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Wills-Revocation by Act to the Document-Effect on Codicil

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COMMENTS

WILLS—REVOCATION BY ACT TO THE DOCUMENT—EFFECT ON CODICIL—The term codicil generally refers to a supplement to a will by which the testator alters or adds to his will.¹ It may be nominated a codicil by the testator or held to be one by judicial construction. If it is to be operative at all, a codicil must of course be executed with all the formalities required by the statute of wills. But, just as it is difficult to describe a codicil without reference to a primary testamentary document, so also is it difficult to determine the status of an otherwise valid codicil when the will it supplements has been revoked. When the will has been revoked, either by an express act of the testator or by operation of law,² how should a court treat a codicil which itself has not been mutilated with intent to revoke and not mentioned expressly by a subsequent revoking instrument?

It should be recognized at the outset that this question may be raised in either of two settings. First, should such an instrument be admitted to probate? Second, if admitted, what effect should be given to it? It is with the first of these two possibilities that this discussion is primarily concerned, for it is at the probate stage that the determination as to revocation must be made, and a probate court finding that the codicil has been revoked obviates the necessity for any inquiry into the meaning of its language.

I. THE ENGLISH CASES BEFORE THE STATUTE OF WILLS

Prior to the enactment of the English Statute of Wills,³ a presumption existed that the revocation of a will revoked its codicils.⁴ This presumption was rebuttable, however, by showing that the testator had a contrary intent.

The earliest case to consider the question was *Barrow v. Barrow*,⁵ decided in 1756. Although the opinion states that by the law of England the codicil was not revoked when the will was destroyed, in order to sustain the admission of the codicil to pro-

¹ JARMAN, WILLS 25 (8th ed. 1951).

² As to what events will work a revocation by operation of law, see ATKINSON, WILLS § 85 (2d ed. 1953).

³ 7 Will. 4 & 1 Vict., c. 26 § 20.

⁴ *Tagart v. Hooper*, 1 Curt. 289, 163 Eng. Rep. 98 (Prer. Ct. 1836); *Coppin v. Dillon*, 4 Hagg. Ecc. 361, 162 Eng. Rep. 1478 (Prer. Ct. 1833); *Medlycott v. Assheton*, 2 Add. 229, 162 Eng. Rep. 278 (Prer. Ct. 1824); *Barrow v. Barrow*, 2 Lee 335, 161 Eng. Rep. 360 (Prer. Ct. 1756).

⁵ 2 Lee 335, 161 Eng. Rep. 360 (Prer. Ct. 1756).

bate heavy reliance was placed on the testator's intent to die testate and on statements made by him after the burning of the will that he intended his wife to get the property as the codicil indicated. In *Medlycott v. Assheton*,⁶ decided in 1824, the court clearly states the principle that a codicil is prima facie dependent on the will and that cancellation of the will is an implied revocation of the codicil. Here the requisite intent to rebut the presumption was held to be lacking when the court found the codicil, in which a bequest was made to trustees named in the cancelled will, to be intimately connected with the destroyed will. The fact that the cancelled will was the only means of ascertaining the legatees under the codicil was for this court determinative of the testator's intent.⁷ The only other case to arise prior to the Statute of Wills was that of *Tagart v. Hooper*.⁸ Here the instrument by its terms was declared to be a codicil to the will and to be taken as part thereof. The will itself was not found after the testator's death and the presumption of its destruction by him with intent to revoke was raised. By its terms the codicil made a bequest to trustees⁹ to pay income to *A* for life, remainder over to *B*. The court adopted the view that the codicil was intended by the testator to be an additional bequest, quite independent of anything he provided for in his will, and that since the codicil was not contingent on the will for meaning in any way the presumption of revocation of the codicil by revocation of the will was overcome.

Thus, it appears that the common law courts were willing to accept and make determinative any available direct evidence of the testator's intent that the codicil should stand although the will was revoked. Where direct expression of such intent was lacking it could be implied if the codicil presented a clearly independent disposition.

II. THE EFFECT OF THE STATUTE OF WILLS

With the enactment of the Statute of Wills¹⁰ in 1837 the question should have become one of statutory interpretation. The

⁶ 2 Add. 229, 162 Eng. Rep. 278 (Prer. Ct. 1824).

⁷ *Coppin v. Dillon*, 4 Hagg. Ecc. 361, 162 Eng. Rep. 1478 (Prer. Ct. 1833), in which the codicil was denied probate, was decided on identical grounds.

⁸ 1 Curt. 289, 163 Eng. Rep. 98 (Prer. Ct. 1836).

⁹ The report of the case does not indicate whether the trustees were specifically named in the codicil.

¹⁰ 7 Will. 4 & 1 Vict., c. 26.

statute, on its face, purports to declare that no will *or codicil* can be revoked except by certain specified acts to "the same," or by a subsequent instrument. Although it would seem, therefore, that the principal inquiry for the courts should be whether the statutory demands have been met, this was not the immediate effect. Two cases, *Goods of Halliwell*¹¹ and *Clogstoun v. Walcott*,¹² decided by the same judge¹³ only a year apart, demonstrate the confusion which existed. *Goods of Halliwell* (1846) presented a codicil which made no bequests or appointments but related solely to settlement of accounts between testator and his business partner. The court still spoke in terms of a presumption that the codicil will fall with the will. In this instance it was admitted to probate when the court found that the codicil was made for a special purpose, that it was totally independent of the general disposition of property, and that therefore it did not appear that testator could have meant to destroy the codicil with the will.¹⁴ No mention was made in the opinion of the wills statute enacted nine years earlier. In *Clogstoun v. Walcott* (1847) the testator, after destroying his will by burning it, expressed orally his intention that two codicils which still existed should be effective. The court recognized that the wills statute must be considered, and held that the presumption of revocation which existed prior to the act no longer applied and that the codicils should be admitted to probate unless the testator's intent to revoke them is shown.¹⁵ However, the court went far to defeat the operation of the statute by saying that the revocation of the will is *prima facie* evidence of testator's *intent* to revoke the codicil. Thus the burden is placed again on the party offering the codicil. Here the codicils were admitted when the court allowed oral testimony of testator's intent in order to rebut the *prima facie* evidence of revocation.

In an apparent return to the pre-statute presumption, the court in *Grimwood v. Cozens*¹⁶ declared that the revocation of

¹¹ 4 N.C. 400 (Prer. Ct. 1846).

¹² 5 N.C. 623 (Prer. Ct. 1847).

¹³ Sir H. Jenner Fust.

¹⁴ See *Goods of Coulthard*, 11 Jur. N.S. Pt. 1, 184 (P. Ct. 1865) which cites this case, *Tagart v. Hooper*, 1 Curt. 289, 163 Eng. Rep. 98 (Prer. Ct. 1836) and *Barrow v. Barrow*, 2 Lee 335, 161 Eng. Rep. 360 (Prer. Ct. 1756) as authority for summarily admitting the codicil to probate; *Goods of Clements*, [1892] P. 254 admits a codicil to probate, citing *Goods of Coulthard*, *supra*, as authority.

¹⁵ The opinion does not indicate any theory for this reversal.

¹⁶ 2 Swab. & T. 364, 5 Jur. N.S. Pt. 1, 497 (P. Ct. 1859).

a will revoked its codicils unless the testator's contrary intent was found. On the basis of written but non-testamentary documents, in which the testator declared his intent that the codicils should fail, the court held that the codicils were revoked.

A new point of departure¹⁷ was developed in 1864 in *Goods of Ellice*,¹⁸ where the decision to admit the codicil to probate was based on the substantially independent character of the instrument. Although it is possible to view this decision as indicating merely another method of determining intent of the testator, the court appears more concerned with the language of the instrument itself and its ability to stand apart from the will and still make some sense as a testamentary disposition. Although the result in this case is the same as that which would have been reached on the basis of the pre-statute *Medlycott* and *Tagart* cases, the difference in theory is significant. Here, the independence of the instrument becomes the ultimate fact while in the earlier two cases it is but evidentiary, to be weighed along with other available evidence tending to show the testator's intent. Thus, under the theory of the *Medlycott* and *Tagart* cases, an instrument, independent on its face, would be denied probate if other evidence established the testator's intent that it should fail. Such a result is not possible under the theory of *Goods of Ellice*.

From the discussion of the four immediately preceding cases it is clear that regardless of which presumption the courts purported to follow with regard to revocation of the codicil, the primary inquiry was into the testator's intent rather than compliance with the wills statute. By following this course the courts arguably have failed to appreciate the significance of the legislative act. It is fundamental to the statute that, regardless of testator's intent, an instrument not properly executed could not make a testamentary disposition of property. Similarly, regardless of testator's intent, a will or codicil should be valid and subsisting unless mutilated with intent to revoke.¹⁹ The case of express revocation presents the problem in a different setting. In such a situation, intent may be a decisive factor. If a testator in a subsequent properly-executed instrument says merely, "I revoke my will," it may be proper to inquire if he meant will in its technical

¹⁷ Some similar language is to be found in earlier cases but this is the first to give it primary emphasis.

¹⁸ 33 L.J.P.M. & A. 27, 12 Weekly L. R. 353 (P. Ct. 1864).

¹⁹ ATKINSON, *op. cit. supra* note 2, § 84.

sense or "will" as his total testamentary scheme. With such facts, there would be a valid revocatory instrument; the only inquiry is what is revoked. Intent either to execute or revoke, as the case may be, becomes significant *only* if the required technical steps have been taken. Although it is apparent that in some cases the testator's subjective intent may be thwarted because of failure to comply with the statutory requirements, it is generally conceded that the underlying policy of the wills statutes, to prevent frauds, and the basic means chosen by the legislature to achieve this end, requirement of certain objective acts, should be preserved.²⁰

The first case to give any serious consideration to the implication of the Statute of Wills²¹ was *Black v. Jobling*,²² decided in 1869, thirty-two years after the statute was adopted. Here a testator executed a will and two codicils. The will and first codicil could not be found after testator's death, giving rise to the presumption of their destruction *animus revocandi*. Lord Penzance, for the court, after reviewing some of the prior decisions, gave consideration to the requirements of the wills act regarding revocation²³ and determined that since the codicil had not been revoked in any mode indicated by the statute the codicil should be admitted. The following year, in a somewhat more emphatic restatement of his opinion in *Black v. Jobling*,²⁴ Lord Penzance in *Goods of Savage*²⁵ declared that the words of the statute were imperative and that a court could not, in the face of the statutory language, hold that a codicil had been revoked by the mere revocation of the will.

Following the doctrine laid down in the two immediately preceding cases, the court in *Goods of Turner*,²⁶ with Lord Penzance again writing the opinion, went to the matter of construction and held that difficulty in interpretation of language of the codicil be-

²⁰ *Ibid.*

²¹ 7 Will. 4 & 1 Vict., c. 26.

²² L. R. 1 P. & D. 685 (1869).

²³ "That no will or codicil or any part thereof shall be revoked otherwise than . . . by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator or by some person in his presence and by his direction, with the intention of revoking the same."

²⁴ L. R. 1 P. & D. 685 (1869).

²⁵ L. R. 2 P. & D. 78 (1870).

²⁶ L. R. 2 P. & D. 403 (1872).

cause of references to the will is not cause to prevent probate of the codicil. Questions of construction were declared to be for another court. It would appear, therefore, that the old theory turning on the independence of the instrument had been rejected.

In *Goods of Bleckley*,²⁷ the only case to arise in which the codicil was not a separate physical instrument, the court held the revocation of the will to be a revocation of the codicil. This case, decided after *Goods of Turner*,²⁸ arose when the testator after executing a will added a properly-executed codicil at the foot of the will and subsequently cut his signature from the will without mutilating the codicil in any way. Parol evidence was admitted to show the testator's intent to revoke the codicil. The court held it to be a matter of testator's intent whether or not the codicil was revoked, and on the evidence found that it was revoked. This case, which appears to return to the earlier theory of testator's intent, is superficially analogous to the situation presented when a clause in a will has been crossed out and it must be determined if a partial rather than complete revocation was intended. In such a case it is clear that whether the crossing out revokes all or only a part of the instrument depends on the intent of the testator.²⁹ Although this analogy perhaps renders *Bleckley* understandable, the result remains unsatisfactory when it is remembered that the codicil itself has in no way been burned, torn, or otherwise mutilated.

Any implication that *Goods of Bleckley*³⁰ would mark a return to consideration of testator's intent as the determinative factor in revocation of a codicil was set to rest three years later when the same court in *Gardiner v. Courthope*,³¹ faced with another codicil, followed the line of decisions upholding the integrity of the wills statute.³² Although discussion of intent is found in *Gardiner*, the decision is squarely based on the fact that there had been no revocation in any mode set out in the statute. As to the intent element, the court said intent to revoke could not be found from the fact that the will had been revoked, even if the codicil depended

²⁷ 8 P.D. 169 (1883).

²⁸ L. R. 2 P. & D. 403 (1872).

²⁹ See ATKINSON, *op. cit. supra* note 2, § 86.

³⁰ 8 P.D. 169 (1883).

³¹ 12 P.D. 14 (1886).

³² *Goods of Turner*, L.R. 2 P. & D. 403 (1872); *Goods of Savage*, L.R. 2 P. & D. 78 (1870); *Black v. Jobling*, L.R. 1 P. & D. 685 (1869).

on the will for its meaning, and therefore there was no evidence of testator's intent to revoke the codicil.

Thus, the English law evolved from a period when intent was the first and only consideration given by the courts in determining whether to probate a codicil to a revoked will to the present, relatively well-settled rule that revocation to be effective must meet the objective standards of the wills statute.

III. THE STATUS OF THE AMERICAN LAW

Forty-nine states³³ have a general provision specifying those acts to the document which, when done with the proper intent, will effectively revoke a testamentary instrument.³⁴ But in only eight states is there a statutory provision expressly dealing with the effect to be given a codicil after the will has been revoked, and in each instance the statute provides that the revocation of the will revokes all codicils to that will.³⁵ The wording of the statutes in the remaining forty-one jurisdictions begins, generally, in one of two ways: "No will or codicil or any part thereof . . ."³⁶ or "No will . . ."³⁷ Following this language is a description of the physical acts or kinds of instruments that are necessary to effect a revocation. The English Statute of Wills, in effect since 1837, was the model for several of the American statutes,³⁸ and its provisions are

³³ Tennessee is the only state in which there is no such provision.

³⁴ See Rees, *American Wills Statutes: II*, 46 VA. L. REV. 856, 871-81 (1960).

³⁵ CAL. PROB. CODE § 79; FLA. STAT. § 731.16 (1959); IDAHO CODE ANN. § 14-318 (1947); MONT. REV. CODES ANN. § 91-134 (1947); N. D. CENT. CODE § 56-04-15 (1960); OKLA. STAT. tit. 84, § 113 (1951); S. D. CODE § 56.0230 (1939); UTAH CODE ANN. § 74-1-30 (1953). The same provision is found in GUAM PROB. CODE § 79 (1953).

³⁶ CONN. GEN. STAT. REV. § 45-162 (1958); KY. REV. STAT. § 394.080 (1960); PA. STAT. ANN. tit. 20, § 180.5 (1950); R. I. GEN. LAWS ANN. § 33-5-10 (1956); VA. CODE ANN. § 64-59 (1950); W. VA. CODE ANN. § 4045 (1955).

³⁷ ALA. CODE tit. 61 § 26 (1960); ALASKA COMP. LAWS ANN. § 59-3-6 (1949); ARIZ. REV. STAT. ANN. § 14-126 (1956); ARK. STAT. ANN. § 60-406 (Supp. 1959); COLO. REV. STAT. ANN. § 152-5-4 (1953); DEL. CODE ANN. tit. 12, § 109 (1953); D. C. CODE ANN. § 19-103 (1951); GA. CODE § 113-404 (1959); HAWAII REV. LAWS § 322-8 (1955); ILL. REV. STAT. ch. 3, § 197 (1959); IND. ANN. STAT. § 6-506 (1953); IOWA CODE § 633.10 (1958); KAN. GEN. STAT. ANN. § 59-611 (1949); LA. CIV. CODE ANN. art. 1691 (West 1952); ME. REV. STAT. ANN. ch. 169, § 3 (1954); MD. ANN. CODE art. 93, § 351 (1957); MASS. ANN. LAWS ch. 191, § 8 (1955); MICH. COMP. LAWS § 702.9 (1948); MINN. STAT. ANN. § 525.19 (1947); MISS. CODE ANN. § 658 (1956); MO. ANN. STAT. § 474.400 (1956); NEB. REV. STAT. § 30-209 (1956); NEV. REV. STAT. § 133.120 (1959); N. H. REV. STAT. ANN. § 551:13 (1955); N. J. STAT. ANN. § 3A:3-3 (1953); N. M. STAT. ANN. § 30-1-8 (1953); N. Y. DECED. EST. LAW § 34; N. C. GEN. STAT. § 31-5.1 (Supp. 1959); OHIO REV. CODE ANN. § 2107.33 (Page 1954); ORE. REV. STAT. § 114.110 (1957); S. C. CODE § 19-221 (1952); TEX. PROB. CODE § 63 (1956); VT. STAT. ANN. tit. 14, § 11 (1958); WASH. REV. CODE § 11.12.040 (1949); WIS. STAT. § 238.14 (1957); WYO. STAT. ANN. § 2-51 (1957).

³⁸ See statutes cited note 36 *supra*.

fairly typical. It provides: "That no will or codicil, or any part thereof, shall be revoked otherwise than . . . by the burning, tearing or otherwise destroying the same. . . ." ³⁹ The language of this section purports to provide the exclusive means by which a will or codicil may be revoked. Aside from revocation by another testamentary instrument, an act must be done to the will or codicil in order to work a revocation. The words "the same" used in the statute clearly relate back to "will or codicil." Thus it seems inconceivable that a jurisdiction in which such a statute is in force could arrive at any conclusion other than that a codicil to be revoked must itself be mutilated in some manner. ⁴⁰ Only by reading "will or codicil" to mean "will *and* codicil" ⁴¹ or codicil," is it possible to construe the wills statute not to apply to the case where a testator with a valid will and codicil desired to revoke the will without affecting the codicil. The statute, so interpreted, would merely provide the testator with explicit directions for revoking both his will and codicil, or merely his codicil. Such an answer, which is not suggested in the opinions, does not seem satisfactory. The statute declares those acts which will be sufficient to revoke a codicil and no distinction is made between revocation of a codicil to a valid will and revocation of a codicil after the will itself has been revoked. ⁴² Any attempt to make this distinction would be judicial legislation.

The revocation clause of the Pennsylvania statute ⁴³ presents the problem in a somewhat different light. It reads: "No will or codicil in writing, or any part thereof, can be revoked or altered otherwise than: . . . (3) Act to the document. By being burnt, torn, canceled, obliterated or destroyed. . . ."

The section is, on its face, open to a plausible construction by which revocation of a will could operate as a revocation of its codicils. This statute also appears to be imperative and exclusive, but by speaking in terms of an "act to the document" leaves open the possibility that "document" could be construed to mean the

³⁹ 7 Will. 4 & 1 Vict., c. 26. Omitted from this quotation are provisions regarding revocation by subsequent instrument and revocation by operation of law.

⁴⁰ The only rational explanation for the result reached in the English cases decided immediately after the wills statute was adopted would appear to be that the courts did not consider that the situation under discussion was one to which the statute applied.

⁴¹ Thus interpreted "will and codicil" would have the meaning of "will" in its non-technical sense of a complete testamentary scheme.

⁴² See ATKINSON, *op. cit. supra* note 2, § 86.

⁴³ PA. STAT. ANN. tit. 20 § 180.5 (1950).

will and its codicils as a single testamentary instrument. Thus the destruction of the will would be a destruction of "the document" within the meaning of the statute and the codicil would be inadmissible. This rationale has not been expressed by any court faced with the codicil to a destroyed will, and the basic theory that a will and codicil constitute but a single document is of questionable validity. Admittedly, a will and its codicils are taken to be part of one and the same instrument for purposes of construction and testamentary disposition;⁴⁴ but this is not so for purposes of execution⁴⁵ or probate.⁴⁶ These results follow from the realization that the testator, at the time of execution of the codicil, must comply with the formal requirements of the wills statute and also have the requisite testamentary intent. Formal compliance with the statute in executing the will by a testator who had the proper intent will not save a codicil in which either element is missing.

Further, it is generally agreed that the revocation of the codicil will not work a revocation of the will even if the testator so intended.⁴⁷ This is a clear case of the courts adhering strictly to the language of the wills statutes. An act done to one instrument, the codicil, is not sufficient to revoke another, the will. The same principle would seem applicable in the reverse situation where it is the will that is revoked by an act to that instrument.

Apparently only five American jurisdictions,⁴⁸ in a total of only sixteen cases, have been faced with the question under consideration. From 1866—when the first of these cases⁴⁹ was decided—to the present, there has been an amazing consistency in the decisions. Despite the statutory considerations outlined above, the test laid down in all but one⁵⁰ of the cases is that of the independence of the propounded codicil: if the codicil makes sense independently of the will its validity is not affected by the destruc-

⁴⁴ *Gelbke v. Gelbke*, 88 Ala. 427, 6 So. 834 (1889); ATKINSON, *op. cit. supra* note 2, § 86.

⁴⁵ *Malone v. Hobbs*, 40 Va. (1 Rob.) 366 (1842).

⁴⁶ *In re Hunt's Estate*, 122 N.Y.S.2d 765 (1953).

⁴⁷ *In re Hargroves' Will*, 262 App. Div. 202, 28 N.Y.S.2d 571, 262 App. Div. 994, 30 N.Y.S. 2d 810, *aff'd*, 288 N.Y. 604, 42 N.E.2d 608 (1942); *In re Miller's Will*, 119 Misc. 4, 194 N.Y. Supp. 843 (1922); ATKINSON, *op. cit. supra* note 2, § 86; Annot. 38 A.L.R. 244 (1925). *Contra*, *In re Brookman*, 11 Misc. 675, 33 N.Y. Supp. 575 (1895).

⁴⁸ Kentucky, New Jersey, New York, Ohio and Pennsylvania.

⁴⁹ *Will of Pinckney*, 1 Tuck. Sur. 436 (N.Y. 1866).

⁵⁰ *In re Brown's Will*, 6 Misc. 2d 803, 160 N.Y.S.2d 761 (Surr. Ct. 1957); *cf.* *Estate of Sapery*, 28 N.J. 599, 147 A.2d 777 (1959).

tion of the will.⁵¹ It is not at all clear, however, what factors a court will consider in making its determination as to dependency.

It appears that the less complicated the codicil, the more likely it is to be found independent and hence admitted to probate even though the will has been revoked. Thus, where the only effect of the codicil was to designate a new executor,⁵² the will being republished in other respects, the codicil was held to be probative. Taking the situation one step further, a codicil which not only appointed an executor but also made a single bequest to a named legatee was admitted.⁵³ Similarly, a bequest of money to a named legatee, which was executed on a postal card in conformity with the wills statute, was probated, although the will had been revoked.⁵⁴

Probate was also granted to an instrument, designated a codicil, in which a devise of realty was made to a named devisee with directions that all estate, transfer, and inheritance taxes be paid from the remaining estate. The will in this case could not be found and the presumption of revocation was raised.⁵⁵ The reference to payment of taxes from the "remaining estate" could have led the court to the conclusion that the instrument was dependent and therefore not entitled to probate. Seemingly such an interpretation was properly avoided since the testator would have an "estate" from which to pay the taxes regardless of the existence of a valid will. The codicil was therefore held not dependent upon the will for meaning.

The most extreme case in which the codicil was probated was one in which the codicil disposed of the testator's entire estate.⁵⁶ The court held that although the will of the deceased could not be found and was presumed to have been revoked, the codicil was admissible and in effect was a revocation of the will.⁵⁷

Although the codicil is written on the same sheet of paper, it

⁵¹ *Smith's Estate*, 2 Pa. County Ct. 626 (1886).

⁵² *Estate of Sapery*, 28 N.J. 599, 147 A.2d 777 (1959); *In re Fould's Will*, 21 Misc. 2d 402, 196 N.Y.S.2d 816 (Surr. Ct. 1960); *In re Lundquist's Will*, 183 Misc. 803, 52 N.Y.S.2d 234 (Surr. Ct. 1944).

⁵³ *Matter of Emmons*, 110 App. Div. 701, 96 N.Y. Supp. 506 (1906).

⁵⁴ *Matter of Steiner*, 142 Misc. 710, 255 N.Y. Supp. 397 (1932).

⁵⁵ *O'Neill's Estate*, 58 Pa. D. & C. 351 (Orphans' Ct. 1946).

⁵⁶ *Smith's Estate*, 2 Pa. County Ct. 626 (1886); *cf. Newcomb v. Webster*, 113 N.Y. 191, 21 N.E. 77 (1889).

⁵⁷ See I JARMAN, WILLS 25 (8th ed. 1951). This instrument was still a codicil since it was intended to be an alteration of the prior testamentary document.

is not necessarily revoked by a revocation of the will, if it can be carried out apart from the provisions of the will. Such a situation was presented in *Youse v. Forman*,⁵⁸ where the court held the codicil to be dependent and therefore revoked when it made reference to the testator's executor, a designation made in the revoked will.⁵⁹ Where the paper on which the codicil was written was taped to the foot of the will, the court held the codicil to have been revoked when the signature on the will was cut out leaving a hole in the page, although the codicil itself was not mutilated.⁶⁰ Surrogate Fowler's opinion in this case, *In re Francis' Will*,⁶¹ makes it clear, however, that even here revocation of the prior instrument does not necessarily work revocation of the codicil if it is an independent instrument. The fact that the testator could have mutilated the codicil but did not do so indicated an intent to distinguish the codicil from the will. Despite this statement, the court refused to grant probate to the codicil, which specifically named a new executor and reappointed a legacy provided in the will. The court decided that these provisions were not independent of the will.⁶²

One New York case⁶³ contains language which would seem to indicate that a codicil could never be admitted to probate as a self-sufficient testamentary instrument.⁶⁴ This position is reached by adopting the theory that a codicil, by definition, is a dependent addition to or qualification of a will,⁶⁵ and that when an instrument is published as a codicil the testator declares his intention that it be merely incident to the will. At another point in the opinion, however, the court indicates that an instrument which can sensibly be executed apart from any others is actually a "will," and that despite its label as a codicil it can be given effect. This case, decided in the same year as *In re Francis' Will*,⁶⁶ was discussed by Surrogate Fowler, who rejected the "definitional" approach

⁵⁸ 68 Ky. (5 Bush.) 337 (1869).

⁵⁹ The court seemed to take the position that, had the codicil been independent, then additional evidence of the testator's intent not to revoke it would have been necessary to carry the proponent's burden of proof.

⁶⁰ *In re Francis' Will*, 73 Misc. 148, 132 N.Y. Supp. 695 (1911).

⁶¹ *Ibid.*

⁶² Cf. *In re Ayres' Will*, 43 N.E.2d 918 (Ohio App. 1940).

⁶³ *In re Nokes' Estate*, 71 Misc. 382, 130 N.Y. Supp. 187 (1911).

⁶⁴ Similar language may be found in *Will of Pinckney*, 1 Tuck. Sur. 436 (N.Y. 1866).

⁶⁵ Cf. *In re Whittier's Estate*, 26 Wash. 2d 833, 176 P.2d 281 (1947).

⁶⁶ 73 Misc. 148, 132 N.Y. Supp. 695 (Surr. Ct. 1911).

suggested.⁶⁷ It does not seem, however, that it would make any substantive difference which approach was adopted. On the one hand, the court labels all independent testamentary instruments "wills," and admits all "wills" to probate, while on the other, the traditional definition of "codicil" is accepted but only independent codicils are admitted.

It seems clear that a codicil which attempted to dispose of the residue of an estate, after specific bequests contained in a will were satisfied, would not be probative under American rules if the will itself was not found after the testator's death and was presumed to have been revoked.⁶⁸ In such a case the interdependence of will and codicil is evident since the determination of the content of the residue is dependent on the will. Accordingly, a codicil which provided for an annuity from the income of a trust established by the will was not probated after the will was revoked.⁶⁹ The only donative provision of this codicil was totally dependent upon the effectiveness of the will, for without the will there could be no trust income with which to pay the annuity.

*In re Brown's Will*⁷⁰ is the only American case giving any indication of an awareness that the wills statutes might be determinative of the question. Here a codicil was admitted to probate although its only function was to revoke one provision of a prior "will" which had not been executed in conformity with the wills statute and was, therefore, not probative. Surrogate Bennett, recognizing that the codicil was ineffective to dispose of any part of the testator's property, nevertheless admitted it because it was executed by a competent testator in accordance with the requirements of the statute and had not been marked or mutilated in any manner or revoked by a subsequent instrument.⁷¹

IV. CONCLUSION

If the proposition is accepted that, at least for execution and probate, a will and its codicils are separate instruments, and if the wills statutes set out the exclusive means by which testamentary instruments may be revoked, then clearly the courts should not

⁶⁷ See *Proctor v. Clarke*, 3 Redf. Sur. 445 (N.Y. 1878) where the codicil was denied probate on the ground that it had been declared to be a codicil and not a will.

⁶⁸ See *In re Pardy's Estate*, 161 Misc. 77, 291 N.Y. Supp. 969 (1936) (dictum).

⁶⁹ *In re Bowles' Estate*, 96 Ohio App. 265, 114 N.E.2d 229 (1953).

⁷⁰ 6 Misc. 2d 803, 160 N.Y.S.2d 761 (1957).

⁷¹ *Contra, In re Pepper's Estate*, 148 Pa. 5, 23 Atl. 1039 (1892).

ignore the statutes when considering whether the revocation of a will revokes its codicils. The mere fact that the provision of the wills act regarding revocation speaks in terms of how "wills"⁷² should be revoked cannot be offered as a valid theory, as the term "will" in the statutes is declared to include codicil.⁷³ Where the statute speaks in terms of how "wills or codicils"⁷⁴ are to be revoked, the command would seem to be patent.

The nature and purpose of probate proceedings should also be kept in mind when evaluating the position of the American courts on the effect of the revocation of a will on its codicils. First, probate precedes construction.⁷⁵ The traditional role of the probate court is to determine if the instrument before it was properly executed or if it has been revoked with the requisite formalities. Any interpretative matters are for a later hearing before a court of equity. It is not the role of the probate court to construe the offered instrument for the purpose of defeating probate. Construction incident to proof of facts which must be established before the instruments are admissible is permitted,⁷⁶ but when deciding the question of admissibility the court has no authority to inquire into the effectiveness of the instrument to dispose of property.⁷⁷ So long as it has not been revoked, the instrument must be admitted if executed in accordance with the wills statute by a competent testator not under undue influence.⁷⁸

Second, probate courts, in general, are not equipped for the difficult and technical legal task of interpreting and construing so complex a document as a will or codicil.⁷⁹ This is a subject which should properly be left to the highly trained trial or appellate court judge.⁸⁰ What is needed at the probate stage is a convenient rule to govern the probate judge's decision. The wills statutes attempt to provide for this by prescribing those acts which

⁷² See statutes cited note 37 *supra*.

⁷³ E.g., N. Y. DECED. EST. LAW § 2.

⁷⁴ See statutes cited note 36 *supra*.

⁷⁵ *Matter of Davis*, 105 App. Div. 221, 182 N.Y. 468 (1905).

⁷⁶ *Syfer v. Dolby*, 182 Md. 139, 32 A.2d 529 (1943).

⁷⁷ *Matter of Davis*, 105 App. Div. 221, 182 N.Y. 468 (1905).

⁷⁸ *In re Tankelowitz's Will*, 162 Misc. 474, 294 N.Y. Supp. 754 (1937).

⁷⁹ MODEL PROBATE CODE 467-71 (Simes 1946).

⁸⁰ *Id.* at 468. The Model Code points out, however, that since there is a growing tendency to place the administrative and interpretative functions in the same court which must probate the instrument, the ideal solution would be to raise the qualifications of the probate judge. This does not mean that there is no longer a distinction between the question of probate, and the question of construction.

he must find before an instrument can be admitted or be held to have been revoked.

If the probate court were to adopt the rule that a codicil to a revoked will should be admitted to probate unless it had been marked or mutilated or revoked by a subsequent properly-executed written instrument, as provided in the statute, we would have the needed convenient, operating rule, which though easily applied would not by its application cause undue hardship. Adopting this rule will leave the parties with the opportunity of litigating interpretative questions before a better qualified equity court. If that court found the instrument to be incapable of intelligent construction the instrument would then be of no operative effect. However, if the court could give substantive meaning to the words of the instrument it would be effective.

By adopting a rule that the codicil can have no meaning apart from the will and thereby automatically denying it probate, a court would indeed be following a convenient operating rule, but its effect would be unreasonably harsh. There would be no second chance on the interpretative questions. By taking the middle ground of allowing probate to "independent" instruments the probate court is taking upon itself a task which rightly belongs to the better qualified higher court. What may seem clearly dependent to a probate judge might seem quite independent and effective to a judge trained in the law.⁸¹

It would seem, therefore, that the more effective operation of probate law would result from the establishment of the principle that a codicil, properly executed, may be revoked only by a physical act to the codicil itself or by the execution of a subsequent revocatory instrument.

Roger W. Kapp, S. Ed.

⁸¹ As a simple example, take the case of a codicil in which a bequest of a fixed sum is made, in trust, to pay the income to *A*, remainder to *B*. The fact that the will in which the trustees were named has been revoked could easily lead to a determination of dependence by a probate judge whereas this bequest could be given effect by the appointment of trustees by an equity court.