

1950

## CONFLICT OF LAWS-MODEL EXECUTION OF WILLS STATUTE-LAW GOVERNING REVOCATION OF WILL

Edward W. Rothe S.Ed.  
*University of Michigan Law School*

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Common Law Commons](#), [Conflict of Laws Commons](#), [Estates and Trusts Commons](#), and the [Jurisdiction Commons](#)

---

### Recommended Citation

Edward W. Rothe S.Ed., *CONFLICT OF LAWS-MODEL EXECUTION OF WILLS STATUTE-LAW GOVERNING REVOCATION OF WILL*, 48 MICH. L. REV. 699 ().

Available at: <https://repository.law.umich.edu/mlr/vol48/iss5/10>

This Regular Feature is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

## RECENT DECISIONS

CONFLICT OF LAWS—MODEL EXECUTION OF WILLS STATUTE—LAW GOVERNING REVOCATION OF WILL—Decedent's will, devising Iowa realty, was denied probate in Illinois, the state of domicile, on grounds that the will had been revoked by cancellation. The devisees offered the will for probate in Iowa, under whose law no revocation was effected. The heirs contested probate on grounds that the Illinois denial of probate was conclusive and binding on Iowa courts in view of §633.49, Iowa code, 1946: "A last will and testament executed without this state, in the mode prescribed by the law, either of the place where executed or the testator's domicile, shall be deemed to be legally executed, and shall be of the same force and effect as if executed in the mode prescribed by the laws of this state. . . ."<sup>1</sup> Held, four justices dissenting, the will is admissible to probate to pass title to Iowa land. The statute is inapplicable because it deals only with the execution of wills, not with revocation, thereby leaving unchanged the rule that the *lex rei sitae* controls as to the validity of revocation. *In re Barrie's Estate*, (Iowa, 1949) 35 N.W. (2d) 658.

It is well settled that, at common law, the *lex rei sitae* governs as to the formalities of execution and revocation of wills devising real property.<sup>2</sup> The rule is otherwise as to wills of personalty, whose validity depends upon the law of the testator's domicile.<sup>3</sup> Consequently, it is held that the admission to or denial of probate by the state of domicile is not binding upon the state where the devised realty is located, and the latter may determine for itself whether the instrument is a will sufficient to pass title to land within its boundaries. The full faith and credit clause does not demand that the situs recognize the determination of due execution or revocation by the domicile, since no state has jurisdiction to pass on title to land in other states.<sup>4</sup> However, it is competent for the legislature of the situs to change this common law rule and give effect to the decisions of the state of domicile regarding the validity of an instrument as a will.<sup>5</sup> For example, those

<sup>1</sup> This statute is identical with the Uniform Wills Act, Foreign Executed (1910), 9 U. L. A. 281.

<sup>2</sup> CONFLICTS RESTATEMENT 249, 250 (1934); PAGE, WILLS 1633 (1941); *Rice v. Jones*, 4 Call (Va.) 89 (1786); *Castens v. Murray*, 122 Ga. 396, 50 S.E. 131 (1905); *Sneed v. Ewing and wife*, 5 J.J. Marsh. 460, 22 Am. Dec. 41 (1831).

<sup>3</sup> CONFLICTS RESTATEMENT 306, 307 (1934); PAGE, WILLS 1638 (1944); *In re Estate of Newell*, 10 Hawaii 80 (1895); *Hodge v. Taylor*, 87 S.W. (2d) 533 (1935).

<sup>4</sup> 57 AM. JUR., Wills §957 (1948); *Robertson v. Pickrell*, 109 U.S. 608, 3 S.Ct. 407 (1883); *Pritchard v. Henderson*, 2 Pennewill (Del.) 553, 47 A. 376 (1900); *Selle v. Rapp*, 143 Ark. 192, 220 S.W. 662 (1920); *Norris v. Loyd*, 183 Iowa 1056 (1916); *Trotter v. Van Pelt*, 144 Fla. 517, 198 S. 215 (1940); 131 A.L.R. 1023 (1940).

<sup>5</sup> Many states have foreign probated wills statutes permitting the recording at the situs of authenticated copies of wills admitted to probate in other states. Whether such statutes operate to change the *lex rei sitae* rule depends, of course, upon the wording, but most courts have taken the view that they were intended only to eliminate the necessity of original proof of the will at the situs, and to preclude collateral attack on the will's validity. So the requirement that, to pass title to land in the situs, the will must be executed according to its laws remains intact. *Evansville Ice and Cold Storage Co. v. Winsor*, 148 Ind. 682, 48

statutes based upon the "Model Execution of Wills Act" (1940)<sup>6</sup> explicitly change the common law by adopting the law of the testator's domicile in determining the validity of a will, regardless of whether it is a will of realty or personalty.<sup>7</sup> It is with such a statute that the principal case is concerned. Its objects are to promote uniformity of the effect given to wills in the various states, to further obliterate the outmoded distinction between wills of realty and personalty, and to avoid intestacy as to realty in other states when a will has been pronounced valid by the state of domicile, thus giving effect to the testator's manifest intent. The statute recognizes that a testator may own property in many states but that he is likely to be informed only as to the formalities of execution and revocation demanded by the state of domicile or execution.<sup>8</sup> It is submitted that the distinction drawn by the principal case between "revocation" and "execution" in order to deny the applicability of the statute and adhere to the common law is inconsistent with the policy considerations behind the statute. In addition, §4.2, Iowa Code, 1946 abrogates the rule that statutes in derogation of the common law are to be strictly construed and substitutes in its stead a canon of liberal construction for such statutes. Even without the aid of the word "revocation" in the statute, other courts have indicated that a revocation, valid where made; is binding on the courts of the situs.<sup>9</sup> And it is most desirable that Model Statutes receive a uniform construction. It would seem clear that under the statute, even as construed by the court in the principal case, Iowa would recognize the validity of a "revoking

N.E. 592 (1897); *Lynch v. Miller*, 54 Iowa 516, 6 N.W. 740 (1880); *Crossett Lumber Co. v. Files*, 104 Ark. 600, 149 S.W. 908 (1912); *McPherson v. McKay*, 207 Ark. 546, 181 S.W. (2d) 685 (1944); *Knight v. Wheedon*, 104 Ga. 309, 30 S.E. 794 (1898); *Dibble v. Winter*, 274 Ill. 243, 93 N.E. 145 (1910); 169 A.L.R. 554 (1947). But cf. *Simpson v. Cornish*, 196 Wis. 125, 218 N.W. 193 (1928).

<sup>6</sup> First promulgated as "an Act Relating to the Execution of Wills" (1892), and then as "The Uniform Wills Act, Foreign Executed" (1910). See 9 U.L.A. 279. Similar statutes in the following states expressly mention "revocation" as well as "execution": Mont. Rev. Code Ann. (1935) §6988; N.D. Rev. Code (1943) §56-0406; S.D. Code (1939) §56-0212; Utah Code Ann. (1943) §101-1-14.

<sup>7</sup> *GOODRICH, CONFLICT OF LAWS*, 3d ed., §166 (1949); *PAGE, WILLS* §1635 (1944); *Shimshak v. Cox*, 166 La. 102, 116 S. 714 (1928); *Moore v. Exec. Com. of Foreign M. Presbyterian Co.*, 171 La. 191, 129 S. 920 (1930); *Lindsay v. Wilson*, 103 Md. 252, 63 A. 566, 2 L.R.A. (n.s.) 408 (1906); *State ex rel. Ruef v. Dist. Court*, 34 Mont. 96, 85 P. 866 (1906); *Estate of Grant*, 34 Hawaii 559 (1938).

<sup>8</sup> *Slocomb v. Slocomb*, 13 Allen (Mass.) 38 (1886); *In re Traversi*, 189 Misc. 251, 64 N.Y.S. (2d) 453 (1946).

<sup>9</sup> *In re Traversi*, supra, note 8. Revocation by cancellation, effective under the law of testator's domicile, though not in New York, was recognized by the New York court, and the Foreign Executed Wills provision held a limitation on the revocation provision. *Gailey v. Brown*, 169 Wis. 444, 171 N.W. 945 (1919). Denial of probate in Illinois because of revocation by operation of law was recognized by the Wisconsin court, although revocation would not have been effected under Wisconsin law. See also, *Matter of Thompson*, 181 Misc. 385, 41 N.Y.S. (2d) 416 (1943). But cf. *In re Estate of Lufkin*, 32 Hawaii 826 (1933). Will made in California; will revoked by marriage of testatrix according to law of California, where she was domiciled at the time, but not according to law of Hawaii, where she was domiciled at death. *Held*, Hawaii law controls validity of revocation. Possible explanation of this decision lies in the theory that revocation by marriage does not take effect at the time, but only at death.

will" executed according to Illinois law and effective as a revocation there.<sup>10</sup> Can there be any difference, then, between such a revocation and a revocation by act to the instrument, in light of the statutory purpose? Indeed, it was argued by the dissent that the determination of the validity and due execution of a will necessarily involves a decision whether or not it has been legally revoked.<sup>11</sup> Therefore, there can be no technical distinction between execution and revocation as regards the fixing of the status of a will. Execution and revocation both relate to the "factum" of a will<sup>12</sup> and cannot be separated for the purposes of the statute. It should be noted that technical distinctions analogous to that drawn by the court in the principal case have been rejected in the construction of similar statutes by other courts. In the leading case of *Bayley v. Bailey*,<sup>13</sup> it was held that a "revoking will" was to be classed as a "will," within the terms of the statute, and not as a "revocation" (the contention being that the statute did not change the rule as to revocation since it was not specifically mentioned). In *Slocomb v. Slocomb*,<sup>14</sup> the court held that a nuncupative will was a "will" within the terms of the statute, as well as a will in writing, even though a nuncupative will is not, strictly speaking, "executed." Therefore, it would seem that a determination by the courts of the domicile that an instrument is not the testator's last will because revoked by him should be binding upon all states which have laws adopting the law of the state of domicile as to questions of due execution. Any other conclusion restricts the usefulness of the statute, defeats its fundamental policy, and frustrates the obvious intent of the testator.

*Edward W. Rothe, S.Ed.*

<sup>10</sup> See *Matter of Logasa*, 161 Misc. 774, 293 N.Y.S. 116 (1937); *Bayley v. Bailey*, 59 Mass. (5 Cush.) 245 (1859).

<sup>11</sup> See *Gailey v. Brown*, *supra*, note 9, at 450.

<sup>12</sup> See *Home for the Aged v. Bantz*, 106 Md. 147 at 152, 66 A. 566 (1907).

<sup>13</sup> *Supra*, note 10.

<sup>14</sup> *Supra*, note 8.