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TO WHICH, (THROUGH THE FIRST THREE VOLUMES,) BESIDES THE NOTES OF THE LATE JOSEPH TATE, ESQ., ARE ADDED COPIOUS REFERENCES TO STATUTES AND SUBSEQUENT ADJUDICATIONS ON THE SAME SUBJECTS.

BY LUCIAN MINOR,

COUNSELLOR AT LAW.

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YERBY *v.* YERBY.

Wednesday, April 20th, 1803.

If since the act of 1792, and before the act of 1794,* concerning wills, a man having children makes a will and devises his whole estate amongst them; after which, he marries a second wife, by whom he has children, and dies without altering his will; the second marriage and birth of children is no revocation of the will.

An implied revocation of a will may be rebutted by circumstances.†

Quære. Whether the Court of Probat can decide whether the will was revoked or not.

Mary Yerby and William Yerby, children of George Yerby, filed a bill in the High Court of Chancery against the administrator and devisees of the said George Yerby, stating that the said George Yerby, in May, 1790, being a widower with six children, intermarried with Elizabeth Rust, by whom he had issue, the plaintiffs. That he had promised before his second marriage, that his children by his last wife should be as well provided for as those by the first. That after the death of the second wife, he had said that he had a will by him made in 1785, which he would alter as soon as he was sufficiently recovered, as it provided for a dead child, and made no provision for the plaintiffs. That he died, however, without altering the said will, which has been admitted to record in Richmond County Court, and that judgment was affirmed by the District Court. That the said will disposes of his whole estate, so that the plaintiffs are left without a shilling, if the said will should

* The act of 1794 gave a share of the estate to children born after the making of a will, and not provided for, but pretermitted in it. See 1 R. C. of 1819, p. 376, § 5. See also, Code of 1849, p. 518, §§ 17, 18.

Confirming *Yerby* v. *Yerby*, see *Savage, &c.* v. *Mears and wife*, 2 Rob. 570.

† A subsequent marriage, and the birth of a child, generally, is an implied revocation of a will; unless the testator afterwards republished, or signified his intention to establish it. If so revoked, it ought not to be admitted to probate. *Wilcox* v. *Rootes*, 1 Wash. 140.

By Code of 1849, p. 517, § 7, a will is revoked by testator's *subsequent marriage:* except a will made in exercise of a power of appointment.

Other provisions about revocations, id. ib., §§ 8, 9, 10.

The doctrine of implied revocations discussed—*Bates* v. *Bates, ex'or. &c.*, 3 H. & M. 502.

What acts revoke a will—*Hughes* v. *Hughes's ex'or.*, 2 Mun. 209. What does not—*Barksdale* v. *Barksdale*, 12 Leigh, 535.

If a testator directs his will to be destroyed, and believes that it is; yet if it be not, such direction and belief do not operate as a revocation. *Malone's adm'rs.* v. *Hobbs, &c.*, 1 Rob. 346.

Proof that a subsequent will was stolen from the testator, without proof of its contents, does not revoke a former will. *Hylton* v. *Hylton*, 1 Gratt. 161.

One having made a will, which was in his possession, but which could not be found after his death; it is presumed he destroyed it. *Appling* v. *Eades*, id. 286.

stand. But the plaintiffs are advised that the second marriage and birth of the plaintiffs was a revocation thereof; especially under the equity of the act of Assembly, which directs that a will made when the testator had no child, and which does not provide for an after-born or posthumous child, shall be void as against such child, who shall be entitled to a distributive share of the testator's estate. (Acts of 1782 and 1792.) The bill therefore prays that the plaintiffs may be admitted to such share, and for general relief.

The answer does not admit any marriage agreement. The administrator, who is the testator's eldest son, says that he pressed his father on his death-bed to alter his will and provide for the plaintiffs; but it was never done.

There is an attempt to prove a marriage contract for the [335] benefit of the issue by the last marriage, but the evidence is not sufficient to establish it. A witness, however, says that he proposed to the testator in his last illness, to alter his will and provide for the plaintiffs; but he refused, saying that he wished some alterations, and that when he got well he would have them made. That he appeared much distressed, and wished to evade the conversation.

The Court of Chancery dismissed the bill upon a hearing, and the plaintiffs appealed to this Court.

WARDEN, for the appellant.

The will was revoked by the second marriage and birth of a child. Pow. on Dev. 554. The first marriage and children will make no difference; because the father was equally bound to provide for the issue of the last as for those of the first marriage, and the presumption is that he equally intended it.

WICKHAM, contra.

The Court of Chancery had no jurisdiction; for the judgments of the County and District Courts were conclusive. And if the plaintiff wished to have litigated the question raised by the bill, he ought to have done it in the Law Courts, and not resorted to a Court of Equity. Of course, the bill was rightly dismissed for the want of jurisdiction, even if the appellants were right upon the merits. But the decree is right upon the merits also; for there was no revocation. Hardship is out of the question. The act of Assembly only provides for posthumous children, and not for those born in the lifetime of the testator. Revocation is not presumed for the benfit of the wife, who is provided for by law, but for the chil-

dren. Of course, it is but the common case of a man who, having children, makes a will, then has other children, and afterwards dies without altering his will: in which case, the subsequent children are always disinherited. The act of Assembly goes further than the English law, which only comprehends the first clause of our act, and leaves implied revocations open: whereas the act of Assembly takes them up, and provides for such as the Legislature intended [336] should annul the will; and, therefore, no other ought to have that effect. Besides, it appears by the testimony that the testator, when upon his death-bed, knew of the will, and did not alter it: which rebuts the ground of revocation altogether.

WARDEN, in reply.

The act of Assembly expressly gives the right of resorting to a Court of Equity to litigate the will, after it has been proved in the Courts of Law: which necessarily gives jurisdiction to the Chancery. Besides, there is no plea to the jurisdiction; and of course it is now too late to except upon that ground. The testator declared upon his death-bed that he would alter his will; which aids the implication. There is nothing in the act of Assembly which operates against an implied revocation like this; for it has said nothing about it, and therefore it stands as it did before the act.

Cur. adv. vult.

ROANE, Judge. This is a bill brought by the second children of Mr. G. Yerby against his administrator, praying that a will made by him in favor of his first children, prior to his last marriage, may be considered as revoked, or that they may be let into a share of his estate, under the equity of the third section of the act of Assembly, concerning wills, &c. R. C. 168, [Oct. 1785, c. 61, 12 Stat. Larg. 140.]

The will contains a disposition of his whole estate to his first children, and the present plaintiffs are wholly unprovided for.

It is alleged, but not shewn, that this will was made by Mr. Yerby when a widower: but I do not know that it is material whether he were so, or was then married to his first wife. Most of the cases on this head are of wills made during celibacy; but the case of *Christopher* v. *Christopher*, 4 Burr. 2182, was of a will made in the life-time of a former wife. She, however, died without issue; and the will [337] was, I presume, of course in favor of a stranger. In the

event, however, of this testator having been a widower when his will was made, it is evident that a greater change of his situation had intervened between the time of its date and his death, than under a contrary supposition; and it is the alteration of situation only, which, in cases like the present, gives ground to presume a revocation. I cannot also, at present, see a reason for presuming a revocation in favor of the children of an intervening mother, which does not equally hold in favor of those of a contemporaneous one.

This case may be considered: 1. As on the general question just stated. 2. As affected by the testimony in the cause.

On the general question, I have found no decisions in favor of a revocation, except where there was a disposition of the whole property, and none except where the disposition was to others than children of the testator. If the case stated by Lord Nottingham, in *Wingfield* v. *Combe*, 2 Ch. Ca. 16, be considered as being of a contrary kind, I reply, that the principle of that case has been often since over-ruled, and that that case would not be subscribed to at this day.

As to the first requisite above-mentioned, our will comes fully up to it; for here is a total disposition. The second requires some consideration.

If a man standing in a state of celibacy, or* being married has no children, bequeaths his estate to those who have no natural or moral claim upon him, and afterwards contracts a new relation, which produces those who have the strongest of all human claims upon him for protection and assistance, in the absence of all testimony relative to intention, we must pre-
[338] sume, in honor of the human character, and in conformity to the just idea, that no man intends to rebel against the strongest moral and natural duties, that the testator had forgotten the existence of the instrument, or had supposed it nullified by the posterior change in his situation. We must not readily admit a presumption so outrageous against every thing just and proper; so militant against the feelings of human nature, as that a parent would, in favor of strangers, disinherit his whole offspring. By strangers I here mean, persons other than children of the testator. Whatever good reasons may exist with a parent for pretermitting particular children, it is an unreasonable presumption, that the whole of a man's progeny has incurred his wrath and displeasure. But this extreme case is widely different from that before us.

[* See *Wilcox* v. *Rootes*, et al. 1 Wash. 140; *Johnson* v. *Johnson*, 1 Phillm. R. 447; *Doe* v. *Bardford* et al. 4 Mau. & Selw. 10; *Brush* v. *Wilkins* et al. 4 Johns. Ch. R. 506.]

Six out of eight of the testator's children are provided for. Strangers are not preferred to his own offspring. It is, at most, only a particular disherison: and, if these children had been the children of the same mother, this suit would not have been brought. Yet, it is not easy to discern that *their* claims on their father are less strong than those of the present plaintiffs.

But, however this question may be as a general one, the idea of revocation is rebutted in the present case.

So far from this instrument being considered by the testator as revoked, as being no will, it was considered by him as a subsisting will; but one, indeed, which he intended afterwards to alter. Abner Dobyns proves this. A reference to a will as a subsisting one, rebuts the presumption of revocation. *Brady* v. *Cubit*, Dougl. 31. And an expression of intention to revoke a will *in futuro*, does not revoke the will, unless the alteration be made. Pow. on Dev. 534. Much less will an intention to alter a will be presumed to revoke it.

It is also in opposition to the presumption of revocation, that the devisor declared that his first children [339] should not be injured by his second marriage, and that he intended the land he lived on, even after the birth of his last child, for the sons of his first marriage. Both these intentions would be contravened by a decision in favor of revocation.

It was argued by Mr. Wickham, that a Court of Equity had not, and that the Court of Probate only had, the power to decide on questions of implied revocations. He differs much from a respectable Judge of the General Court, who decided in the case of *Wilcox* v. *Rootes*, that a Court of Probate had nothing to do with questions of the kind. That judgment was reversed in this Court;* but there is nothing in the decision here, conveying an idea, that the power belonged to the Courts of Probate, in exclusion of other Courts. Mr. Wickham's idea is also confronted by § 11 of the act 'concerning wills, &c." [Oct. 1785, 12 Stat. Larg. 142; c. 104, § 13, R. C. ed. 1819,] authorizing a procedure in Chancery, within seven years, to contest the validity of a will.

Mr. Wickham also supposed that the ground of implied revocations was narrowed down, so far as to shut out the present case, by the specification of two cases of total and particular revocation, provided for by § 3 of the same act. As this cause is in Mr. Wickham's favor upon the merits, I have not con-

[* *Wilcox* v. *Rootes*, 1 Wash. 140; *Bates* v. *Holman*, 3 Hen. & Munf. 502; *Hughes* v. *Hughes' ex'r.* 2 Munf. 209.]

sidered, nor shall I say, farther than is inferable from this opinion, whether the ground of implied revocation taken by the act, be narrower than that which before existed. But if it be so, it seems to me at present, that if the strong negative words of that clause interdicting revocations otherwise than pursuant to the act, do not extend to implied revocations, neither can the particular affirmative declarations thereof, going to cases not coming up to the general doctrine, or only inserted through abundant caution.

[340] But the plaintiffs say they come within the equity of the third clause concerning wills, &c. That clause has two members. The first is, that if a testator having no child living, shall make a will, not mentioning or providing for children, which he might have, if at the time of his death, he leave a child, or his wife *enciente* of a child, which shall be born, such will shall have no effect during the life of such after born child, and shall be void, unless the child die without having been married, or before attaining twenty-one. This provision stands on the same ground with the general doctrine, authorizing implied revocations, which I have just stated: It makes some alterations, indeed, as to the effect of the will in relation to the after-born child's marrying or coming of age; but it only contemplates a case of disposition to strangers; for it only applies to cases of testators having no children living at the date of the will. It consequently only establishes a revocation, where there is a total disherison in favor of strangers, of all the testator's progeny.

In these important respects, our case differs from that provided for by that member of the clause, and does not come within the reason upon which it is founded.

The latter member of the clause relates to posthumous pretermitted children, and gives them a provision which it is presumed the father would have done, could he have foreseen their future existence. The reason and equity of this provision does not extend to our case, where the plaintiffs were living in the testator's life-time.

Under these impressions, I think the decree of dismission ought to be affirmed.

FLEMING, Judge. The important question is, whether the second marriage and birth of children by it, revoked the will

[341] of 1785? That marriage and the birth of a child are a revocation, was, at first, considered as applying to personal estate only; they were, however, at length, settled to be equally applicable to real. [*Wellington* v. *Wellington*,] 4

Burr. 2171; Pow. on Dev. 555; but as a presumptive revocation only, liable to be rebutted by expressions in the will, or by circumstances. [*Lugg* v. *Lugg*,] 1 Ld. Raym. 441; [*Brady* v. *Cubitt*,] Dougl. 31. And, in the present case, there is abundant evidence that the testator, when about to marry the second time, declared that it should not prejudice his children by the former marriage; and, even after the birth of a son by the last wife, he was heard to say he did not intend him any land, but would give him an education, and bind him to sea or some useful trade. These circumstances repel the idea of a revocation, even upon the principles of the English law: and, under the act of Assembly which requires actual destruction of the will or a revocation in writing, the appellants can have no relief; for they come within neither of the exceptions. Not within that which declares that no will made when the testator *had no child living*, shall be effectual during the life of an after-born child; because the testator had children living when his will was made. Nor within that relative to posthumous children; because the appellants were not such. Of course, there is nothing to save them from the general operation of the law. For, although the testator is said to have declared in his last illness, an intention, if he recovered, to make alterations in his will, they were not expressed or reduced to writing, and, therefore, can have no manner of effect. Consequently, there being nothing to impeach the will, the Chancellor did right in dismissing the bill, and his decree ought to be affirmed.

CARRINGTON, Judge. I recollect two cases upon the subject of implied revocations. The first was the will of an old man who had never married, but, who afterwards marrying, and having children, the General Court adjudged it a revocation. The other was the will of Mr. Wilcox, who had no children at the time of making it, but afterwards married [342] and had issue, which this Court decided revoked the will [*Wilcox* v. *Rootes* et al.] 1 Wash. 140. The present case, however, is like neither of them; for the testator here ha, children at the time of making his will; and, therefore, thd appellants are not entitled, upon the ground of those decisionse But, even in cases where the testator has no children at the time of making his will, the presumption may be rebutted by circumstances: and here the testator spoke of his will in his last illness, and declared an intention to make alterations, but manifested no desire to revoke it. Added to which, he had before said that he did not mean to give the complainants any

part of his estate, but to educate them, and bind the son to sea or to a trade. These circumstances destroy the presumption; and, as the appellants do not come within the exceptions in the act of Assembly, I think the decree is right, and ought to be affirmed.

LYONS, Judge, concurred that the decree should be affirmed.*

[* See Act Dec. 5th 1794, c. 170 R. C. ed. 1803; c. 104, § 4, R. C. ed. 1819.]

HILL *v.* BURROW.

Thursday, April 28th, 1803.

Devise of lands to T. H. to him and his heirs forever; but, in case *T. H. dies without a lawful heir*, remainder over to R. H. and his heirs forever, created an estate tail in T. H. and consequently is barred by the act of Assembly for docking entails.*

In ejectment brought by Hill against Burrow, for a tract of land, the jury found a special verdict, stating that Richard Hill made his will on the 3d of October, 1774, whereby he devised the lands in the declaration mentioned, as follows: "I give and devise to my son Thomas Hill, all my lands on the north side of Nottoway river, in Sussex county, to him, his heirs and assigns forever, as also my lands in Brunswick
[343] county, to him and his heirs forever; but *in case my son, Thomas Hill, dies without a lawful heir*, my will and desire is, that the tract of land in Brunswick county only should descend to my son Richard Hill and his heirs forever." That

* By act of 1819, going into effect 1 January, 1820,—The words "dying without heirs," or "without issue," &c. &c. in a deed or will, are to be construed to mean *dying without heirs*, or *issue*, &c., living at the time of the immediate grantee's or devisee's death. See 1 R. C. of 1819, p. 369, § 26; and Code of 1849, p. 510, § 10.

See cases deciding limitations over, before that statute, to be bad because too remote—*Williamson* v. *Ledbetter*, 2 Mun. 521; *Deane, &c.* v. *Hansford, &c.* 9 Leigh, 253.

And cases deciding somewhat similar limitations over to be good—*Higginbotham* v. *Rucker*, 2 Call, 313; *Dunn and wife* v. *Bray*, 1 Call, 338; *Royall* v. *Eppes, adm'r.* 2 Mun. 479; *Timberlake et ux.* v. *Graves*, 6 Mun. 174; *Gresham* v. *Gresham*, id. 187; *Cordle's adm'r.* v. *Cordle's ex'r.* id. 455; *Didlake* v. *Hooper*, Gilm. 194.

Every part of a will may be looked to, to ascertain the testator's intention in a particular devise. Even the attestation clause, signed only by the subscribing witnesses, was resorted to in this case to limit the phrase *dying without issue* to mean *dying without issue living at the first taker's death. Lucas and wife* v. *Duffield*, 6 Gratt. 456.