201 VA 950

Return to
FILE COPY
Supreme Court of Appeals
Richmond, Va.

Record No. 5085

In the Supreme Court of Appeals of Virginia at Richmond

MAUDE MILLER TIMBERLAKE, ET AL.
v.
STATE-PLANTERS BANK OF COMMERCE AND TRUSTS, ET AL.

FROM THE CHANCERY COURT OF THE CITY OF RICHMOND

RULE 5:12—BRIEFS.

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

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

HOWARD G. TURNER, Clerk.

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

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 5085

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 9th day of October, 1959.

MAUDE MILLER TIMBERLAKE, ET AL., Appellants,

against

STATE-PLANTERS BANK OF COMMERCE AND TRUSTS, ET AL., Appellees.

From the Chancery Court of the City of Richmond

Upon the petition of Maude Miller Timberlake and Richard J. Weber an appeal is awarded them from an order entered by the Chancery Court of the City of Richmond on the 20th day of May, 1959, in a certain chancery cause then therein depending under the style of, *Re*: Kate Miller Levering, Deceased; upon the petitioners, or some one for them, entering into bond with sufficient security before the clerk of the said chancery court in the penalty of three hundred dollars, with condition as the law directs.

RECORD

* * * * *

page 17 }

* * * * *

INTER PARTES PROBATE OPINION DATED APRIL 30, 1959.

Kate Miller Levering, deceased, had two properly executed testamentary papers in the custody of the trust department of the State-Planters Bank of Commerce and Trusts, which by its former name, State-Planters Bank and Trust Company, was the executor named in both. The earlier one, consisting of a will and codicil of even date, was dated October 29, 1954, and the later, January 31, 1955. In the later will there was a participial phrase expressly revoking all earlier wills; 'I do make this my last will and testament, hereby expressly revoking, etc.'.

The decedent visited the bank in person and withdrew the later will, expressing her intention to make certain undisclosed changes by a new will rather than by a codicil. She left the earlier will with the executor-bank. The bank's retained unexecuted copy of the later will has been filed as Opponents' Exhibit No. 1. The due execution of all these testamentary papers in conformity with our statute of wills has been established; on this point there is no controversy.

The later will has not been found. The evidence, aided by the presumption arising from the possession of the testatrix, allows but one conclusion,—that it was destroyed by the testatrix.

The earlier will has been offered for probate in this *inter partes* proceeding. Its probate is urged by certain of the beneficiaries named therein and also by the exe-
page 18 } cutor-bank, whose duty it is to propound it and to endeavor to sustain its validity,—a duty owing to the decedent and well recognized in law. Probate is resisted by certain of the decedent's next of kin, who are parties to the proceeding and take the position that both wills were revoked and that the decedent died intestate.

The question presented is: Has the earlier will been revoked? Or, did the testatrix die intestate; both wills having been revoked—the later by destruction and the earlier by reason of the revocation phrase in the later will?

The decision hinges upon the proper construction and application of Code §64-59, and the most careful study of these Virginia cases:

Bates v. *Holman,* 3 Hen. & M. 502;
Barksdale v. *Barksdale,* 12 Leigh 551;
Rudisill v. *Rodes,* 29 Grat. 147;
Hugo v. *Clark,* 125 Va. 126;
Clark v. *Hugo,* 130 Va. 99;
Bell v. *Timmins,* 190 Va. 648; and
Poindexter v. *Jones,* 200 Va. 372.

The methods by which a will may be revoked in Virginia are set out in Code §64-59. They are exclusive. In no other way (since §64-58, providing for revocation by marriage, was repealed in 1956) can a valid will be revoked. In addition to physical mutilation in the manner specified by the statute, which has no relevancy here, since the will propounded is unblemished, there are only two ways by which a will may be revoked, namely: (1) by a subsequent *will* (or codicil); or (2) by an effective writing declaring an intention to revoke, properly executed.

Under (1) I have *italicised* the word *"will"* because we now know and understand from the decision of the recent case in December, 1958, *Poindexter* v. *Jones,* about which much is to be said in a moment, that to accomplish revocation in this method there must be a valid, effective will at the time of the death of the testator. An executed testa-
page 19 } mentary paper is a potential will during the lifetime of the testator; it is ambulatory and does not become a will in fact unless it is in effect at the time of the death of the testator.

The first method is spoken of as "testamentary revocation," the second, as "declaratory revocation." To measure up to the first there must be a *will* surviving the testator and effective at the time of his death. And to measure up to the second there must be, to quote a very high authority, "a subsisting and independent declaratory act of revocation," "a distinct act of revocation," not merely "a part of the will itself."

The situation here should be clarified at the outset by pointing out that 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. That section concerns the resurrection of dead wills and has nothing to do with the effectiveness of live ones. Our question is whether the earlier

will now propounded has been revoked. If it has not, we never reach the question of revival under §64,60; if it has been revoked, it is obvious that nothing has occurred that by any stretch of the imagination could constitute a revival,—and I think no one would make such a contention. We are under Code §64-59, *revocation,*—and nowhere else.

Bates v. *Holman, supra,* is of such vital importance that the space which I shall now accord it is well justified. The principles recognized there are the principles to be applied in order to reach a sound decision in the instant case. And there can be no doubt that these principles have been overlooked or obscured in at least two later Virginia cases: overlooked in the *Rudisill case,* and so obscured in *the Clerk* and *Hugo cases* that the overruling of them in *Poindexter* eventually followed their earlier repudiation in *Bell.*

page 20 } In *Bates* v. *Holman,* 3 Hen. & M. 502, two testamentary papers were under consideration, a will dated November 16, 1799, and a will dated September 2, 1803. This later will was holograph and, oddly enough, bore two signatures, the first at the end of what appeared to be the will proper and the second after an appended nine word "postscript": "I revoke all other wills heretofore made by me." The later will the testator revoked by carefully cutting off the first signature, leaving the "postscript" and the signature appended thereto intact.

The question presented was whether the earlier will of 1799 was revoked. The testator had preserved the later paper; it was before the court in its mutilated condition. None of the galaxy of judges and lawyers advanced the idea that any question of *revival* of the earlier was presented. The sole question was whether the earlier will was *revoked.*

The case was twice heard, first in 1808 and upon rehearing in 1809. It is difficult to determine how many judges were on the Supreme Court of Appeals in the early years of the 18th Century, and who they were at any particular time. Before January 1, 1807, there were five judges: Peter Lyons, President, Paul Carrington, William Fleming, Spencer Roane and St. George Tucker (1 Hen. & M. 21). On January 1, 1807, Judge Carrington resigned, mentioning the fact that he was in the seventy-fifth year of his age (1 Hen. & M. 208). In that year the General Assembly passed an act recognizing the vacancy on the court occasioned by this resignation and providing that it not be filled, the court thereafter to consist of four judges, three of whom should constitute a court, until the next vacancy, after which the court would consist

of only three judges, two of whom should constitute
page 21 } a court (id.).

So in November, 1808, at the time of the first hearing of *the Bates case* (3 Hen. & M. 512), it would seem that there were four judges, Lyons, Fleming, Roane and Tucker. But indisposition prevented Judge Lyons from participating (id.p.1, footnote), and the court was constituted by the presence of Judges Fleming, Roane and Tucker. The will was rejected from probate by a divided court, two to one, Judge Tucker handing down the majority opinion (id. 513), Judge Fleming concurring (no opinion), Judge Roane dissenting, giving his reasons "at large" (id. 518).

A rehearing was granted, mainly because it was hoped that there could be "a full court" (id. 518, 519). Upon this rehearing in April, 1809 (id. 512) there was indeed "a full court" consisting of the four regular judges—with Judge Carrington also sitting (id. 529), despite his resignation over two years earlier (for this I can offer no explanation).

In the second decision Judges Fleming and Tucker adhered to their former positions, rejecting the will. Judge Carrington must have united with them, for it is certain that there were two vigorous dissents, one by Judge Roane (id. 521) and the other by Judge Lyons (id. 529), the latter concluding with this emphatic language:

"I cannot have a scintilla of doubt, but that the testator died leaving as his last will the paper which has been established as such by the judgment of the District Court"—which was the earlier will.

Judge Roane's opinion was equally as firm, couched in the clear and logical language that makes his opinions a delight to read.

The lawyers who participated in both hearings (id. 512) were the recognized leaders of the bar; which is sufficiently attested by the mere mention of their names, Taylor, Hay, Call, Wirt and Randolph—and, as if this were not enough,
Wickham came in with Taylor and Hay on the
page 22 } second hearing.

Reference to Shepard's Citations discloses the strange fact that *the Bates case,* which in view of the caliber of the judges and lawyers who participated in the two hearings and the two decisions, and the great attention and deliberation that was accorded the case, deserves to be considered a landmark in probate law,—and has not been cited in any sub-

sequent Virginia case. This is strange indeed. And it becomes (to quote high authority) "curiouser and curiouser" when it is recognized, as it must be, that the principles involved have the most material bearing upon not less than six later Virginia cases, all of which will be mentioned in this opinion.

The point on which *the Bates case* turned was whether the "postscript" revoking all former wills, which bore the *uncancelled* signature of the testator, was a separate instrument operating independently of the will as a declaratory "paper" of revocation, or was an integral part of the will itself.

All the judges seem to have been in accord that if the "postscript" was a part of the revoked will it fell with the will and never became operative as a revoking instrument. It would be as if it had never existed.

This foreshadowed the unanimous view of the present seven justices in December, 1958, announced in *the Poindexter case.* They too held the second testamentary paper a potential will that never became a "will" in fact, having been revoked while it was still ambulatory. It was revoked by the testatrix and never became an operative paper for any purpose. It was as if it had never been executed.

In the dissenting opinion of Judge Spencer Roane (the very name is like a flying flag) it is said:

"* * * this writing" (that is, the revoked will and the "postscript" appended with signature intact) "all formed but one instrument" (p. 523).

page 23 } "* * * entirely inconsistent with the idea that the postscript" (that is, the nine holograph words of express revocation, signed) "did not fall together with the will; or that it was a subsisting and independent act of revocation * * * it is undoubtedly a part of the will itself." (p. 524).

"If this postscript had been contained in the body of the will, and there had been only one signature, it is evident that the cancelling the last will would clear the way for the first, which would consequently be established. * * * As to such a clause of revocation, it also is liable to be revoked; and, being revoked, before the death of the testator, is as if it had never existed (p. 525). * * * I consider this postscript, therefore, as not an independent declaratory act of revocation * * * but as predicated on the will then made, and a part thereof, and liable to stand or fall by that will's being cancelled or suffered to take effect." (p. 526).

The foregoing quotations are from a dissenting opinion it is true. They nevertheless clearly show that the difference

of opinion was on the point whether the "postscript" was a part of the will or an independent declaratory act; and that all the judges were in agreement that if it was a part of the revoked will it fell with the will. In other words, the *whole will* was ambulatory and no part of it, the clause of revocation or anything else, was effective for any purpose if the testator revoked the will in his lifetime.

Judge Tucker's opinion for the majority shows that he also was satisfied that if the revocation was in fact a part of the will it would fall with the will when the will was revoked. He says on page 517:

"I consider this declaration, then, wholly written, and separately signed by Mr. Bates, as an express statutory revocation of all former wills made by him, utterly independent of, and unconnected with, his second will; and by the maker left in full force, at the time of cancelling that second will, and remaining in full force at the time of his death."

The next pertinent case was *Barksdale* v. *Barksdale,* 12 Leigh 551. This case introduced the doctrine of dependent relative revocation which was again favorably stated and relied on in *Bell* v. *Timmins*, 190 Va. 648, 659, and page 24 } was emphatically again restated, and perhaps somewhat expanded, in *Poindexter* v. *Jones*, 200 Va. 372, 382. In view of this recent application of the doctrine, and the familiarity of all with it, elaboration here is unnecessary. Its pertinency in cases of this character is recognized by the Court of Appeals and is now obvious to all of us.

Then came *the Rudisill case.* Candor requires me to say that at first blush this case appears to rule the instant case so far as a *nisi prius* court is concerned; for upon first reading it seems to be a decision of our appellate court that has not been overruled, on all fours with the instant case, and is therefore an ironclad, binding rule of decision for this court.

But the solution is not as simple as that. Much is to be said about *the Rudisill case* beyond the mere statement that an earlier will cannot be admitted to probate if there ever was at any time a subsequent testamentary paper containing an express clause revoking all former wills, and that the revocation by destruction or otherwise of a later will does not clear the way for the probate of an earlier one.

The first comment is that it seems strange indeed that the two earlier cases I have referred to, which bear directly and so strongly upon the principles to be applied, were not cited or alluded to in *Rudisill.*

The next comment is that *the Rudisill case* does not even touch upon the points that were urged in *the Poindexter case,* and are now urged in the instant case, namely, that it is not a question of reviving a revoked former will but whether a former will was ever revoked so as to need revival. Nor was the efficacious and salutary doctrine of dependent relative revocation alluded to.

page 25 } In *the Rudasill case* it was apparently conceded that the earlier will stood instantly revoked immediately upon the execution of the later will which "contained a clause revoking all former wills." At any rate the opinion nonchalantly states that this revocation was thus instantly effective, with apparently no consideration whatever given to what was the turning point in *the Bates case,* and in *the Poindexter case,* and is now the turning point in the instant case. That turning point is this: Whether the second will with its "revocation clause" was ever an effective instrument for any purpose but was merely tentative, imbedded into and an inseparable part of an ambulatory paper, so that when revoked by the testator, it, and the whole of it, was rendered ineffective for any purpose, precisely as if the "will," and the revoking clause with it, had never existed. As was said in *the Poindexter case, the Rudisill case* "did not even comment upon Section 8,chapter 118, Code 1873, now §64-59, which has to do with 'revocation of wills generally' * * * unless the subsequent will *revoked* the former when executed, the issue of whether or not there is a revival is never reached. The court seems to have treated the second will of February 14, 1871, as being concedely revoked upon the execution of the third will in 1872 * * *."

Then *the Poindexter case* makes a further criticism of *the Rudisill case* for its failure to refer to *the Barksdale case* "which casts light upon the question of whether or not there was ever a revocation if the latter instrument is not operative at death."

Those who participated in *the Rudisill case* seem to have been obsessed with the "new" revival statute which came into our law for the first time in 1849, and is now Code §64-60. The real point that should have been

page 26 } passed on in *the Rudisill case* is the precise point that the court must pass on in the instant case, namely: Was the earlier will revoked by words of revocation imbedded in a subsequent ambulatory paper which was itself revoked by the testator and never became operative in any aspect, or for any purpose, at any instant of time?

I have said the point is "precisely" the same. But of this one cannot be certain. All *the Rudisill case* discloses is that

the later will "contained a clause revoking all former wills." What the wording of that "clause" was, and where and how it was placed, is not shown; nor can it now be ascertained,—for I have looked in the Clerk's Office of the Supreme Court of Appeals and find that the record is gone and only the opinion remains in the files. The clause may have been incidentally inserted in the preamble (as the phrase is in the instant case); or it may have been a separate sentence or even a separate, numbered article or "clause"; or it may have been more like the independent sentence in *the Bates case.*

I have put "clause" in quotation marks because the use of this word indicates that it contained a verb and so could have been a declaration of intent. To effect a declaratory revocation under Code §64-59 a declaration of intent is required. In the instant case there is no *clause.* The words relating to revocation of former wills are here in the form of a participial phrase, thrown into the middle of a sentence in the preamble. The intent that is there *declared* is the intent to make *a will.* And the scope of that testamentary intent is modified so as to include as an incident the revocation of former wills. That is all the phrase does. It is inseparably bound up with the declared intent to make a will.

page 27 } Neither Judge Tucker nor Judge Fleming (or anybody else for that matter) could argue here that there is any separate, independent declaration of intent to revoke former wills that can survive the revocation of the will of which it is but an incidental, though an integral and inseparable, part.

If it be thought that these distinctions are tenuous and finespun, it should be remarked that we are after all endeavoring to construe English words in English usage. It is difficult to see how, in conformity with good usage, one can make a *declaration* without employing a verb. At any rate, I make no apology. It is my frank purpose to exert, to the fullest extent, all 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.

These criticisms of *the Rudisill case,* and doubtless those the Supreme Court of Appeals has expressed, are of course not directed against the learned and able judge who wrote that opinion. It was a wise man who first said that all that can rightly be expected of any court is for it to decide cases *as they are presented to it.* That *the Rudisill case* was not adequately presented a wayfaring man though—well, shall we say, he who runs may read.

However, these unfavorable comments on *the Rudisill case* for its failure even to touch the pertinent point involved

and for its failure to mention prior Virginia decisions having the most direct and important bearing are not sufficient, standing alone, to justify a *nisi prius* judge in refusing to follow this decision of our highest court that has not been overruled. To justify this it is necessary to find subsequent rulings by our appellate court that undermine the principles upon which the case was based. Such subsequent rulings have been found. It may be plainly stated that, page 28 } though not expressly overruled in so many words, the principles applied in *the Rudisill case* have been repudiated, I may say abjured, in later Virginia decisions.

The only Virginia cases in which *the Rudisill case* has been relied on are the two *Hugo-Clark-Clark-Hugo* cases. And insofar as these two cases sought to rely on and expand the import of *the Rudisill case* they were held to be of no binding force in *Bell* v. *Timmins,* and have been expressly overruled in *Poindexter* v. *Jones.*

It will now be pointed out that the principles applied in *the Rudisill case* have been abjured, in effect overruled, if you please, twice in later Virginia decisions,—or three times if we may count the overruling of *the Hugo-Clark* cases.

In *Bell* v. *Timmins*, 190 Va. 648, *the Rudisill case* was not cited. In that case there was evidence of a subsequent will duly executed that contained an express clause revoking all previous wills. The court did not follow the doctrine of *the Rudisill case* and hold that the mere execution of such a subsequent will would work an instant revocation of the prior will. The court, to adopt an expression on page 659 of 190 Va., declined "to rip this introductory clause of the supposed second will out of its setting, and use it to cancel" the earlier will.

Though it may appear to add unduly to the length of this opinion, I must at this point insert a rather extensive quotation from *Bell* v. *Timmins* (page 658 of 190 Va.):

" 'Except for some little points of differentiation and subsequent events, I should be almost bound by the case of *Hugo* v. *Clark*, 125 Va. 126, 99 S. E. 521, wherein there was testimony of two reliable witnesses that they had seen a later will expressly revoking the will under consideration; and these witnesses further undertook to say what the provisions of that will were throughout. 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.

page 29 } "'But two years later, and after two jury trials below, under the reverse style of *Clark* v. *Hugo,* 130 Va. 99, 107, S. E. 730, the case was again before the Court of Appeals. It appeared that since the first appeal there had been one trial resulting in a verdict for the will, which the trial court had set aside, and another trial (which was the third), resulting in a verdict against the will, which the trial court had set aside. The Court of Appeals again reversed, and, indicating its entire satisfaction with the will, 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."

It seems clear that the doctrine of *the Rudisill case case* cannot live under the principles announced in *Bell* v. *Timmins.*

But this is not all. The *Rudisill* doctrine cannot live under the principles announced in the latest Virginia case, *Poindexter* v. *Jones*, 200 Va. 372. Though in this recent case our Court did not in so many words overrule *the Rudisill case,* it adopted a sound principle under which the holding in *the Rudisill case* cannot stand.

Elaboration would seem to be unnecessary. The principle announced in *the Poindexter case* is that a subsequent will is not an effective instrument for any purpose until the testator's death. Throughout the testator's life it is merely a potential will, ambulatory and revocable. If the testator revokes it, it is as if it had never existed. *The whole of the revoked will is inoperative.* If there is imbedded in it, as part and parcel of it, an express clause revoking previous wills, this clause too never becomes effective, for any purposes, at any moment. In the language of *the Bates case* the

page 30 } express clause of revocation falls with the revoked will of which it is a part. How can it be supposed that an entire integrated instrument which is tentative, or ambulatory, and has been rendered wholly ineffectual by revocation, can nevertheless be deemed effective as to one of its clauses though ineffective as to the rest?

It seems too plain for further elaboration that when our Supreme Court of Appeals said in *the Poindexter case* that

the question of revival was never reached (and that was the only point decided in *the Rudisill case*), and further expressly held that the subsequent will was an ambulatory instrument, inoperative until the testator's death,—these holdings were tantamount to overruling that case. How can the court repudiate the principles upon which an earlier decision is based and not have it understood that the case is no longer of binding authority?

In narrow scope that decision denied that the former will was revoked *instantly upon its execution* by the inconsistent provisions of a later will. The court says the later will never became a will in fact, and so no inconsistency ever arose. From this it necessarily follows that the express clause of revocation embodied in a subsequent will is not effective immediately upon its execution. Such a clause is just as ambulatory as are inconsistent dispositions,—such a clause never becomes operative. When the will is revoked it all falls together, the clause of revocation along with the rest.

The conclusion of the matter is that in view of the later rulings by the Supreme Court of Appeals of Virginia this court is not bound by the decision in *the Rudisill case*. The principles upon which that case was based have been completely overruled, repudiated and abjured.

page 31 } It seems to me that it is coming more and more to be recognized that it is the safer and more realistic practice for the courts 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 vitiated by the execution of other documents that are no longer in existence,—that may never have been in existence except, perhaps, *momentarily;* subject, however, to the recognized jurisdiction of a court of equity, upon cogent and convincing proof, to set up any document that has been lost or destroyed by accident, mistake or fraud.

I find myself altogether in accord with Judge Burpee and his cogent reasoning in the majority opinion in *Whitehill* v. *Halbing,* (1922) 98 Conn. 21. This case is reported and well annotated in 28 A. L. R. 895, and see especially pp. 913 *et seq.* And I have, of course, taken great pains to be convinced that my views are also in accord with the principles announced in the later Virginia cases, especially in *Bell* v. *Timmins,* 190 Va. 648, and *Poindexter* v. *Jones,* 200 Va. 372.

I shall conclude this opinion with a statement similar to that which concludes the opinion in *the Poindexter case.* It is just as plain here as it was there that this decedent did not desire, or expect, to die intestate; and it is the duty of the

court here, as it was there, to exert every possible judicial power to prevent intestacy. *The Poindexter case* concludes with a suggestion that it would be shocking for the law to hold a decedent intestate who died with a good will "in his hand," one that conflicts with no testamentary instrument then in existence.

The will in the instant case was left in a better, a more significant and a safer place than if she had died with it "in her hand." This decedent died with a valid, unblemished will in the custody of the executor named therein, upon whose integrity and good faith to propound that will for probate and to carry out its testamentary provisions she had a right to rely.

page 32 }

The will here offered for probate dated October 29, 1954, together with the codicil of the same date, the proper execution of which has been satisfactorily proved and is not disputed, will be admitted to probate as together constituting the last will and testament of Katherine Miller Levering, deceased.

BROCKENBROUGH LAMB.

* * * * *

page 34 }

* * * * *

PROBATE OF WILL.

This matter came on April 21, 1959, to be again heard pursuant to the convening order heretofore entered, all the parties appearing by counsel; and the court then proceeded to hear the evidence orally in open court, which evidence was taken down by a reporter and reduced to writing and the transcript duly authenticated by the judge is now made a part of the record.

The court, having maturely considered the motion for the probate of the will and codicil, both dated October 29, 1954, the evidence adduced and the arguments of counsel, and being of opinion, for reasons stated in writing dated April 30, 1959, and now made a part of the record, that the aforesaid will and codicil of October 29, 1954, is the true last will and testament of Kate Miller Levering, deceased,—doth so adjudge.

And proceeding now to probate the will it is ordered as follows:

Two paper writings, both dated October 29, 1954, purporting to be the will and a codicil thereto of Kate Miller Lever-

ing, deceased, having been presented and offered for probate in these proceedings as recited in the convening order of March 6, 1959, and State-Planters Bank of Commerce and Trusts, the executor named therein by its former name State-Planters Bank and Trust Company and the trustees of St. James's Protestant Episcopal Church of Richmond, Virginia, uniting in the offer for probate, were this day again presented and so offered;

page 35 } And it appearing that Kate Miller Levering resided at Number 1207 West Franklin Street, in the City of Richmond, within the jurisdiction of this court, and died on November 1, 1958, R. A. Hord, Jr., one of the subscribing witnesses to the said paper writings heretofore appeared in this proceeding and deposed and said that he was present together with W. B. Chamberlain and Alfred G. Williamson, the other two subscribing witnesses, and in the presence of Kate Miller Levering when she, the testator, signed the two said paper writings aforesaid and acknowledged them to be her will and codicil, and that he and the two other subscribing witnesses at her request and in her presence and in the presence of each other, all four being present at the same time, subscribed their names as subscribing witnesses; and that the testator was at that time over twenty-one years of age and capable of making a will.

Thereupon the said paper writing dated October 29, 1954, is established and adjudged to be the last will and testament of Kate Miller Levering, deceased, and doth order that they bearing the same date is established and adjudged to be a codicil thereto; and the court doth adjudge that the two paper writings together constitute the true last will and testament of Kate Miller Levering, deceased, and doth order that they be recorded as such.

It being intimated that Maude Miller Timberlake and Richard J. Weber desire to apply to the Supreme Court of Appeals of Virginia for an appeal from this order, they having objected and excepted to it, the operation of this order of probate is suspended until July 31, 1959, provided that Maude Miller Timberlake or Richard J. Weber;

page 36 } or someone for either or both of them, do within ten days from this day enter into a suspension bond in the penalty of $300.00 before the Clerk of this court, with surety thereon to be approved by the Clerk.

(on back)

Enter May 20, 1959.

B. L.

* * * * *

page 38 }

* * * * *

QUALIFICATION OF CURATOR.

The will of Kate Miller Levering having been this day probated and the order of probate suspended for appellate purposes, on motion of State-Planters Bank of Commerce and Trusts, the Trustees for St. James' Protestant Episcopal Church of Richmond, Virginia, and Homer E. Ferguson, persons interested, all by counsel, the court appoints State-Planters Bank of Commerce and Trusts as Curator of the Estate of Kate Miller Levering, deceased, who resided at Number 1207 West Franklin Street in the City of Richmond, within the jurisdiction of this court, and died on November 1st, 1958.

Thereupon State-Planters Bank of Commerce and Trusts appeared by John E. Campbell, its Assistant Trust Officer, and having first justified upon the oath of its Assistant Trust Officer as to its sufficiency to give such bond without security, entered into and acknowledged in open court a bond as such Curator in the penalty of $200,000.00, payable and conditioned according to law.

Enter May 20, 1959.

B. L.

* * * * *

page 39 }

* * * * *

To the Honorable Everett E. Warriner, Clerk of said Court:

This is to notify you that it is our intention to appeal to the Supreme Court of Appeals of Virginia from the order of the court entered May 20, 1959, in the above-styled probate proceeding.

Our assignments of error are as follows:

1. The court erred in entering the order of May 20, 1959, whereby the paper writing dated October 29, 1954, was

established and adjudged to be the last will and testament of Kate Miller Levering, deceased, and the paper writing bearing date of October 29, 1954, was established and adjudged to be a codicil thereto; and that the two paper writings together constitute the true last will and testament of Kate Miller Levering, deceased.

2. The court erred by its order of May 20, 1959, in admitting to probate and recording the two paper writings dated October 29, 1954, as the true last will and testament of Kate Miller Levering, deceased.

3. The court erred in refusing to sustain the position of your petitioners that Kate Miller Levering, deceased, left no valid will and therefore died intestate.

Respectfully,

MAUDE MILLER TIMBERLAKE
AND RICHARD J. WEBER
By JOE T. MIZELL, JR.
JESSE M. JOHNSON,
Counsel.

(on back)

Filed June 24, 1959.

E. E. WARRINER, Clerk.

* * * * *

page 3 }

* * * * *

RUBLE A. HORD, JR.

called as a witness by Mr. Williams, first being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Williams:

Q. Will you state your full name?

A. Ruble A. Hord, Jr.

Q. Mr. Hord, I believe you are more than twenty one years of age?

A. I believe so.

Q. What is your employment?

Ruble A. Hord, Jr.

A. I am with State Planters Bank of Commerce and Trusts with our Lombardy and Broad Street office.
Q. What is your title?
A. Vice President.
Q. Were you in that office in 1954?
A. Yes, I was.
Q. Did you witness a will for Mrs. Kate Miller Levering?
A. Well, I witnessed one or two wills for her. I
page 4 } don't remember the exact dates.

The Court: Pass this to Mr. Williams, please.

Q. Mr. Hord, you have two papers. If you will take the thicker one, the several page document, and look at the last page and see if you signed your signature on that document.
A. (Examining) That is correct.
Q. Was that document signed by Kate Miller Levering in your presence?
A. Correct.
Q. Was it signed in the presence of the other two witnesses, W. B. Chamberlain and Alfred G. Williamson?
A. That is correct.
Q. All four people were present at the same time?
A. Correct.
Q. Did she acknowledge it as her Will?
A. That is right.
Q. Did she ask you all to sign it as witnesses to her will?
A. Correct.
Q. At that time was she over twenty one years of age?
A. I am sure she was.
page 5 } Q. Was she of sound mind, capable of making a Will at that time?
A. Well, now, in my opinion she was, but whether she was or not—
Q. That is all we want, your opinion. If you will take a single page—

By the Court:
Q. I would like to ask you whether you can state, Mr. Hord, that you and the other two witnesses signed your signatures there in the presence of Mrs. Levering?
A. Yes, sir, we were all three in the same office.
Q. That would make four, counting the three witnesses and Mrs. Levering?
A. That is right, correct, sir.

Ruble A. Hord, Jr.

Q. The testatrix and the three witnesses?
A. That is right.
Q. Did all of you remain there until the execution of the paper was completed?
A. That is correct.
Q. The signing and the witnessing?
A. That is correct.

By Mr. Williams: (Continued)
Q. I will ask you to take the second document.

page 6 }

* * * * *

Q. Is your signature on the second document?
A. Correct.
Q. Is Mrs. Levering's signature on it?
A. Correct.
Q. Did she sign it in your presence?
A. That is correct.
Q. Did she sign it in the presence of yourself, W. B. Chamberlain and Alfred G. Williamson?
A. That is correct.
Q. Were all four of you present at the time?
A. Correct.
Q. Were all four of you present when the three witnesses also signed it?
A. All four of us were present and signed in the presence of each other.
page 7 } Q. Of each other?
A. Correct.
Q. Did you sign it at the request of Mrs. Levering?
A. Correct.
Q. She was then of age and capable of making a Will, more than twenty one and capable of making a Will?
A. Well, I would say she was of age and in my opinion she was capable.

CROSS EXAMINATION.

* * * * *

page 12 } By Mr. Johnson: (Continued)
Q. After Mrs. Levering executed the 1955 Will, did you have any conversation with her, and, if so, what?

Ruble A. Hord, Jr.

A. After she executed the Will that was delivered to the bank you mean?

Q. Yes, sir, the 1955 Will.

A. Well, she came in sometime later and made a request to withdraw that Will.

Q. Did she withdraw the Will?

A. She did.

* * * * *

page 15 }

* * * * *

CROSS EXAMINATION.

By Mr. Mizell:

Q. Do you remember the date the 1955 Will was withdrawn? Do your records indicate that?

A. Yes.

Q. What was it?

* * * * *

page 16 }

* * * * *

A. (Continued) The Will was either delivered to Mrs. Levering on November 20 or November 21, 1956.

* * * * *

page 19 }

* * * * *

The Court: It is stipulated that the executed original of the Will dated October 29, 1954 and the Codicil of the same date were, upon execution, delivered to the Trust
page 20 } Department of the State Planters Bank and Trust Company at Ninth and Main Streets and remained in that custody continuously until produced in this Court after Mrs. Levering's death.

HENRY W. BROCKENBROUGH,
called as a witness by Mr. Williams, first being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Williams:

Q. Mr. Brockenbrough, will you state your full name?

A. Henry W. Brockenbrough.

Q. Mr. Brockenbrough, you are a Trust Officer of the State Planters Bank of Commerce and Trust?

A. That is correct.

Q. During the time that the Will and the Codicil of October 29, 1954, were in your possession, that is from the time of the delivery to you until Mrs. Levering's death, did she at any time request the return of it?

A. No, there was no such request.

• • • • •

A Copy—Teste:

H. G. TURNER, Clerk.

INDEX TO RECORD

	Page
Appeal Awarded	1
Record	2
Inter Partes Probate Opinion dated April 30, 1959	2
Probate of Will—May 20, 1959	13
Order—May 20, 1959	15
Notice of Appeal and Assignments of Error	15
Witnesses:	
Ruble A. Hord, Jr.	16
Henry W. Brockenbrough	20
Stipulation	19

RULE 5:12—BRIEFS

§1. Form and Contents of Appellant's Brief. The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall be to the official Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

§2. Form and Contents of Appellee's Brief. The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate references to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this Court, giving his address.

§3. Reply Brief. The reply brief (if any) of the appellant shall contain all the authorities relied on by him not referred to in his opening brief. In other respects it shall conform to the requirements for appellee's brief.

§4. Time of Filing. As soon as the estimated cost of printing the record is paid by the appellant, the clerk shall forthwith proceed to have printed a sufficient number of copies of record or the designated parts. Upon receipt of the printed copies or of the substituted copies allowed in lieu of printed copies under Rule 5:2, the clerk shall forthwith mark the filing date on each copy and transmit three copies of the printed record to each counsel of record, or notify each counsel of record of the filing date of the substituted copies.

(a) If the petition for appeal is adopted as the opening brief, the brief of the appellee shall be filed in the clerk's office within thirty-five days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. If the petition for appeal is not so adopted, the opening brief of the appellant shall be filed in the clerk's office within thirty-five days after the date printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office, and the brief of the appellee shall be filed in the clerk's office within thirty-five days after the opening brief of the appellant is filed in the clerk's office.

(b) Within fourteen days after the brief of the appellee is filed in the clerk's office, the appellant may file a reply brief in the clerk's office. The case will be called at a session of the Court commencing after the expiration of the fourteen days unless counsel agree that it be called at a session of the Court commencing at an earlier time; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

(c) With the consent of the Chief Justice or the Court, counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

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

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

§7. Effect of Noncompliance. If neither party has filed a brief in compliance with the requirements of this rule, the Court will not hear oral argument. If one party has but the other has not filed such a brief, the party in default will not be heard orally.

CLERK
SUPREME COURT OF APPEALS
RECEIVED
JAN 7 1960
RECEIVED
RICHMOND, VIRGINIA