Abbott, Judge

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DECREE

This cause came on this day to be heard on the papers formerly read and proceedings had in said cause; upon the Petition and Motion of the Complainant, by counsel, to set aside and vacate the decree made and entered on May 12, 1969, in the above-styled chancery cause, adjudicating a fee simple interest in June Lugar, under the Will of the testator; and for good cause shown, it is ADJUDGED, ORDERED, and DECREED that the decree in *toto* entered in the above-styled cause on May 12, 1969, in Chancery Order Book 8 Page 156, be and it is hereby vacated, set aside and held for nought, and the said decree having been this day rescinded, the cause is set for further hearing on the issue presented, for the day of , 1969.

And this cause is continued.

Refused 6-14-69.

E.L.A.

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NOTICE OF APPEAL
and
ASSIGNMENT OF ERROR

NOTICE is hereby given that W. R. Carper, Jr., in his own right and as Administrator C.T.A. of the Estate of Walter Edgar Reynolds, deceased, the complainant herein, appeals to the Supreme Court of Appeals of Virginia from a final order of the Circuit Court of the County of Craig, Virginia, entered on the 12th day of May, 1969, and will apply to the said Supreme Court of Appeals of Virginia for an appeal to said judgment.

In support of his petition for an appeal, the following error is herein assigned and will be relied upon:

The Court erred in adjudicating and decreeing that the testator intended to devise unto June Lugar a fee
page 147 } simple interest in and to the two hundred forty-five (245) acre tract referred to in said decree upon the following grounds:

(a) That the Court, by virtue of its decree, rewrote the Will of the testator and erroneously interpreted the same, inasmuch as said Will unequivocally states that "a one-half (1/2) undivided interest" was devised to the said June Lugar therein.

(b) That the evidence indicates that the testator had no intention of devising a fee simple interest to the said June Lugar, as the Court decreed, inasmuch as the evidence adduced proved that the testator purchased from the said June Lugar her one-half (1/2) undivided interest in and to the tract aforesaid for Eight Thousand Dollars ($8,000.00) cash on the 29th day of April, 1967.

(c) That the said June Lugar is estopped to claim any interest in and to the tract aforesaid under and by virtue of the said Will, inasmuch as the deed from her to the late Walter Edgar Reynolds recites that she conveyed all her right, title and interest in the tract aforesaid and did therein quit-claim any and all interest.

(d) That the said Will does not affect after acquired property not mentioned in the Will wherein the words contained therein indicate that they refer to matters and things as they exist as of the date of the Will and the wording contained therein is not sufficiently broad or encompassing to include an after acquired interest.

(e) That no interpretation or construction of the said Will indicates that the late Walter Edgar Reynolds intended the said June Lugar to have, take and acquire a page 148 } fee simple interest in the tract aforesaid rather than the specific one-half (1/2) interest which the said Walter Edgar Reynolds owned at the time the Will was executed, which fact is plainly established by virtue of the delineation in the first paragraph of said Will and any other interpretation placed upon the Will would upset and do away with the obvious plan of distribution of the said Walter Edgar Reynolds to his blood relatives.

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Filed June 16, 1969.

W. J. Oliver, Clerk.

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A Copy—Teste:

Howard G. Turner, Clerk.

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