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Revocation and Revival of Wills in Virginia

JAMES H. BARNETT, JR.

Kate Miller Levring executed two wills, the first in 1954, the second in 1955. The latter contained an express revocation clause. Following her death the second will which was last traced to her possession could not be found, thus giving rise to a strong presumption that she had destroyed it with intent to revoke. In an *inter-partes* proceeding, the executor named in the first will, offered that will for probate. Probate was contested by certain next of kin of the deceased. The only evidence introduced was a statement by the decedent that she planned to make certain undisclosed changes in her second will by a new will rather than by a codicil. The presiding judge of the Probate Court, Chancellor Brockenbrough Lamb of the Chancery Court of the City of Richmond, admitted the 1954 will to probate as the true last will of the decedent, on proof that it was executed in conformity with the statute of wills. At the instance of the contestants an appeal has been granted by the Supreme Court of Appeals of Virginia. How should the court rule? The question presented to the court is whether the 1954 will was revoked, and if so, was it revived by the subsequent revocation of the revoking instrument? This question cannot be fully appreciated without an understanding of the history of the revival of wills in England and in Virginia. This involves a survey of the judge-made rules and the statute designed to change those rules. This development will be illustrated by the use of supposititious cases.

Suppose T executes a valid will leaving all his personalty to A and all his realty to B. Later T executes a second valid will, containing an express revocation clause, leaving all his personalty to X and all his realty to Y. Later T with intent to revoke tears up the second will. Does T die testate or intestate as to any part of his property?

1. *In England prior to 1937*

(a) T dies testate as to his realty, the same passing to B under the first will. His intent as to the first will is immaterial.
 (b) T dies intestate as to his personalty, unless it is affirmatively established that he intended to revive the first will when he revoked the second.

The explanation of this diversity is found in the opinion in *Rudisill v. Rodes*, 70 Va. (29 Gratt.) 147 (1877) set out below. The ecclesiastical courts managed to retain jurisdiction over testaments disposing of personalty, while the common law courts never lost jurisdiction over wills devising realty.

2. *In Virginia prior to 1848*

The answer was probably the same as to both kinds of property. I have found no case where the precise question was presented. If the ecclesiastical rule prevailed then the answer for both kinds of property would be that given in 1 (b) above. If the common law rule prevailed then the answer for both kinds of property would be that given in 1 (a) above. Church courts were never set up in this country. When the state courts were presented with this question they selected one or the other of the rules and applied it to both kinds of property.

3. *In Virginia after 1849 and prior to 1960*

The answer is clearly set out in *Rudisill's ex'ur v. Rodes*, *supra*. The opinion reads as follows:

John Rudisill, of the county of Nelson, died in the month of June, 1874, having in his lifetime made and published successively three wills, dated, the first on the 22d day of January, 1868; the second on the 14th day of February, 1871, and the third and last in the month of April or May, 1872. The second contained a clause revoking all former wills, and the third contained a similar clause. The testator destroyed the last will *animo revocandi*, leaving the other two uncancelled; the single question is, whether by the destruction of the third and last will, the second was revived.

The solution of this question depends upon the construction of section 9, chapter 118, Code of 1873, which is in these words:

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

This section was first enacted in this state at the general revisal of the laws in the year 1849, and is almost a literal copy of the first clause of the English Statute of Wills, 7 Will. IV and 1 Vic. ch. 26 (July 3, 1837), which may be found in 2 Jarman on Wills (1st Amer. ed.), 751. Indeed, nearly the whole of this chapter, of which this section is a part, as reported by the revisors, was adopted from the English statute for the double reason, as they say, that they approved its provisions, and that the adoption here of those provisions would give us the benefit of the English decisions upon them; decisions made by courts over which there generally preside men of ability and learning. Report of Revisors, p. 623.

Previous to the act 1 Vic. ch. 26, it was a vexed question in the English courts, whether by the destruction, *animo revocandi*, of a will containing a revocatory clause, a former will preserved uncancelled, was thereby revived. It seems to have been held generally by the common law courts, that in such a case it was a necessary conclusion of law, admitting of no proof to the contrary, that the former will was revived. This rule was deduced from the nature of the revoking instrument, which is itself revocable and never becomes final and absolute until the death of the testator; and it was considered that the effectual revocation of such instrument, restored the former will and left it to operate in like manner and with like effect as if the revoking will had never been executed. *Goodright v. Glazier*, 4 Burr. R. 2512; *Burtinshaw v. Gilbert*, 1 Cowp. R. 49; *Bates v. Holman*, 3 H. & M. 503, 525, 542; 1 Jarman on Wills, 123; 4 Kent's Com'rs, 531; 1 Redfield on Wills, 374, 375; 1 Tuck Com'rs (Book 2), 295; 2 Minor's Ins., 931, 932.

On the other hand, in the ecclesiastical courts, the revival or restoration of the former will was made to depend on the intention of the testator, to be gathered from the facts and circumstances of each particular case, and parol evidence was admissible to show the intention. 1 Jarman on Wills, *supra*, and cases cited in notes on *Lawson v. Morrison*, 2 Amer. Lead Cas. (5th ed.), 482, 518 to 523.

The effect of the rule in the law courts was to exclude arbitrarily all extrinsic evidence of intention upon the question of revival, and thus oftentimes to set up a will contrary to the intention of the testator; while the rule in the ecclesiastical courts threw the door wide open to the admission of such evidence, and suffered the intention of the testator to be determined by 'the uncertain testimony of slipper memory.'

It was the object of the English statute, by the 22d section, to abrogate both of these rules, which were attended with the mischiefs just indicated, and to establish in their stead a safer rule, by which the intention of the testator would be manifested with more certainty, and be less liable to be defeated by acts and circumstances of an equivocal character.

This section, from which, as before stated, section 9 of our statute was taken almost in totidem verbis, was construed by the prerogative court in the year 1843, and, therefore, before its adoption in this state. The case decided was, in its circumstances, almost identical with the one in judgment here.

A testatrix, after the act 1 Vic. ch. 26, duly executed a will, and, subsequently thereto, two other wills, in each of which was contained a clause revoking all former wills. She afterwards destroyed the two latter wills. It was held that the first will was not thereby revived, and that parol evidence was not admissible to show an intention to revive.

Sir Herbert Jenner Fust said: 'I feel that I have no discretion to exercise in this case. There have undoubtedly been cases decided over and over again under the statute of frauds, holding that parol evidence was admissible to prove the revival of a once revoked instru-

ment. It was this that led to the introduction of the 20th and 22d sections into the present Wills Act. It is admitted, in this case, that the testatrix did, subsequently to the will of January, make two other wills; that both were duly executed; and both contained a clause expressly revoking all former wills. Then, the first was revoked to all intents and purposes, and to have a re-operation, it must have been revived. Then, was it revived? The only mode by which it could be revived is that pointed out by the 22d section. That section is most express; there must be a re-execution. There are no other means of showing an intention to revive. Destruction of the revoking instrument is not sufficient; it is not a re-execution of the revoked will, according to the present act. I pronounce against the paper as a will.' *Major & Mundy v. Williams & Iles*, 3 *Curteis*, 453, (7 *Eng. Eccl. R.* 453.)

This is the only English case upon the construction of this section of the statute, which has been brought to our notice, and we find eminent law-writers concurring in the construction there given. 1 *Jarman on Wills*, 123; 4 *Kent Com.* (5th ed.,) 533, note a; 1 *Redfield on Wills* (3d ed.,) 369-371; *Id.* 320-322, and notes; 2 *Amer. Lead. Cas* (5th ed.) 522; 1 *Lomax's ex'ors* (2d ed.,) side p. 53, top 131; *Id.* top pp. 160-161; 2 *Minor's Ins.* (2d Ed.,) 932.

We are not aware that this section (the 9th of our act) has ever been construed by this court. There is no case reported. But we find no difficulty at all in construing it. Its language is very plain, and taken in connection with the other sections of the act of which it is a part, its meaning can hardly be mistaken.

By section 4 it is declared how wills and codicils (see section 1) may be executed and attested; by sections 7 and 8, the 'manner' in which they may be revoked; and by section 9, the only mode, in which, after being 'in any manner revoked,' they may be 'revived,' and that mode is by 're-execution, or by codicil.'

The circuit court for the county of Nelson, affirming the judgment of the county court of said county, held that the paper writing offered for probate as the last will and testament of John Rudisill, deceased, bearing date on the 14th day of February, 1871, had been revoked by the

subsequent will of said decedent, executed in April or May 1872, and was not revived by the destruction, *animo revocandi*, of the last named will; and that, therefore, the said paper writing was not the true last will and testament of the said decedent, and that the motion to admit the same to probate as such last will and testament be overruled.

We are all of opinion, for the reasons stated, that there is no error in the said judgment of the said circuit court, and that the same should be affirmed.

4. *In Virginia today*

The issue in the Levering case is simply this: What is the rule in Virginia today?

This question will be explored in some detail. There has been no change in the pertinent statutes discussed in the *Rudisill* opinion above. Changes, if any, therefore, must be found in subsequent cases which have in some way dealt with this question. The cases are:

Hugo v. Clark, 125 Va. 126 (1919)

Clark v. Hugo, 130 Va. 99 (1921)

Adams v. Cowan, 160 Va. 1 (1933)

Bell v. Timmins, 190 Va. 643 (1950)

Poindexter v. Jones, 200 Va. 372 (1950)

Re Levering, Chancery Court, City of Richmond, April 1959

The pertinent statutes are:

No will or codicil, or any part thereof, shall be revoked unless under the preceding section, or by a subsequent will or codicil, or by some writing declaring an intention to revoke the same, executed in the manner in which wills are required to be executed, or by the testator, or some persons in his presence and by his direction, cutting, tearing, burning, obliterating, cancelling or destroying the same or the signature thereto, with intent to revoke. Va. Code Ann. § 64-59 (1950)

No will or codicil or any part thereof, which shall be in any manner revoked, shall, after being revoked, be

revived otherwise than by re-execution thereof, or by a codicil executed in the manner hereinbefore required, and then only to the extent to which an intention to revive the same is shown. Va. Code Ann. § 64-60 (1950)

Hugo v. Clark.

The lower court had probated a well-executed will of Cyrus Warden. The contestant offered evidence that the decedent had executed a second valid will containing an express revocation clause. Since the second will could not be found, a presumption arose that it had been revoked by the decedent. The lower court had permitted the attorney who drew the second will to testify as to its due execution but ruled that testimony as to its contents was not admissible. The contestants appealed. The court said:

The question is whether the paper offered is the true last will and testament. If it has been revoked, it is not, and if the decedent thereafter executed a second will expressly revoking the previous will, there is no reason to infer that he then intended the fact of such revocation as a confidential communication to be withheld after his death. . . . we think . . . the evidence . . . as to the contents of the second will should have been admitted for the consideration of the jury. 125 Va. 126, 135 (1919)

The decision is based on the *Rudisill* case which was not cited. The court sent the case back for a new trial.

Clark v. Hugo.

Following the decision in the *Hugo v. Clark* case, the case was twice tried in the circuit court. The first trial resulted in a verdict for the will. The court set this verdict aside, and at the next trial there was a verdict against the will upon which the judgment now under review was entered. In the first trial the proponents of the first will had sought to show that the second instrument though regular in form as a will never became one because the *animus testandi* was absent. To sustain that contention the testimony of the two attorneys who drew the instrument was introduced in which they testified

that it was “. . . more peculiar than those relating to any will or paper he had ever drawn,” and that the decedent had stated that, “I have come to you to draw a paper which may be my will and it may not.” They further testified that he said, “A certain thing may happen that this will not be my will. I have drawn it, and if it does happen it will be my will.” 130 Va. 99, 103, 104 (1921).

The court said the question involved here is a very narrow one but it is not free from difficulty. “Did Cyrus Warden ever have a second will? Or, to put it differently, was the so-called March will a testamentary document in such legal sense as that it can be treated as a will subsequent to, and therefore, destructive of, the December will?” The court continued:

The legal rules and principles which must control our decision are clear. A will is revoked by a subsequent inconsistent will; and after such revocation the destruction of the latter will does not have the effect of reviving the former, even though the testator so intends. . . . *Rudisill v. Rodes*. . . . The decisive and narrow question, therefore, is whether the March paper ever in truth became Mr. Warden’s will. . . . There must have been a testamentary intent. *Id.* at 105-106.

The court then quoted the following from *Lister v. Smith*, 3 Sw. & Tr. 282 (Eng 1863):

The momentous consequences of permitting parol evidence thus to outweigh the sanction of a solemn act are obvious. . . . On the other hand, if the fact is plainly and conclusively made out that the paper which appears to be the record of a testamentary act was in reality the offspring of a jest . . . and never seriously intended as a disposition of property . . . the court should [not] turn it into an effective instrument.” *Id.* at 108.

Again, the court said:

We have found no case involving facts exactly similar to those of the instant case. . . . This, of course, does not mean that it will be permissible to introduce evidence to

show that the operation of a paper executed with testamentary intent, and having once become a testamentary paper absolute in its terms, can be shown by extrinsic evidence to depend upon conditions not therein expressed. Perhaps the best and most succinct statement of the rule is to be found in 30 Am. & Eng. Enc. 2nd Ed., page 580, 581 as follows: 'Evidence is admissible * * to show that an instrument, on the face of it testamentary, was not written *animo testandi*; but not to show that the operation of a will, absolute in its terms, depends upon conditions.' *Id.* at 109.

The court went on to say that the case was analogous to *Whitaker & Fowle v. Lane*, 128 Va. 317 (1920) in which it was held that it was not a violation of the parol evidence rule to permit such evidence for the purpose of showing that a sealed instrument, absolute on its face, was delivered to the grantee on an oral condition precedent to its effectiveness.

The court held that parol evidence was admissible to ascertain whether the paper was executed with testamentary intent, and found on examination of testimony of the two attorneys that Cyrus Warden intended when he signed the second paper that it should become a will only on the happening of an unstated event, which the court apparently assumed had never occurred. This assumption was based on the fact that the decedent had destroyed the paper because it never became a will.

In short the court held that paper was subject to an oral condition precedent stating that it was "somewhat analogous" to the Virginia case which held that a deed "absolute on its face could be delivered . . . to the grantee on an oral condition precedent to its effectiveness." *Id.* at 109.

The first verdict was upheld.

It should be noted that the court cited the *Rudisill* case with approval and went further than that case in suggesting that a subsequent inconsistent will revokes a prior will and if the subsequent will is revoked the prior will is not revived.

The late Dean Alvin E. Evans of the Law School of the University of Kentucky in an article on "Conditional Wills" in

35 Michigan Law Review 1049 devoted several pages to a discussion of this case in the course of which he states that it is the only case holding that a will can be executed in escrow.

Did the *Clark* case overrule the *Hugo* case? Certainly not in words, but did it in legal effect?

Bell v. Timmins.

While under this heading the case above will be referred to as "this case" or "this opinion."

A holographic will was offered for probate in an *inter partes* matter. During the proceedings the contestant, an heir at law, brought forward a witness who testified that the testatrix had executed a second holographic will containing an express revocation clause and "dispositions of identical purport as the paper offered for probate." 190 Va. 648, 657 (1950).

Chancellor Lamb, who presided in the probate proceedings and whose opinion was adopted without change by the Supreme Court, said:

The question, therefore, confronts the court whether . . . the testimony as to the revocation by a subsequent will must not be held to work a revocation of the paper now before the court.

Except for some little points of differentiation and subsequent events, I should be almost bound by the case of *Hugo v. Clark* . . . wherein there was testimony of two reliable witnesses that they had seen a later will expressly revoking the will under consideration. . . . The court held that the express revocation would revoke the will in dispute; and sent the case back for a new trial, instructing the court below to let the jury hear the evidence 'as to the contents of the second will'. This sounds as if the court had in mind that the later will was to be set up; but that was a probate proceeding, as this is, and not a suit in equity to set up a lost will.

But two years later, and after two jury trials . . . the case was again before the Court of Appeal. . . . The Court of Appeals again reversed, and, . . . and entered up final

judgment probating the earlier will, despite the clause of express revocation in the lost subsequent will.

It seems to me that in the two intervening years a notable change had come over the approach, and the conclusions as well, of the Court of Appeals. They had come to recognize as they indicate on page 108 of 130 Va., the momentous consequences of placing every will at the mercy of parol testimony of a stranger that it had been revoked by some document that had disappeared.

So I feel I am not bound by anything that was said in *Hugo v. Clark*. . . .

Now the court is not permitted in this proceeding to follow Agnes O'Brien's testimony throughout and to its ultimate conclusion. If so followed there could and would be set up a subsequent will of the same purport and to the same effect as the will now before the court. For two reasons I cannot do that: *first*, this can be done only in a suit in equity brought for the purpose of setting up the lost will and then probating it. This is not that kind of a proceeding. And, *second*, I cannot do this because there is only one witness to indicate that there was a subsequent will and the testimony of that witness lacks the cogent force and the convincing quality that a court requires to set up a lost instrument.

The Court is asked by the contestant to accept the testimony of Agnes O'Brien that there was a later will beginning with a clause of revocation. The court is asked to rip this introductory clause of the supposed subsequent will out of its setting, and use it to cancel this 1935 will; but without going further and undertaking to set up, here or elsewhere, the whole of the subsequent will.

But I am satisfied that I should apply the doctrine of dependent relative revocation in this situation. . . . *Id.* at 657 *et seq.*

I will comment at this point on some of the statements above before exploring the full scope of the opinion. *First*, the statement that the court in the *Clark* case probated “. . . the earlier will, despite the clause of express revocation in the lost subsequent will,” seems not to be sustained by the record.

Just because Chancellor Lamb would have held the subsequent instrument to be a will is not germane. In the *Clark* opinion Justice Kelley was speaking for a court that had jurisdiction to decide the issue. Whether the court was in error as to the validity of the oral condition is not here involved. The statement here criticised creates the impression that the *Clark* case repudiated the *Rudisill* case. *Second*, the following statement about the change that had come over the court is even more unfortunate. Even if not inaccurate it gives a misleading impression. The term "momentous consequences" taken out of context referred either to the revocation clause in the second instrument and thus to the *Hugo* case or to the testimony of the attorneys and thus to the *Clark* case. Whether to one or the other, it is not correct because if to the *Clark* case the court accepted the risk and went further than any case I have found in using such evidence. If the phrase refers to the *Hugo* case it is clear, by the question posed by the court quoted above starting "Did Cyrus Warden . . .," that the court was prepared to use the revocation clause had it become necessary. However, the parol evidence, the testimony of the attorneys, established that there never was a subsequent will. *Third*, if the court never had occasion to use the principle laid down in the *Hugo* case, how can it be seriously urged that the *Clark* case overruled the *Hugo* case? Was there a change in the approach of the Court of Appeals? No. The change was in the evidence brought out by the attorneys for the proponent in the second trial.

What did the Chancellor mean when he said that "I am not bound by anything that was said in *Hugo v. Clark* . . . ?" Did he mean that the *Clark* case had completely overruled the *Hugo* case? The answer to this question will throw light on just what the *Bell* case decided. The *Hugo* case expressly recognized a broad principle and then added a subsidiary principle based on the *Rudisill* case.

The broad principle involves lost unrevoked wills. It is a settled rule that a will cannot be used as a muniment of title to personal property until it has been admitted to probate. The

broad principle is not in conflict with that settled rule. It merely provides that the contestant may defeat the probate of a prior will by proving that the testator made a second valid will containing an express revocation clause which has been *lost*. In the application of this principle the contestant is not required to set up the lost will and then probate it before offering proof that it contained a revocation clause. He must establish that the lost will was well executed but is not required to prove the dispositions in the lost will. If the contestant wins, neither will is probated. This broad principle is followed in a majority of the states. Since this principle presupposes that the lost will has not been revoked no question of revival is involved as in the *Rudisill* case.

Some jurisdictions have special statutes providing for the proof of lost wills. Such statutes usually require that the contents be established by two witnesses. Since the statutes contemplate the eventual probate of the instruments, a majority of the cases hold that they do not apply to the broad principle under discussion, because the proof of the revocation clause is made solely to defeat the probate of another instrument and not to establish the lost will as a muniment of title.

The contestant must prove that the lost will was well executed. What evidence must be introduced to meet this requirement? If the will was attested the contestant must establish that the testator and the two witnesses signed the will. Suppose the lost will was holographic. Obviously he must prove that it was in the handwriting of the testator and properly signed. Can he meet the requirements by offering one witness who testifies to these facts or must he bring in two witnesses as required by the last clause of the Virginia statute which provides: "If the will be wholly in the handwriting of the testator that fact shall be proved by at least two disinterested witnesses." Va. Code Ann. § 64-51 (1950). Could the contestant in the *Bell* case bring his proof within the *Hugo* principle? There is no clear authority on the point in Virginia. *Tate v. Wrenn*, 185 Va. 773 (1946) is not helpful. Texas, which recognizes holographic wills, has a statute which pro-

vides that a lost will must be established by the same proof required to prove the will in a probate proceeding. The Texas statute providing for proof of a holographic will is identical with the Virginia statute quoted above. In *McCluskey v. Owens*, 255 S.W. 2d. 939, (Texas 1953) the following issue was presented: T had made a valid will which had been admitted to probate. The present suit had been brought to set aside the probate and to probate a second holographic will which was alleged to have been stolen after the death of the testator. There was only one witness to prove the contents of the will and that it was in the handwriting of the testator. The court held that the proof was sufficient as to contents but not as to handwriting so as to satisfy the statute either in probating the lost will or for the purpose of setting aside the probate of the prior will. In refusing to set aside the probate of the first will the court ruled on a question that was raised in the *Bell* case when the contestants asked the court to accept the testimony of Agnes O'Brien that there was a later will beginning with a clause of revocation. Chancellor Lamb stated that he was not bound by anything said in the *Hugo* case. If he refused to hear the testimony because he rejected the broad principle recognized in the *Hugo* case, then he was not required to rely upon the doctrine of dependent relative revocation. Suppose he had allowed the contestants to use this principle? Could they have proved that the second will was well executed when they had only one witness who could testify that the second will was wholly in the handwriting of the testator? In the discussion of the broad principle I have assumed that the second will was lost. The same result would be reached whether it had been revoked as well as being lost.

The subsidiary principle in the *Hugo* case is the application of the broad principle to a situation like the *Rudisill* case where the second will was both lost and revoked. The court stated that proof that the second will was well executed and contained an express revocation clause would be sufficient to show the revocation of the first will even though the testator later revoked the second will.

I cannot determine from a study of the opinion if the Chancellor ruled that the contestants could not defeat the probate of the first will by proof of the second will and its contents, but on the contrary must establish and then probate the second to defeat the first. Or did the Chancellor rule that although theoretically the contestants could use the *Hugo* principle, they were not in a position to do so because they could not prove due execution of the second will? Whether he took one or the other of the views it seems that it was unnecessary to discuss the doctrine of dependent relative revocation. Did he refuse for the same reason as given in the Texas case? It is clear from the Chancellor's discussion of the sufficiency of Agnes O'Brien's testimony that he realized that it was impossible to set up the second will and probate it even if it had not been revoked. Did he agree with the minority of courts by taking the position that the contents of the second will cannot be received in evidence unless the proof offered would be sufficient to establish the will in a probate court? Some of his statements in the *Levering* opinion indicate that he is opposed to such proof. Suppose he had accepted the broad principle recognized in the *Hugo* case and allowed the contestants to offer the testimony, could they have satisfied the requirement that the contestants must first establish that the lost will was well executed? The Texas case held that they could not prove due execution by the testimony of one witness. It will be recalled that the Chancellor had stated that he was not bound by anything said in *Hugo v. Clark*. It may be urged in the light of what was written in his book and of the attack made on the *Rudisill* case in the *Levering* opinion that he was speaking only of the subsidiary principle laid down in the *Hugo* case. This subsidiary principle is that even if the later will was revoked, proof that it contained an express revocation clause will defeat the probate of the prior will by showing that this prior will had been revoked. If the decision in the Texas case was sound the contestants in the *Bell* case were not in a position to ask that the *Rudisill* doctrine be applied in their favor. They lacked the necessary proof. One thing is certain. The

Chancellor, whether he took one or the other of the positions suggested, manifested no desire to argue these points at length but seemed rather eager to discuss and apply the doctrine of dependent relative revocation. Aside from the arguments just presented I submit that the Chancellor was not required to reject the *Rudisill* case in probating the first will. In support of that contention I offer the following California case where the testator, as in the *Bell* case, drew up two wills. In the *Bell* case they were exactly alike. In the California case the two wills were, for practical purposes, exactly alike. A discussion of that case follows.

In re Thompson's Estate, 185 Cal. 768, 198 P. 795 (1921), the decedent left two wills, one made in 1908 and another made in 1916. The two wills, save for gifts of \$14.00, were exactly alike. The 1916 will contained an express revocation clause. It had been accidentally destroyed after the death of the testatrix. Only one witness ever saw this will. The contestant, to defeat the probate of the 1908 will, offered the testimony of the one witness who was able to establish by common law standards (*i.e.* by the testimony of one witness) the contents of the 1916 will. The local statute required that lost wills be proved by the testimony of two witnesses. The court held that the 1908 will should be probated. Four of the seven justices approved the general rule that the contestants (under the *Hugo* principle) could defeat the probate of a prior will by proving by one witness the revocation clause in a subsequent lost will. Three of the justices held that the testimony of only one witness would not be sufficient to defeat the probate of the prior will. These three were joined by one of the first four justices referred to who held that even though the testimony was sufficient yet since the two wills were substantially the same he found no intent in the entire second will to displace and revoke the 1908 will. The other three suggested that if they had held that the testimony of the one witness was sufficient they would have found no intent in the 1916 will to revoke the prior will. The *Rudisill* rule was not directly involved in the case yet it is apparent from the opinions of the four

justices that they would have reached the same result if the second will had been revoked. California in 1851 adopted the New York statute (1830) which provided that if after making a will, the testator duly makes and executes a second will, the destruction, cancellation, or revocation of such second will, does not revive the first will. What does the *Thompson* case stand for? The majority found that the second will was conditional. Professor Atkinson in the 1950 Annual Survey of American Law at page 689 had this to say about *Bell v. Timmins*:

. . . a holographic will was presented for probate and a witness testified that there was a later holographic will making an identical disposition and containing a clause of revocation. However, the latter will was not found and it could not be probated because of the requirement that two witnesses must establish a lost will. In answer to the contention that the revocation clause was sufficiently proved to warrant denial of probate of the first will, the court relied upon the doctrine of dependent relative revocation as ground for denying effect to the clause of revocation. This is not the ordinary case of dependent relative revocation where the courts give relief against a revocation under mistake by denominating it a dependent or conditional revocation. Here a condition to the revocation clause is implied and it is a condition as to a future event, namely probate of the will containing the revocation clause. However, the result reached is certainly a just one, and by the holding the court avoids the necessity of considering whether the later instrument was presumptively revoked, and finally the question of revival. (*In re Thompson's Estate* cited in *accord*).

There is a striking similarity in the facts of the *Bell* and *Thompson* cases. In each the second will contained a revocation clause and dispositions substantially the same as those in the prior will. California had an anti-revival statute which its courts had construed as bringing about the same result as that reached in the *Rudisill* case. In the *Thompson* case the second will had been lost. In the *Bell* case there was a strong presumption that the second will had been revoked. In neither

case could the second will be proved for probate. In both cases the first will was probated. Though the anti-revival statute was not directly involved in the *Thompson* case, the three judges writing the majority opinion held in dictum that if the second will had been revoked instead of lost the contestants could have proved its contents by the testimony of the one witness. The three, however, indicated that in that eventuality they would have found no revocation of the first will by the second will. This view was shared by the one judge who joined with the three in holding that the first will should be probated. The four judges said that the search to ascertain the intent of the testator should not be limited to the revocation clause but should include the dispositions in the second will. They said that since the dispositions were the same in both wills they found no indication that the testator intended to revoke the dispositions in the first will when he wrote those same dispositions in the second will. I submit that this reasoning should have been applied in the *Bell* case to sustain the holding that the first will should be probated.

I agree with the result reached in the *Bell* case but not with the reasoning. I am convinced that not one of the judges in the *Thompson* case thought that the decision there nullified the anti-revival statute in California. To suggest that the *Bell* case overruled the *Rudisill* case would indicate a failure to appreciate the basis of the application of the doctrine of dependent relative revocation. Cases applying the doctrine should never be regarded as laying down a broad general rule. Such cases always rest on peculiar facts and should be limited to these facts only.

In affirming the lower court's decision in the *Bell* case the Court of Appeals said at page 650: "The pertinent facts are so concisely stated in the opinion of the Chancellor, and his reasoning is so logical and convincing, that we have decided to refuse the appeal and to adopt and publish his opinion as the opinion of this Court . . ." By the use of these words did the court mean to overrule the *Rudisill* case? Did they have the *Rudisill* case mind? The question may seem a bit far-fetched.

However, in the *Levering* opinion, Chancellor Lamb states, "It seems clear that the doctrine of the *Rudisill* case cannot live under the principles announced in *Bell v. Timmins*."

The Chancellor wrote the opinion which was adopted in the *Bell* case. The *Bell* case was apparently treated as controlling by the court in the *Poindexter* case which is yet to be discussed. The opinion in the *Levering* case was written by him. It becomes quite apparent that the present rule in Virginia was in fact fashioned by Chancellor Lamb of the Chancery Court of the City of Richmond. His views on this matter are of the greatest interest.

We now turn to Chancellor Lamb, the author. Since the *Bell* opinion was handed down he has written an excellent book, *Virginia Probate Practice*. Section 33 is entitled *Revival and Republication*. *Rudisill v. Rodes* is not mentioned there or in any other part of the book, despite the fact that the book was written to assist attorneys in probate practice. It must be remembered that the *Rudisill* case is not only the leading case in this state in construing the statute taken from the Wills Act, but it is also one of the leading cases in this country construing an anti-revival statute. It has been discussed in all treatises on wills. The *Hugo* and *Clark* cases already discussed in this paper are sharply criticised by the author. It is difficult to believe that the failure to mention the leading case is an oversight. The author, after repeating the statement in the *Bell* case that the Chancellor was no longer bound by the *Hugo* case, goes further and states "Nor is it at all clear that the court intends that the second opinion ([*Clark*] 130 Va. 99) is to be relied on in other cases." Lamb, *Virginia Probate Practice*, 102 (1957). This statement is echoed by Justice Miller in the *Poindexter* opinion. The author sharply criticises the *Clark* opinion. This is surprising since the *Bell* opinion relied on the *Clark* case to kill the *Hugo* case. The man, who as Chancellor, wrote the opinion in the *Bell* case and there used the *Clark* case to kill the *Hugo* case, now, as author, turns on his ally and claims it too was killed in the struggle. This reminds one of a free for all, or going to bat once and making two hits.

In speaking of the *Clark* case Chancellor Lamb, the author, states:

It is indeed difficult to distinguish between the intent of that testator and the intent of testators in general. For it is implicit at the time of the execution of every will that the testator may revoke it. . . . The only difference that appears in the *Clark-Hugo* case is that the testator *put in words* his recognition of the paper as ambulatory. . . . *Id.* at 102.

Let Dean Evans in commenting on *Clark v. Hugo* answer the argument.

The argument that giving effect to the evidence would, in the first case, work a revocation is clearly erroneous. So is the proposition that the instrument is being varied by parol evidence. It is true that the result would be the same as if a condition were read into the instrument, but the method is rather that of showing that under the circumstances there was no *animus testandi*, or no will. That leaves two considerations, the question what is the mark of finality in the case of a will, and the question of policy. 35 Mich. L. Rev. 1049, 1064. (1937)

The author, Judge Lamb, then criticises the *Clark* case for citing a quotation from 30 Am. & Eng. Enc 2nd Ed. 580, 581 which he alleges does not sustain the court. The quotation reads as follows: "Evidence is admissible * * to show that an instrument, on the face of it testamentary, was not written *animus testandi*; but not to show that the operation of a will, absolute in its terms, depends upon conditions." 130 Va. 99, 109 (1921). A careful reading of the opinion makes it clear that the court was making a distinction so often made when an obligor or maker is permitted to deliver a deed or note, absolute in terms, in escrow to the obligee or payee. Such condition can be shown by parol testimony.

Poindexter v. Jones.

In this case T executed four valid wills, one each in 1938, 1939, 1947 and 1950. Prior to her death T revoked the last two

by act to the document. *None of the wills contained an express revocation clause.* The court said: "We must now determine whether or not the 1938 and 1939 wills were revoked by the 1947 and the 1950 wills when either or both of the latter papers were executed, and if so, did their ultimate destruction by Maude R. Snyder, *animus revocandi*, revive the 1938 and the 1939 wills." 200 Va. 372, 379 (1958). It is further stated that the last wills together were "... wholly inconsistent with the 1938 and 1939 wills, and if unrevoked would have supplanted those prior wills" *Id* at 380.

The court held that the 1938 and 1939 wills were unrevoked and should be probated. In doing so it set out in full Sections 64-59 and 64-60 of the Va. Code Ann. (1950), (*id* at 379), and on page 380 stated:

It is pertinent to observe that neither the 1947 nor the 1950 will contained a revoking clause, nor did either 'declare an intention to revoke' any previous wills. In fact, it is not claimed by the heirs and distributees that either the 1947 or 1950 document constitutes a 'writing declaring an intention to revoke * * *. executed in the manner in which a will is required to be executed * * *.' Thus there is no revocation of the 1938 and 1939 wills under that specific provision of §64-59.

This statement is the heart of the opinion. If the prior wills were not revoked under that specific provision there is no other provision under which, on the facts, they could possibly be revoked. The court in the statement quoted above has correctly stated the question. Did the last two wills *when executed* revoke the prior wills? There is no point in arguing that they did not revoke the prior wills at the death of the testatrix. The remainder of the opinion is not germane to the issue nor is it responsive to the question as stated.

Does a subsequent will declare an intention to revoke prior inconsistent wills or gifts in such wills?

If T by a first will leaves all his property to A and then by a second will leaves all his property to B and both wills stand

as executed at T's death no question of revocation need be raised. In wills the last comes first so by the valid disposition in the second nothing was left to pass under the first will.

Suppose, however, that the gift to B in the second will is invalid because of something outside the instrument such as a violation of the rule against perpetuities or because its terms are too indefinite to be saved by the *cy pres* doctrine (such as a gift to "all the needy respectable widows of the City of Richmond"). Both wills are standing untouched at T's death. Does T die testate or intestate? Note that this question is the same whether the case came up before or after 1849.

This problem was presented in *Adams v. Cowan*, 160 Va. 1 (1933). In a prior will T had left the residue of her property to a nephew, Richard Adams. Then in a later will she made various gifts and stated, "The remainder of my property I wish to go to the relief of the poor, whether in my kindred or not, and through proper channels of the Presbyterian Church." In a suit for construction of the will all the testamentary papers had been probated upon an issue *devisavit vel non*. The court held, affirming the lower court, that the residuary gift in the second will revoked the residuary gift in the first will even though such ruling resulted in the testatrix dying intestate as to the residue in the second will. The court rejected the argument of the nephew that only a valid gift in the second could revoke a valid gift of the same property in the first. The court said that "a more controlling consideration in the eyes of the law is the discernment of the intention of the author of the will and the adoption of the construction which will effect that intention." 160 Va. 1, 8 (1933).

Suppose in a common law jurisdiction T makes a valid will leaving all personalty to A and all realty to B, then later executes a valid will revoking all former wills and leaving only personalty to X. Admittedly T would die intestate as to his realty. Why? He has declared his intention to revoke the first will, not by a valid disposition to others but by a declaration of intent to revoke that went into effect at death. Compare that well-settled rule with the *Adams* case. The revocation

there must rest solely on an effective declaration of an intent to revoke prior gifts of the residue to the nephew. Certainly it does not rest on the annulling effect of a second valid disposition.

When T in his last valid will declares an intent to devise Blackacre to B does he not by necessary implication declare an intent to annul any prior declaration of intent to give the property to others? Consider the following statement:

“ . . . it seems to me that when you have a gift in lieu of a previous appointment, either by necessary implication or by direct words, you must revoke the original appointment if you are to give effect to the second; and therefore, whether the testator says in so many words ‘I do revoke,’ or whether he uses words which necessarily involve revocation, it seems to me the result is the same . . .” Neville, J. *In re Bernard’s Settlement* 1 Ch. 552, 560 (1916).

I submit that the Adams case holds that a later inconsistent will does declare an intention to revoke prior inconsistent dispositions. Whether that declaration goes into effect at time of execution or at death is not pertinent at this point. I am interested at this point in the unsubstantiated statement of the court that such a will does not so declare. I will discuss later when the subsequent inconsistent will goes into effect. Note that in the *Rudisill* case, where the declaration of intent to revoke was express, not implied, the court held that it went into effect at execution. That is the heart of the *Rudisill* case.

Search the *Poindexter* opinion and you will not find any authority, case or text, cited in support of the statement I have discussed. Apparently no attempt was made to find cases in point. I cite just two cases because they involve the precise facts in the *Poindexter* case and are in jurisdictions which have statutes identical with §§ 64-59 and 64-60 of the Va. Code Ann. (1950). These are in the *Goods of Hodgkinson*, Probate 339 (Eng. 1893), and *Singleton v. Singleton*, 269 Ky. 330, 107 S.W. 2d 273 (1937). Both cases followed the *Rudisill* doctrine and reached conclusions directly opposite to that reached in

the *Poindexter* case. The first will was held revoked to the extent of its inconsistency with the second will. A long established judicial tradition would, it seems, invite a search of the English and Kentucky cases since Kentucky, as Virginia, adopted the provision of the English Wills Act. Is the *Adams* cases still law? One gets the impression from *Poindexter* and *Levering* opinions along with Judge Lamb's book that the *Rudisill* case is out of step with all the others having similar statutes. *Barksdale v. Barksdale*, 39 Va. (12 Leigh) 535 (1842).

Since *Barksdale* has been relied on, practically as the sole authority, in the *Bell*, *Poindexter* and *Levering* cases it is obvious that no discussion of the main question in this monograph would be complete without a thorough examination of this decision. The *Barksdale* decision will therefore be considered before completing the discussion of the *Poindexter* case.

I wish to state at the outset that in my opinion the common law and ecclesiastical rules as to revival and restoration are not involved in this case and further to point out that it came up on facts arising ten years prior to the adoption of the 1849 Virginia Code.

At the time the *Barksdale* case arose wills disposing of property had to be witnessed, but a writing declaring an intent to revoke prior wills was not required to be attested.

T made a will which gave about \$35,000 in gifts to others, then the remainder to his father. Later not being satisfied that the will met the desires that his grandfather had expressed T drew up a later instrument purporting to be a will which declared an intention to revoke all prior wills and indicated an intention to leave all his property to his father, his heir, except a legacy of \$5,000. The second instrument was not valid as a will. Was it valid as a revoking instrument? The court held that T had in mind two things to be accomplished by the second instrument—a revocation and a testamentary disposition, and since it was not effective as the latter it was not effective as a revocation. It is clear from the evidence that T

was not satisfied with the first will and wished to leave substantially all his property to his father, his sole heir. It will be noticed that if the court had given effect to the revoking clause in the second instrument all the property of T except \$5,000 would have passed to his father under the statute of descent and distribution.

The court said that if the second instrument was consistent with the first then T had no design to abrogate the first instrument until the second was effectual; if the provisions were inconsistent then his only purpose must have been to make a change of or amongst the objects of his bounty. In neither case did he intend to die intestate. "Besides, no man, I should think, ever made provision by last will and testament for dying intestate." 39 Va. (12 Leigh) 535, 543 (1842). Suppose T in his valid will leaves a legacy to X of \$5,000. Later T strikes through the number \$5,000 and writes above it \$1.00 in his attested will. Unless re-executed the provision for the substituted amount is invalid. Has T revoked the entire legacy to X, or was he engaged in seeing two things so tied together that he intended the revocation to be dependent on the validity of the substituted amount? See *Ruel v. Hardy* 6 A. 2d 753 (N.H. 1939). Let us assume that in Virginia T, a salty, outspoken individual, make a valid will in 1827 in which he gave all his property in trust for the support and assistance in every way of the purposes of the Abolition party. In 1839 he executes a paper as in the *Barksdale* case sufficient as another writing but invalid as a disposing instrument containing in part this: "I want to die testate but I don't want that damn Abolition will; I would not be caught in hell with it. I, revoking all prior wills, do hereby make the following testamentary dispositions. I give" Then follows a gift in trust for the purpose of assisting in every legal way the extension of slavery in the territories. Would, or should, the court probate the first paper on the ground that his intent was conditional? He had complied with the statutory method for revoking a will. The principle of the *Rudisill* case could not possibly be involved for two reason: first, ten years will pass before the 1849 Code is

adopted; second, the question here is whether the first will has been revoked. There is no question of revoking the revoking instrument. There was no second will.

The dependent relative revocation doctrine is a sort of escape valve to enable the court to achieve the intent of the testator where, laboring under a mistake, he has done something which if given effect will not carry out his intent.

Professor Joseph Warren's classic article, "Dependent Relative Revocation", in 33 Harv. Law Rev. 337 (1920) has done much to dissipate the fog created by the cases dealing with this problem. Perhaps some people have been misled by the title, in particular by the word "dependent" which has relevance only to a rather rare case where T tears up a valid will intending his act to become a revocation only when a second valid will is made. In such cases if no will is made or, if made, is invalid the courts probate the first will and properly so. In most situations the testator is laboring under a mistake, as in striking out the \$5,000 figure in the hypothetical case above. Many courts, however, still speak of T as having a conditional intent and of course would probate the will as originally written. In recent years judges influenced by Warren have written opinions which considered the problem as one of mistake. I think the *Barksdale* case is unsound when applied to the facts. The court got itself entangled in a logical knot by failing to see that T was attempting to do two things which, though related, were not necessarily inseparable. If the instruments had been much alike as in *Bell v. Timmins* then his mistake as to the validity of the later instrument might well be such as to justify the setting aside of the revocation of the first will. The intent of the testator should never be locked in some mechanical formula.

Was not the principle of the *Barksdale* case rejected in the *Adams* case? They can be distinguished but the line is very thin. In both the testator intended to accomplish two things, a revocation and a new disposition, and in both the dispositions failed. In the former, through failure to comply with the Statute of Wills, in the latter through failure to designate the

beneficiaries. The average testator would treat them equally as failures.

Consider the quotation from the *Barksdale* case which had been relied upon in the *Bell*, *Poindexter* and *Levering* cases, that "no man, . . . , ever made provisions . . . for dying intestate." 39 Va. (12 Leigh) 535, 543 (1842). Wasn't that exactly what the testatrix achieved as to the residue of her estate in the *Adams* case? Suppose, however, that the object of the gift of the residue in the first will in the *Adams* case had been a properly designated charity under the Presbyterian Church. Then there would be presented a proper situation for the application of the doctrine of dependent relative revocation. T would be acting under a mistake of law for which courts in this type of case do give relief. Both wills would show an interest in charities sponsored by the Presbyterian Church. In the *Bell* case both wills were alike.

On page 381 of the *Poindexter* case the court stated that the third will in the *Rudisill* case did declare an intention to revoke, but said that the court in that case

directed its attention to section 9, chapter 118, Code 1873, now §64-49, which has to do with the revival of wills after revocation.' It did not even comment upon section 8, chapter 118, Code 1873, now § 64-59, which has to do with 'revocation of wills generally,' and is equally pertinent to the precise question presented as is §64-60. . . . Nor did the court refer to *Barksdale v. Barksdale*, 12 Leigh (39 Va.) 551, which casts light upon the question of whether or not there was ever a revocation if the latter instrument is not operative at death.

Then the court in the *Poindexter* case refers to several A.L.R. notes which state that the *Rudisill* case was based on a statute that required revival of a revoked will. The court then makes this statement: "Of persuasive effect is *Barksdale v. Barksdale* . . ." and then quotes extensively from the opinion. I have read and re-read that quotation from *Barksdale* and I humbly admit my inability to see its applicability to the facts in the *Poindexter* case. Contrast the facts in these two cases.

In the *Barksdale* case, as in the *Poindexter* case, the testators were laboring under a mistake. In the *Poindexter* case when the testator tore up the second will believing that it would revive the former will, in the *Barksdale* case his mistake was in believing that the second instrument was a valid will. The mistakes were not the same. The problem of inconsistency was not involved in the *Barksdale* case, where there was no act of revocation to the second instrument. In *Poindexter* this statement is made:

A former will is not revoked in whole or in part by a later inconsistent will unless there is, in fact, such conflict between the two as to necessarily have the effect of supplanting the former by the latter, in whole or in part, . . . , and thus preclude the former from operating as a will upon the subject matter at the death of the maker. 200 Va. 372, 384 (1950).

Why did the court make this statement which in effect says that inconsistent wills which are not inconsistent do not supplant prior wills, and, furthermore, why it was made when the court had said that if the two last wills had not been revoked they would have "supplanted" the prior wills? Continuing the quotation, the court says: "If one has been destroyed by the maker *animus revocandi*, then no conflict arises or can arise between the two instruments, for wills are ambulatory and operate only upon and by reason of death. *Spinks v. Rice* [187 Va. 730 (1948)] and 57 Am. Jur. Wills, §15, p. 48." *Id* at 384.

Apparently the court thought the case cited was in point. Justice Miller wrote the opinions in the *Poindexter* and *Spinks* cases. There was no second will in the latter case. There was a second instrument but it was not executed as wills are required to be executed. Furthermore, the decedent in the *Spinks* case never tore up the second instrument.

It will assist in removing the fog that seems at times to settle over the problem considered here if one will keep this simple fact in mind. The principle in the *Rudisill* case cannot

arise unless the court finds that at some time the decedent executed two wills.

The following analogy seems apt. We will use a poker game where chips are essential in the same way wills are essential when playing the *Rudisill* game. If a group of card players decide in advance that no one can open unless he puts up two chips, we have a situation similar to the requirement to be met before a probate judge can play the *Rudisill* game. In a probate contest a judge is talking sheer dictum when he seeks to apply the *Rudisill* principle if the decedent never executed but one will. Let us apply this test to the cases. In the *Hugo* case the court held if the trial court finds that the decedent made a second valid will then the trial judge could play the game. When the case came back in the *Clark* opinion the court, after examining the testimony of the attorney, found no second will and properly withdrew from the *Rudisill* game. The court in the *Barksdale* case, for three reasons could not enter the game: *first*, the decedent never made a second will; *second*, it was never revoked by destruction; and *third*, the *Rudisill* game had not been set up in Virginia at that time. Several years were to pass before the legislature would set up the rules for the game. I am unable to see how the *Barksdale* case overrules the *Rudisill* case. It would seem sufficient to meet the suggestion by calling attention to the fact that the *Rudisill* case was based on a statute passed years after the facts in the *Barksdale* case arose.

Back to the statement above in the *Spinks* case that wills are ambulatory. Of course they are ambulatory when dispositions of real and personal property are involved and, under the common law rule, even as to revocations by a later will or codicil. The court in the *Rudisill* case was talking about a statute making revocation effective on execution and Justice Miller refused to discuss the statute.

Re Levering.

This case, the facts of which were stated on page 1, *supra*, was decided by the Chancery Court of the City of Richmond in April 1959. Ordinarily opinions of judges of lower courts

are not significant where the higher court has passed on the question. Chancellor Lamb, the writer of this opinion, occupies a unique place in Virginia. He is regarded as among the ablest, if not the ablest, judge in the state in probate matters. It was he who handed down the opinion in the *Bell* case wherein he stated that the *Clark* case had overruled the *Hugo* case. Later, in his book, he stated that the *Bell* case had overruled the *Clark* case. The Court of Appeals adopted in toto his opinion in the *Bell* case and in the *Poindexter* case relied solely on the *Bell* and *Barksdale* cases. In the *Levering* opinion, Chancellor Lamb, for the first time, mentions the *Rudisill* case and levels a direct attack at it. It is apparent in all the material considered that he is the driving force behind all the criticisms of the principle laid down in the old case.

Chancellor Lamb by virtue of his reputation as an expert in this field, coupled with the high respect accorded him, has been able to achieve far-reaching results. He has, within the last ten years, changed, or aided in changing, some solid principles in the law of wills. Just how far these changes extend only time can tell.

Significant extracts from the opinion are set out below. Chancellor Lamb states: "The decision hinges upon the proper construction and application of § 64-59" and the following cases, listing the cases previously discussed in this paper and adding *Bates v. Holma*, 3 Hen. & M. 502 (1909). He adds "... the provisions of Code § 64-60, concerning the methods by which a revoked will may be revived, are not in the remotest way pertinent here We are under Code § 64-59, *revocation*—and nowhere else."

Just this comment. The Chancellor refused even to consider the statute adopted in 1849 from England which in that country and in the *Rudisill* case was held to have changed the unwritten law. I have found no case in jurisdictions having revival statutes like our own in which the court refused to consider the statute in a similar case. The decision that § 64-60 was not pertinent left nothing more to decide. The opinion might well have stopped at that point.

The Chancellor then discussed the *Bates* case decided in 1809 where T had made a valid will, then a second valid will, and then on the same page and just below his signature to the second will T had signed a statement revoking prior wills. At T's death the second will was found with the signature removed but the clause below was intact. The only question was whether the revocation by the act to the second will had revoked the clause below the signature. The majority of the court held that the clause was a separate instrument and that T had died intestate. The question raised in this monograph was not involved. Chancellor Lamb devoted considerable space to the case and speaks of it as "a landmark on probate law," that it "has not been cited in any subsequent Virginia case." The reader is asked to turn back to the *Rudisill* opinion where authorities are listed supporting the common law rule. There he will find the *Bates* case cited. The case was not referred to as supporting the common law rule; only the dissenting opinions in that case were cited in support of this rule. Chancellor Lamb goes on to state: "This is strange indeed." In this I concur.

Why was so much space devoted to a case which dealt primarily with facts? Was it to show that the case supports the common law rule? I submit that it does not involve that question. The Chancellor has stated that the *Rudisill* case puts the cart before the horse by assuming a revocation. Please note that the court in the *Bates* case found no revocation of the revoking instrument. How can it be cited for the proposition that revocation of the revoking instrument restores the revoked will?

I will comment later on how important, in the solution of the question raised at the beginning, it is to determine whether Virginia followed the common law or the ecclesiastical rule. Chancellor Lamb was aware of the importance of this question.

The Chancellor then argues that a declaration of an intent to revoke under §64-59 must contain a verb; that if it is a mere participial phrase such as that used in the will of the one-time abolitionist then there is no declaration of intent to re-

voke. I am not sure his meaning has been correctly stated. At any rate I am unable to appreciate the distinction.

The Chancellor then states that the *Rudisill* opinion does not "allude" to the "efficacious and salutary doctrine of dependent relative revocation." This calls for comment because one gets the impression that he believes its application would achieve the result he favored in the *Bell* case; if two witnesses could have been found to testify as to the handwriting of the testator, that is, by probating the first will. This is not so according to cases where the same or similar statute obtains. There the second will would be probated.

Consider *Powell v. Powell*. L.R. 1 P & D 209 (Eng. 1866). Here T made a valid will, then later made a second valid will revoking prior wills, then became dissatisfied with his second will and tore it up mistakenly believing that the first will would be revived. The English court, consistent with all their decisions on this point, held that the first will had been revoked when the second will was made and since the testator was not under any mistake it could not be orally revived. However, the court held that the second will was revoked under a mistake and in effect set aside the revocation by probating the second will. Please note that the case did not hold that a testator cannot revoke a will by act to the document; that is still law in England. It merely held that under the facts the second will would be probated. Any decision involving the doctrine of dependent relative revocation should not be taken as authority laying down a broad principle, but rather with a grain of salt keeping an eye on the peculiar facts involved. See, for example, *Callahan*, 251 Wis. 247, 29 N.W. 2d 352 (1947), where the same result was reached under a statute similar in effect to our statute as interpreted in the *Rudisill* case. I believe the doctrine was properly applied in that case since the testator wanted the first will revived, which was impossible. The alternatives were probate of the second will or intestacy, and since the testatrix by both wills had partially disinherited her sons, it was proper to probate the second will.

Now I come to the most unfortunate statement of all in the *Levering* opinion, a repetition of a quotation taken from the *Poindexter* case: "As was said in the *Poindexter* case, the *Rudisill* case 'did not even comment upon section 8, chapter 118, Code of 1873, now §64-59, which had to do with revocation of wills generally. . . .'"

Again, with respect, I ask the reader to look at the record as set out above in the *Rudisill* opinion—that part of the opinion following reference to authorities concurring with the construction given the statute by the English courts. Note that the court made it clear that the construction of section 9, now § 64-60, was the sole point in issue. The court refers to section 4 which is involved in revival, then as to the manner by which a revocation is achieved in sections 7 and 8, and then back again to section 9. Note the emphasis placed on the phrase "in any manner revoked." I submit, again with all respect, that disagreement as to the proper construction of this phrase is to be expected but there does not appear to be any justification for anyone to fail to read carefully this opinion that has been under attack for the past ten years.

The opinion in *Levering* states that the "Supreme Court of Appeals has completely overruled, repudiated and abjured" the *Rudisill* case. The term "abjure" is twice repeated. The chancellor speaks of those participating in the *Rudisill* case as being "obsessed with the 'new' revival statute." This seems to be rather strong language for a lower court judge to apply to the upper court not only of this state but to the many judges in England and Kentucky who have repeatedly affirmed the principle laid down in the first English case construing the statute. See the *Rudisill* opinion.

Those approving the *Rudisill* case include among others, in 1877, Professors Minor and Lomax of the University of Virginia Law School. See also Atkinson, *Handbook of the Law of Wills*, § 93 (2nd ed. 1953) to name just one treatise, the best short work on the subject published in the last fifty years. Included are the specialists drawn from teachers and practitioners who drafted § 55 of the Modern Probate Code

which contains the phrase "in any manner revoked" and is substantially a copy of Virginia Code § 64-60. See, too, Professor Atkinson's comments in the 1948 edition of the Annual Survey of American Law at 752 where he uses practically the same reasons as those given in the *Rudisill* opinion for favoring the adoption of the English statute. Dissociating myself from those just mentioned, I accept the soft impeachment.

Chancellor Lamb also speaks of the court as "nonchalantly" arriving at its conclusion without considering the main point at issue but then softens his criticism by suggesting that the fault was no doubt with the attorneys who argued the case. Let us examine this criticism by comparing the opinion with that in the *Poindexter* case.

When I read the *Rudisill* opinion forty-five years ago I was favorably impressed with its clarity, its statement of the old rules and why the English adopted a statute, its report of the Code Revisors and their reasons for adopting the English rule, its reference to the opinions of a list of distinguished commentators in the law, and, finally, the discussion of the code sections and the conclusion.

The *Poindexter* case came up eighty years later. In that time many statutes had been passed, many cases decided, and very much written on the subject by commenators. Was any of this material cited in *Poindexter*? Aside from the *Bell* case, which has been fully discussed before, no other case was mentioned which in any way supported the decision in the case. Several cases were mentioned from this state which were contra to the decision, but they were brushed aside by the assertion that they had been overruled. There was no discussion showing just how the *Bell* case and the *Clark* case overruled these decisions. Section 15 of the Am. Jur., Wills, was cited but as stated above that merely held that the *dispositions* in wills were ambulatory. Section 621 of the same work, though containing an inadequate discussion of the point involved, was not mentioned.

I have already called attention to the statement by the court in *Poindexter* that the heirs did not claim that the sub-

sequent wills declared an intention to revoke prior wills, but stated later that they claimed they did revoke by conflict. If the heirs based their contention solely on the fact that the inconsistent wills supplanted the prior wills by the annulling effect of a valid disposition at death through a conflict, the contention was unsound on its face since these later wills were revoked prior to death. If the heirs argued the point, the court flatly rejected the possibility that the later wills declared an intention to revoke prior wills, giving no reason for their decision.

In *Harrison's Ex'r v. Harrison's Adm'r*, 171 Va., 224 (1938) and in *Salyers v. Salyers* 186 Va. 927. (1947) the court in construing a statute went back to the Revisor's Notes to the 1919 Code to determine the meaning of changes recommended by them just as the court in *Rudisill* went back to the Revisors' Notes with reference to the meaning of section 9 of the code in that opinion. There is not a single reference to the Revisors' Notes in either the *Poindexter* or the *Levering* case.

I now quote from the *Levering* opinion: "That the *Rudisill* case was not adequately presented a wayfaring man though—well, shall we say, he who runs may read." Really I have no idea what one who glances casually at the opinion would conclude; there has been too much of this already. I ask the reader, a lawyer, for who else would struggle with me this far, to read both with care and form his own opinion.

The following extract is perhaps significant: "It is my frank purpose to exert, to the fullest extent all the judicial power at my command, to the end that this decedent, whose firm intent to die testate is perfectly plain, is not held to have died intestate." I mention this because all admire a crusader. In fact I am so engaged at this moment. Then a thought mentioned in Chancellor Lamb's treatise is restated as follows in the *Levering* opinion: "... it is ... safer to ... accept the documents as they exist at the time of the decedent's death and not let their force and validity be subject to attack by oral testimony, asserting that the documents have been viti-

ated by . . . other documents that are no longer in existence, . . ." This is a reference to the *Hugo* case. I fear that, in this attempt to kill *Rudisill*, other solid rules applying to wills have been overruled, qualified, or seriously modified. As often happens good citizens, mere bystanders, are injured when the law seeks to reach the criminal. The following illustration is just one of many that has occurred to me.

T, a confirmed bachelor, executes a valid will in 1949 naming the Central National Bank as executor, and the instrument is lodged with the trust officer of the bank. A short time thereafter T falls in love with his new secretary and soon they marry, but tragedy strikes on their honeymoon and his bride is accidentally killed. Later impressed with the ability of his young nephew, a law student, T executes a codicil naming X as executor and revoking the appointment of the bank. Later T and X get into an argument over the merit of the Massive Resistance movement in Virginia and T tears up the codicil. At his death in 1955 the trust officer of the bank offers the will for probate and proves by the attorney who drew the codicil that it started out "Codicil to my 1949 will" and then revoked the appointment of the bank and appointed S as executor. *The attorney proves the due execution of the codicil.*

It seems that the following sections of the code are involved: §§ 64-59, 64-60, and § 64-71, the last of which provides: "Every will re-executed or republished, or revived by any codicil, shall, for the purposes of this chapter, be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived."

If we apply the rule in the *Poindexter* case then the codicil never became effective, therefore did not operate to revive the will revoked by the marriage, and the codicil revoking the appointment of executor would not be effective and so would not revoke the appointment. The bank would be named executor in a revoked will. The word "deemed" seems significant. I had always thought that section made revival effective from the date of the codicil just as the *Rudisill* case held that re-

vocation was made effective at the time of execution of a revoking will which as to its dispositions was ambulatory. This problem cannot be brushed aside by the suggestion that it is moot because of the repeal of the section making marriage a revocation of a prior will. Other problems of republication yet lurk in the shadows.

The first anti-revival statute was passed in New York about 1830. It provided substantially as follows: "If, after making a will, the testator duly makes and executes a second will, the destruction or other revocation of the second will does not revive the first will, unless it appears by the terms of such revocation that it was the intention to revive and give effect to the first will. . . ." Ala., Ark., Calif., Idaho, Kan., Mont., Nev., N. Mex., N. Y., N. D., Ohio, Okla., S. D., Utah, Wash., Hawaii, Alaska, the Virgin Islands, Oregon and Ga., have with variations adopted this statute. See Bordwell, "Statute Law of Wills," 14 Iowa L. Rev. 283, 309-10.

It has been suggested that Parliament studied the New York statute before drafting the Wills Act. What were the main objectives sought in drafting the act? Certainly one was to lay down the same requirements for the execution and revocation of wills disposing of both realty and personalty. Then the problem of revival arose. Here they found a strange illogical jumble of rules. If a will had been revoked by operation of law or by an act to the document it could be revived only by a re-execution but where a first will had been followed by a second will in terms revoking the first and the second had been destroyed the two rules stated in the *Rudisill* opinion had developed, one by the ecclesiastical courts, the other by the common law courts. How could they draft a statute that would make a revocation by a later writing or a will operative at once, yet at the same time preserve the ambulatory nature of testamentary dispositions of property? They had in mind what Justice Owen Roberts discusses fully in 48 Am. Law Reg. 505 (1900). He suggests that when a testator sits down to draft a will he quite often has in mind two things to accomplish; first, to wipe out *now* any testa-

mentary dispositions he may have made of his property and then with the board clean to formulate the dispositions he desires to go into effect at his death.

Then the question of drafting such a statute. I suggest that the reader will better appreciate the problem if he will pause for a moment and consider language that will achieve the first without defeating the second objective. Parliament provided three methods or modes for revoking a will and then sought to require by the statute the same formalities for reviving as had prevailed when revoked by act to the document.

They drafted what appears in our Code as §64-59, providing for revocation by a later writing executed as wills are required to be executed or by an act to the document. Then comes the crucial section which contains the statutory change. It is § 64-60 which reads: "No will or codicil, or any part thereof, *which shall be in any manner* revoked, shall, after being revoked, be revived otherwise than by the re-execution thereof, or by a codicil executed in the manner hereinbefore required, and then only to the extent to which an intention to revive the same is shown." (Italics supplied).

Section 64-60 was lifted out of the Wills Act of 1837. I will discuss this section, rather than the corresponding section of the Wills Act, in considering the problem faced by Parliament in drafting this statute. The clause, "which shall be in any manner revoked," was selected to accomplish the basic objective of providing the same requirements for testamentary dispositions of realty as for personalty. The provisions of the old Statute of Frauds were concerned primarily with the former but dealt with the latter in part and then only in a back-handed sort of way. It should be remembered that we are looking at the terms of the proposed bill from the viewpoint of Parliament in 1837. Unquestionably § 64-60, with the clause set out above, will change the ecclesiastical rule which had prevailed as to revocation and revival of dispositions of personalty. Will the section change the common law rule as to revocation and revival of devises of realty? If not, then a revocation clause in a second will would not go

into effect prior to death, that is, not until the potential revivor is himself past reviving. If so, then the provision in the section as to how the revoked will may be revived becomes of no practical utility and the basic objective of Parliament is defeated. Instead of securing the uniformity sought, lack of uniformity has been increased. The testator will die intestate as to his personalty (unless he re-executes the first will) but testate as to his realty.

The basic objective of Parliament could not be achieved if § 64-60 is construed to deal only with the question how a will revoked under § 64-59 might be revived. Parliament intended that § 64-60 should have a broader operation. By use of this phrase it caused the section to accomplish two objectives: *first*, to provide *how* a revoked will must be revived to become effective; and *second*, to provide *when* a will must be revived to become effective again. It must be revived *when* it "*shall be in any manner revoked.*" To ascertain the manner or modes or methods of revoking a will the court must turn to § 64-59 to discover the methods of revoking a will. This section states that a prior will may be revoked by a subsequent will declaring an intention to revoke the same. This survey of § 64-59 is solely to ascertain the method. When that information is gained the court is directed back to § 64-60 which is still operating as a qualification of § 64-59. In short the *when* in this clause is now of crucial importance. In explanation, I suggest that Parliament intended that the clause quoted above should receive this construction: that whenever a testator used any of the *methods* prescribed in § 64-59 for revoking a will, whether it be by an act to the document or by a later instrument, this method when used had a *present operation*. The prior will was instantly revoked on the execution of the revoking instrument. The basic objective of Parliament could not be achieved unless this phrase "*in any manner revoked*" is applied in the same way with the same *immediate effectiveness* to a revocation by a later instrument as has always been applied to a revocation by an act to the document. It should be noticed that unless this construction is adopted the reference to how the will can be

revived, though in terms referring to *in any manner revoked*, could not practically apply to any revocation other than by act to the document or by operation of law. Six years after the passage of the Wills Act the English court in *Major & Mundy v. Williams & Iles*, 3 Curteis 432 (1843), construed the statute as achieving the basic objectives of Parliament. It is pointless to suggest that the statute there construed was not clear. The important fact is that the court construed the section as suggested. I do not feel that the construction was unreasonable even when the primary purpose of Parliament is laid to one side.

The court in the *Rudisill* case was not presented with as difficult a problem of statutory construction as that facing the English court. The question whether the English court correctly construed the section just discussed was not, it seems to me, the main problem before the court in the *Rudisill* case in view of the Revisor's Notes to the statute in question. Under our system of government no one can be sure just what a statute means until the courts have construed it. The Revisors for the Virginia Code of 1849 stated in their report to the legislature that they had borrowed extensively from the Wills Act for two reasons: *first*, they approved the provisions; and *second*, they had the benefit of the English decisions construing the sections. When the report was adopted by the legislature it carried with it the construction given to it by the *Major & Mundy* case, which it should be noticed was handed down prior to the Revisor's report. The court in the *Rudisill* case was presented with a statute which had already been construed. That is why Judge Burks, after giving the historical background and how the statute came to be incorporated into the Virginia Code, stated ". . . we find no difficulty at all in construing it." 70 Va. (29 Gratt.) 147, 151 (1877).

In 1947 when the distinguished committee of the Probate Division of the American Bar Association drafted § 55 of the Model Probate Code, headed "*Revival*," they incorporated the rule of the *Rudisill* case in it. Since it had been construed many times, they elected to use the same phrase, "*in any man-*

ner revoked", rather than run the risk of leaving new phrases to be construed by courts of the future. In short they followed in the footsteps of Patton and Robinson, the Revisors of the 1849 Code.

Can the Virginia court follow the *Poindexter* case and still support the *Rudisill* case by denying probate to the first will in the *Levering* case? I submit that it can, despite the unnecessarily broad language in the *Poindexter* opinion which stated that while the *Rudisill* case involved a third will which declared an intention to revoke prior wills, the 1938 and 1939 wills in the *Poindexter* case did not so declare. Since the main part of the latter opinion devoted its discussion to the supplanting of the prior wills by the later revoked wills, it seems that despite the apparent eagerness of the Chancellor in the *Levering* case to extend the *Poindexter* decision to a case where there is an express revocation clause in the subsequent will, the opinion stated that it did not have that problem before it.

If the Court of Appeals affirms the decision of the lower court in the *Levering* case it will be the first time in more than a score of cases, during the last one hundred and twenty years, that a court has rejected the English decision relied upon in the *Rudisill* case. The court would then face this question: What is the rule in Virginia? If the court adopts the ecclesiastical rule favored by a majority of states without an anti-revival statute then it seems inevitable that it must come back to the same result as reached in the *Rudisill* case. In making that decision the opinion of Commissioner Roscoe Pound, now Dean Emeritus of the Harvard Law School, was faced with this problem in a Nebraska case, *William v. Miles*, 68 Nebr. 463, 94 N.W. 705 (1903). The Nebraska Constitution provided that in cases where there was no statute then the common law should apply. He pointed out that the term "common law" was not limited to judge-made law in England at the time of the Revolution but includes American decisions that through the years have changed to meet the felt needs of the time, and in the end he decided that the ecclesiastical rule was the common law of Nebraska.