

THE AMERICAN LAW REGISTER

FOUNDED 1852.

UNIVERSITY OF PENNSYLVANIA

DEPARTMENT OF LAW

VOL. { 48 O. S. } SEPTEMBER, 1900. No. 9.
 { 39 N. S. }

THE REVIVAL OF A PRIOR BY THE REVOCATION OF A LATER WILL.

The Statute of Frauds was, at the time of its passage, evidently thought by English lawmakers to be a complete and final disposition of all questions relative to the legal modes and forms for the expression of a man's testamentary intent. Experience has, however, proved that there are numerous instances which the statute does not explicitly cover. The consequence has been the growth of an enormous body of law dealing with the question whether a testator has succeeded legally in doing what he intended to do,—that is to say, whether his testamentary intent can be considered, in view of the condition or form in which he has left the evidence of such intent. Most of the uncertainties and omissions in the Statute of Frauds have been cured in England by the Wills Act of 1st Victoria, C. 26, which has greatly simplified the law of wills and done much to reduce it to a clear and uniform code both as to realty and personalty.

One of the cases not dealt with by the Statute of Frauds is that which arises where two or more wills exist, the later

revoking the earlier, and the later is itself revoked. The statute is silent as to the result of such revocation upon former wills. Its framers were careful to provide how a will might be revoked, but failed to provide any method for the revocation of a revocation. This was probably due to the fact that it was considered that a revocation of a revocation was itself really a new testamentary act. If it had been so considered from the first, all difficulty would have been removed. As it is, however, the question of revival of an earlier will by the destruction or other revocation of a later will is involved in much contradiction and conflict. The courts of different jurisdictions seem to have taken every conceivable view of the matter, and it can hardly be said that there is any doctrine which carries with it the decided weight of authority.

The matter has been settled in England by the statute of 1st Victoria, C. 26, Sec. 22 (1837), which provides "that no will or codicil, or any part thereof, which shall be in any way revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same."

We shall have occasion to refer again to the statute, and shall take up the problem first, irrespective of it and similar American enactments.

The facts in a general way, as to which we are to ascertain the law, are these: A makes his will; subsequently he makes a will which revokes the former one, either because it is inconsistent therewith or because it contains an express revocation of former wills. He then destroys this second will or otherwise revokes it. What effect has his action on the prior will which is still in existence?

The question appears to have been first raised in England in Chancery in the case of *Ex parte Hellier*,¹ where it was decreed that the cancellation of the second will did not set up the first. Sir George Lee said that the execution of the second will is a revocation of the first, though the second be afterwards canceled. This was a case of personal property, and of course the question of the revocation of the

¹ 3 Atk. 798 (1754).

first was decided apart from the provisions of the Statute of Frauds.

The next case arose at common law, and under the Statute of Frauds. It was *Goodright & Glazier v. Glazier*.² It there appeared that a will was made in 1757; a second in 1763. The former was never canceled; the second was canceled by the testator. Both wills were in the testator's custody at the time of his death; the second canceled, the first uncanceled. A verdict in ejectment was given in favor of the heir-at-law, as against the devisee, who was devisee in both wills. Lord Mansfield, in granting the rule for a new trial, remarked that in *Ex parte Hellier* (*supra*) Atkins only reported what passed in Chancery and there might be other circumstances appearing to the Ecclesiastical Court which might amount to a revocation of a will of *personalty*. He then went on to say, "Here, the testator has, by both wills, devised the lands in question to the defendant. His canceling the second is a declaration 'that he does not intend that to stand as his will.' Does not that speak, 'that his first will shall stand?' If he had intended to revoke the first will when he made the second, it must have operated as a declaration 'that the defendant should *not* take.' But that could not be his intention; because he devises to the defendant by both."

This reasoning is not very convincing, unless Lord Mansfield went upon the theory that the second will did not contain any express clause of revocation, and that therefore it could only be a revocation of the first if it took effect as a will, namely, if it gave the property to some one else than the devisee in the first will, in which case it would of course supersede it. In accordance with such a view of the case is the following paragraph from the opinion:

"Here the intention of the testator is plain and clear. A will is ambulatory till the death of the testator. If the testator lets it stand till he dies, it is his will; if he does not suffer it to do so, it is *not* his will. Here he had two. He had canceled the second; it has no effect, no operation; it is as no will at all, being canceled upon his death. But the former, which was never canceled, stands as his will."

² 4 Burr. 2512 (1770).

This view may well be taken, if, as stated, the second will contained no clause of revocation, and several courts have taken this to be all that was in issue in the case.³ It is true that in Burrow's Report no mention is made of an express clause of revocation in the second will, but in the report in Buller's *Nisi Prius* 266, and also in the report in Lofft, 575, it is said that the second will contained an express clause of revocation of all former wills. If this be true, then it appears that Lord Mansfield's reasoning as to the intention of the testator is unsatisfactory, for if the testator supposed the second will was a complete revocation of the first, he may have canceled it with the idea and intention of dying intestate. And such a hypothesis is at least as reasonable as that he intended his former will which he had declared revoked to be again his will.

Mr. Justice Yeates said "A will has no operation till the death of the testator. This second will never operated; it was only intentional. If by making the second he intended to revoke the former, yet the revocation was itself revocable; and he has revoked it."

This language seems also to point to a view that the case was not one of express revocation, or why the words "if he intended to revoke?" The justice went on to say that "Hellier's Case (*supra*) might be rightly determined; there might be collateral evidence of an intention to revoke."

Both this language and that of Lord Mansfield (*supra*) seem to indicate that the court thought the ascertainment of intention important as bearing on the question of the revival of the former will.

Justice Yeates then quoted the Statute of Frauds that "no devise in writing of lands, . . . shall be revocable otherwise than by some other will or codicil in writing, or other writing *declaring the same*, or by burning it; but all devises and bequests of lands, . . . shall remain and continue in force until the same be burned, etc.; or unless the same be altered by some other will or codicil in writing or other writing of the devisor, signed in the presence of three or four witnesses, *declaring the same*." He said, "Now

³ James v. Marvin, 3 Conn. 576 (1821); Colvin v. Warford, 20 Md. 357 (1863).

here are none of these circumstances used in what is pretended to be a revocation of this first will. Therefore the first will stands good." *Quære*, does this mean that the Justice understands that the second will contained no *declaration* (which word he italicizes) of a revocation, or does he mean that whether it contains such declaration or not, it can never be operative as a revocation till the death of the testator?

The above quotations and comments show how uncertain it is, exactly what was intended to be decided in this case. The court seems to intimate that the intent of the act of cancellation is important; it is not clear whether the revocation was express, or sought to be implied merely from certain inconsistencies in the two wills. It is hardly a case from which to deduce broad legal principles.

The same observations apply to the *dictum* of Lord Mansfield in *Harwood v. Goodright*,⁴ where he says "it is settled, that if a man by a second will revoked a former, yet, if he keep the first will undestroyed, and afterwards destroy the second, the first will is revived." This was not a case of express revocation, but merely of alleged inconsistency in the two wills.

The same judge delivered a contrary *dictum* in *Burtonshaw v. Gilbert*.⁵ That was a case of trespass. Plea, justification under authority of X, surviving devisee of the lands in question under the will of G dated 1759. Issue on the validity of said will. G made a will in 1759. He afterwards said it was not to his liking, and made a new will in 1761, with different dispositions of his property and an express clause of revocation of former wills. The will of 1759 was in duplicate, and the duplicate which G had at the time of making that of 1761, was torn up by his order. The other duplicate was in the hands of a devisee. He afterwards sent to his solicitor for the will of 1761, and on his death it was found canceled. The evidence showed that he had a few days before his death sent for a solicitor to make him a new will. The other duplicate of the will of 1759, above mentioned, was found uncanceled in his room with

⁴ Cowper, 87, 91 (1774).

⁵ Cowper, 49 (1774).

other papers. *Held*, he died intestate. Lord Mansfield: "He executes it (his intention to do away with his former will) by a new will in 1761, which is a complete, legal and effectual will; and if he had died immediately after, whether he had canceled the former or not, it would have been revoked; because at the end of the second will there is a declaration by which he revokes all former wills." He then goes on to hold that the cancellation is also sufficient to revoke finally the will of 1759 and put it beyond possibility of revival. Mr. Justice Aston concurred on the latter ground.

The above language shows that the revocation by the later will was looked upon as an executed act. If it is so, it is hard to see how it can be itself rescinded on the ground that it is put in a will which is ambulatory. Either Lord Mansfield contradicts himself or he decided *Goodright v. Glazier* on the ground that the second will in that case contained no express revocation.

The case of *Goodright v. Glazier* has, it is said,⁶ established the doctrine that, at common law the revocation of a revoking will revives the prior revoked will. This is said to result by law; it is not a presumption and proof to the contrary is not receivable. And it makes no difference whether the revoking will is such by virtue of an express revocatory clause therein contained or because it contains dispositions of property inconsistent with those of the prior will. And this, in spite of the language used in the case relative to testator's intention; for certainly the court thought an inquiry into the intention of testator important enough to discuss it and to reach a conclusion which they thought in accordance with his intention.

The Ecclesiastical Courts have not followed the seeming trend of *Ex parte Hellier* (*supra*) in holding that the presumption is adverse to a revival. Such seemed at first to be their attitude, but it early came to be settled that there was no presumption either in favor of or adverse to a revival. It was said to be a pure question of intention, and such

* 1 Jarm., Wills, 136 (Fourth Edition); 1 Wms., Executors (Fifth American Edition), 154-156. But see Powell, Devises (Second Edition), 526.

intention was to be gathered from any circumstances in the case.⁷ This view of the law, at least, has the merit of getting at the justice of a case. Whether it can be sustained under the provisions of the Statute of Frauds as to revocation, we shall discuss later.

Turning, now, to the American law, we find that the Statute of Frauds, with respect to wills, has been substantially adopted in almost all the states. The modifications, when there are any, in most instances are a reduction in the number of witnesses required in the execution of a will.

A number of states have legislation bearing on the precise question at issue. Virginia has adopted the Statute of 1 Victoria, C. 26, Section 22, bodily,⁸ so that in that state a revival of the prior will, upon destruction of the revoking one, can only be accomplished by a re-execution.⁹

Alabama,¹⁰ California,¹¹ Kentucky,¹² Missouri,¹³ and New York¹⁴ have statutory provisions almost identical in

⁷ In *Moore v. De La Torre*, 1 Phillim. 375 (1816), Sir John Nicholl said: "If it were necessary to decide the point, I should hold that it was not the presumption when B was canceled that A should revive." In *Moore v. Moore*, 1 Phillim. 406 (1817), the Court of Delegates was much pressed with Lord Mansfield's decision in *Goodright v. Glazier*, and seemed dissatisfied with it; they refused to adopt it. "The clear result of all the cases, the common-sense of them, is that it must be ascertained whether it was or was not the intention of the deceased that the will should stand." *Hooton v. Head*, 3 Phillim. 26, 32 (1819), per Sir John Nicholl. See also *Wilson v. Wilson*, 3 Phillim. 543, 554 (1821); *Usticke v. Bawden*, 2 Add. 116, 125 (1824); *Welch v. Phillips*, 1 Moore P. C. 299 (1836); *James v. Cohen*, 3 Curt. 770 (1844).

Since the Wills Act 1 Victoria, C. 26, Sec. 22, a will of personalty, like one of realty, cannot be revived by the destruction or revocation of a later revoking will: *Major v. Williams*, 3 Curt. 432 (1843); *Saunders v. Saunders*, 6 No. Cas. 524 (1848).

⁸ Sec. 9, Chap. 118, Code of 1873.

⁹ *Rudisill v. Rodes*, 29 Gratt. 147 (1877).

¹⁰ R. C. Sec. 1933.

¹¹ Code Sec. 1297. *In re Lones*, 108 Cal. 688; 41 Pac. 771 (1895), held that a third will, revoking a second, which had in turn revoked a first, did not revive the first because no such intention appeared on the face of the will.

¹² Gen. Stat. C. 113, Sec. 11; *Minor v. Guthrie*, 4 S. W. 179 (1887).

¹³ Wagn. Stat. 1366; *Beaumont v. Keim*, 50 Mo. 28 (1872).

¹⁴ 2 Rev. Stat., C. 6, Tit. 2, Sec. 53.

wording,¹⁵ and evidently copied from one another, which provide for the case in question. There is some doubt from the wording just what is intended, it being said there shall be no revival "unless it appear by the terms of such revocation that it was his intention to revive." The inquiry suggests itself, Does this mean that in case of a revocation by burning, tearing, etc., if testator at the time of doing the act states it to be a revival of his earlier will, that this is effective to revive it? This question has been answered in the negative in New York.¹⁶ X made a will and subsequently made a revoking will. Afterwards in the presence of witnesses he tore up the revoking will, saying that he was satisfied with the old one and would have it. The first will was in existence undestroyed at his death. *Held*, that under the statute there could be no revival without express republication, and the first will was not revived.

It would be hard to imagine a clearer case for revival short of express republication than the above, and, if the case is followed elsewhere, it means that in these states the statute is practically the same as the English Statute of 1 Victoria. This seems to be the intent of the enactment, though it is vague in expression.

The earlier American cases in point were decided in Pennsylvania. *Lawson v. Morrison*,¹⁷ contains *dicta* which cover the case. There A made a will in 1775, another in 1777, which he revoked; another in 1779, which was traced to her possession, but not found after her death. It was argued that the presumed destruction of the will of 1779 set up the will of 1775. There was no evidence that the will of 1779 contained a revoking clause or that it was inconsistent with that of 1775. The court held: First, that the

¹⁵ The New York statute is given: "If, after the making of any will, the testator shall duly make and execute a second will, the destruction, canceling or revocation of such second will shall not revive the first will unless it appear by the terms of such revocation that it was his intention to revive and give effect to his first will; or, unless after such destruction, canceling or revocation, he shall duly republish his will."

¹⁶ *In re Stickney's Will*, 52 N. Y. Supp. 929 (1898). See also *Ludlam v. Otis*, 15 Hun. 410 (1878).

¹⁷ 2 Dall. 286 (1792).

will of 1779 could not be said to be a revoking will, since its contents were not known to the court;¹⁸ second, that the presumption was that A herself destroyed the will of 1779;¹⁹ third, that if this was true, then the will of 1775 stood, for no one could have a will till he died, and when A died she had a subsisting will,—that of 1775; fourth, and this must be true, unless it was clearly proved that A had destroyed the will of 1779 with intent to die intestate; fifth, McKean, C. J., said: “Should a contrary opinion hold, to wit, that the first will was revoked at the instant the second was executed, yet the canceling of the second by the testatrix herself is a revival of the first if undestroyed. (Citing *Harwood v. Goodright*.)

Of course, all this is *dictum*, for the court held there was no sufficient evidence that the later will was a revoking will. The court, however, takes a different view from any yet examined, viz.: that there is a presumption of revival (whether the revoking will is so, either by reason of inconsistency or express revocation), but that such presumption may be met by proof that testator intended to die intestate.²⁰

In *Flintham v. Bradford*,²¹ which was an ejectment, the question was whether a will of 1821, which had been revoked by a will made in 1824, has been subsequently revived by the cancellation of the later will, and whether parol evidence was competent or admissible to rebut the presumption of an intent to revive. The court held the destruction of the second will revived the first, because a will is ambulatory till the death of the testator, and rejected the evidence of intent. Coulter, J., said: “The other rejected evidence . . . would, in effect, if allowed to prevail, defeat the rule in regard to the effect which the cancellation of a posterior will has on a prior will preserved by

¹⁸ See *Harwood v. Goodright* (*supra*); *Freeman v. Freeman*, 5 D. M. & G. 704 (1854); *Cutto v. Gilbert*, 9 Mo. P. C. 131 (1854).

¹⁹ *Brown v. Brown*, 8 Ell. & Bl. 876 (1858); *Finch v. Finch*, L. R. 1 P. & D. 371; *Burns v. Burns*, 4 S. & R. 295 (1818); *Newell v. Homer*, 120 Mass. 277 (1876).

²⁰ In *Boudinot v. Bradford*, 2 Yeates (Pa.) 170 (1797), the court said that parol evidence was admissible to show *quo animo* the cancellation of the second will was done.

²¹ 10 Pa. 82 (1848).

the testator, and would also amount to a revocation by word of mouth. I will admit that if it clearly proved that the testator, at the time he canceled the posterior will, intended to die intestate, but had not the prior will then in his possession or power, so as to annul or destroy it, that such intent existing at the time of cancellation, and connected with it, might be given in evidence as part of the *res gestæ*.²²

This case comes very close to the common-law rule. The field for evidence of intention is by it very much limited. The common-law doctrine is adopted in New Jersey.²³

In Massachusetts, in a comparatively late case, *Pickens v. Davis*,²⁴ the Supreme Court, with most of the statutes and decisions before it, has adopted the view that there is a presumption against revival, but this presumption may be overcome by evidence of intent to revive, and has even gone so far as to hold that declarations of the testator made prior and subsequent to the revocation of the second will are admissible to prove the *quo animo*.²⁵ The court said: "Evidence of declarations made at other times is to be received with caution. They may have been made for the very purpose of misleading the hearer as to the disposition which the speaker meant to make of his property."

The Supreme Court of Georgia,²⁶ in a *dictum*, has taken the same view, apparently, though there is an earlier case which seems somewhat inconsistent with this view.²⁷ The same rule appears to prevail in South Carolina.²⁸

²² Cited with approval, *Comm. v. Stauffer*, 10 Pa. 350 (1849).

²³ *Randall v. Beatty*, 31 N. J. Eq. 643 (1879).

²⁴ 134 Mass. 252 (1883).

²⁵ See, also, *Williams v. Williams*, 142 Mass. 515 (1886), where a testator executed three wills, each containing a revocatory clause, and each of which he published as his last will. At the time he executed the third will he said he would keep them all till he made up his mind which he wanted for his will. He afterwards destroyed the first and third. *Held*, that these facts warranted a finding that the testator, in destroying the third will, intended to revive the second, and it should be admitted to probate.

²⁶ *Lively v. Harwell*, 29 Ga. 509 (1859).

²⁷ *Barksdale v. Hopkins*, 23 Ga. 332 (1857).

²⁸ *Taylor v. Taylor*, 2 Nott. & McC. 482 (1820).

Tennessee seems to have adopted the rule of the Ecclesiastical Courts of England.²⁹

It is not clear what rule is followed in North Carolina.³⁰

A number of jurisdictions have adopted the rule now enforced in England, under 1 Victoria, without any express statutory provision, founding their decisions on an interpretation of the provisions of the Statute of Frauds as to revocations.

In *Bohanon v. Wolcott*,³¹ the facts were that G made a will in 1829. In 1831 he made a second, expressly revoking all former wills. He afterwards expressed an intention of revoking his last will and applied to B to write a new one for him. He handed B the will of 1831, with interlineations and erasures, and declared he had made them and had done away with that will. G expressed a desire to B that if the new will should not be published the will of 1829 should go into effect. He died before publishing the new will. *Held*, first, The will of 1831 was validly canceled; second, That of 1829 was not republished. Lord Mansfield's opinion in *Goodright v. Glazier* was said not to be sound. Smith, J., said: "A will is ambulatory, and has no effect until the death of the testator. If he lets it stand till his death, it is his will, but if revoked it cannot be. But when revoked, it cannot be considered as having either a present or a potential existence, and must require some express and direct act of the testator, which, in fact, does not revive the defunct will, but adopts it as the present will of the testator, and it is to be regarded as a new testamentary act of the party."³²

In *Hawes v. Nicholas*,³³ probate was asked of an instrument dated 1873. The contestants offered to prove that testator made and executed, with due formalities, another will in 1879, in which he expressly revoked all former wills, and that he afterwards destroyed the same. The contention was that he died intestate. The Texas Statute³⁴ pro-

²⁹ *McClure v. McClure*, 86 Tenn. 173 (1887).

³⁰ *Marsh v. Marsh*, 3 Jones L. 77 (1855).

³¹ 1 How. (Miss.) 336 (1836).

³² See, also, *Colvin v. Warford*, 20 Md. 357 (1863).

³³ 72 Tex. 481 (1889).

³⁴ R. S., Art. 4861.

vides for revocation "by a subsequent will, codicil, or declaration in writing executed with like formalities." The court declared an intestacy, saying: "A written declaration properly executed as effectually revokes a will from the date of its execution as does its destruction. If the purpose to revoke is sufficiently expressed, and the writing is properly executed it cannot be controlled or limited by the name given the instrument or by its containing other provisions."

In Connecticut in the absence of statutory provision as to revocation the same conclusion was reached.³⁵ There was an express clause of revocation, and it was held that the destruction of the later will did not revive the former.

Subsequently a statute was passed in Connecticut providing that no will should be revoked except by burning, etc., "or by a later will or codicil." This differs from the wording of the Statute of Frauds in omitting the phrase "or other writing declaring the same." In *Peck's Appeal*,³⁶ the court suggested that the aspect of the above question was changed by the statute, and intimated that under it a will containing even an express clause of revocation must take effect as a will before it could have any effect on a former will. The case was, however, one of implied revocation, because there was no evidence of the existence of an express clause of revocation in the second will. Except for this *dictum*, the authority of *James v. Marvin* is unimpaired.

The distinction noted between the cases of *James v. Marvin* (*supra*) and *Peck's Appeal* (*supra*) as to express and implied revocations is carried out in Michigan. In *Scott v. Fink*³⁷ the second will contained an express revoking clause and was burned at the direction of the testator. It was held that this did not revive the first will,³⁸ and a distinction was drawn between such a case as this and one where the revocation occurred, because the second will was inconsistent with the first.

³⁵ *James v. Marvin*, 3 Conn 576 (1821).

³⁶ 50 Conn. 563 (1883).

³⁷ 45 Mich. 241 (1881).

³⁸ *Stevens v. Hope*, 52 Mich. 65 (1883).

In *Cheever v. North*,³⁹ on application for probate of a will, evidence was offered of the execution of a second will. The jury found that the second "made a complete disposition of his estate." There was no evidence and no finding as to whether the second will contained, in terms, a revocation of the prior will. The court admitted the first will to probate, holding that while an express revocation operated instantaneously to abolish a former will, in such a case as this the second will must take effect at testator's death to be a revocation of the earlier will.

We have now taken an exhaustive survey of the views of the various courts on this subject, and it remains merely to comment briefly upon them. Let us first discuss the case where an express clause of revocation is inserted in the later will.

It is believed that the problem really resolves itself into this question, What is a revocation under the Statute of Frauds? If a revocation has taken place by the execution of the second will, then the revoked instrument can never be set up again save by certain formalities prescribed by the statute. If, on the other hand, no sufficient statutory revocation has taken place, the original will has been in full force all along, and it is rather incongruous to speak of the "revival" of something that has never been dead.

The statute provides certain modes for the revocation of a will, viz.: First, burning, tearing, etc.; second, another will or codicil; third, a writing executed with formalities like those of a will, declaring the same. If any of these requirements are fulfilled the will is revoked. Let us see how.

The making of a will is a deliberative act; therefore, it is subject to change up to the time of death; it is the expression of a future purpose—an intention, and, therefore, during life, cannot be irrevocable and final. It is executory. On the other hand, a revocation is executed. It is the expression of a present purpose. If it means anything it means that a testator has fully and once for all made up his mind that a given paper does not represent his present wish as to the final disposition of his property. Now, if the law.

³⁹ 106 Mich. 390; 64 N. W. 455 (1895).

requires him to manifest that wish by certain formalities, and provides a method for destroying the efficacy of the formalities he has gone through, why, if he ever wishes to re-establish such a will, should he not be required again to manifest his purpose as though no will existed?

It certainly never was contended that after the revocation of a will by cancellation the testator could, by a parol declaration, revoke the cancellation and declare a change of purpose. It is hard to imagine that any court would hold that a duly signed and executed paper declaring a revocation could be done away with by any act less than a republication or re-execution of the revoked will.⁴⁰ If this is true, it is because a revocation is an act different in nature from a mere testamentary disposition.

What, then, gives a clause of revocation, contained in a will, a different character from any other form of revocation? It is said that it is part of a will, and that the will is ambulatory, consequently the clause of revocation is ambulatory, and, if ambulatory, it is subject to be abolished at any time up to the death of the testator. If this be true it can have no final effect until the death of the testator. Consequently, the prior will remains unaffected until that time. If, in the meantime, the will containing the clause of revocation is revoked, it leaves the prior will just as it was at the time of its execution,—in full force.⁴¹

Now, either this proposition is true, in which case there must be a revival as matter of law; or it is false, in which case there cannot possibly be a revival.

Let us examine the books to determine the opinion of the courts on this question of the inseparability of the revocatory clause from the rest of the will.

“An express revocation is a positive act of the party, independent of the will which may happen to contain it, and operating instantaneously and *per se*. As a clear consequence resulting from this principle, all prior wills are

⁴⁰ In *Walton v. Walton*, 7 Johns. Ch. 258 (1823), it was held that a contract to convey land which had been devised was a revocation, and that the devise could not again be set up except by express republication.

⁴¹ 1 Redf. Wills, Sec. 328; *Goodright v. Glazier*, *supra*.

recalled or reversed,—the proper meaning of the word revoked,—and must remain in this condition until revived by republication.”⁴²

“A man has power, then, to insert in his will a revocation that shall be operative, though it turn out that the will itself shall be inoperative. Having power, a man may, if he pleases, insert in his will a revocation that shall be operative independently of the will.”⁴³

“But a clause in a subsequent will, which in terms revokes a previous will, is not only an expression of the purpose to revoke the previous will, but an actual consummation of it, and the revocation is complete and conclusive, without regard to the testamentary provisions of the will containing it.”⁴⁴

“If it can be proved that a later will was duly executed, attested and subscribed, and that it contained a clause expressly revoking all former wills, but evidence of the rest of its contents cannot be obtained, it is nevertheless a good revocation.”⁴⁵

“The clause of revocation is not necessarily testamentary in its character. It might as well be executed as a separate instrument. The fact that it is inserted in a will does not necessarily show that the testator intended that it should be dependent on the continuance in force of all the other provisions by which his property is disposed of.”⁴⁶

In the light of these quotations, it does not seem too much to say that there is no difference between this sort of revocation and any other, and that it is not ambulatory as some of the cases have held.⁴⁷ If this is so, the revocation is complete, and nothing but a new testamentary act, in the form prescribed by statute, will suffice to revivify the earlier will.⁴⁸

⁴² Hosmer, C. J., *James v. Marvin*, 3 Conn. 576 (1821).

⁴³ *Barksdale v. Hopkins*, 23 Ga. 332 (1857).

⁴⁴ *Colvin v. Warford*, 20 Md. 357 (1863).

⁴⁵ Gray, C. J., *Wallis v. Wallis*, 114 Mass. 510 (1874).

⁴⁶ *Pickens v. Davis*, 134 Mass. 252 (1883). See also the language quoted from *Bohanon v. Wolcott*, *supra*, p. —; *Hawes v. Nicholas*, *supra*, p. —.

⁴⁷ *Lawson v. Morrison*, *supra*, p. —; *Flintham v. Bradford*, *supra*, p. —. 1 Jarm. Wills (Fourth Edition) 136.

⁴⁸ *Bohanon v. Wolcott*, *supra*, p. —; *Scott v. Fink*, *supra*, p. —.

It is believed that either one of two positions is inevitable; that there is a revocation and no revival; or no revocation, and the former will remains unimpaired. Nevertheless, some courts have, as we have seen, taken cognizance of the intention of the testator, for or against the revival. This may be well enough where no statutory method of revocation is prescribed, and where no formality is necessary to the making of a will, but if a will is revoked by a clause inserted in a later will, then it is gone. However much the testator may intend to set it up again by destroying the revoking will, his intention can have no effect, and a court should not hear evidence of intention, for the statute provides that no testamentary intent is sufficient unless evidenced in certain ways. On this ground such cases as *Pickens v. Davis*⁴⁹ and *Wallis v. Wallis*⁵⁰ seem to be ill-considered.

On the other hand, if the second will is no revocation, its destruction as matter of law must leave the first in force, and the fact that testator said he did not intend it to be in force, but intended to die intestate, cannot alter the status of the first will. The statute provides against the revocation of wills by word of mouth, and it nowhere provides that the cancellation of a revoking will, with intent to die intestate, shall revoke a former will. Therefore, evidence of intent is immaterial and irrelevant here. On this ground *Flintham v. Bradford*⁵¹ seems to be erroneous.

A very different question is raised where the second will contains no clause of revocation, but simply devises the property in a different manner from the first. In such a case, if the second will takes effect upon the death of the testator, the first cannot, and, of course, the second does, take effect as being the expression of the testator's latest intent. Many of the cases⁵² recognize this distinction, which is very well brought out in the Michigan cases.⁵³ In fact, the Michigan

⁴⁹ *Supra*, p. —.

⁵⁰ *Supra*, p. —.

⁵¹ *Supra*, p. —.

⁵² *James v. Marvin*, *supra*, p. —; *Colvin v. Warford*, *supra*, p. —.
Bohanon v. Wolcott, *supra*, p. —.

⁵³ *Scott v. Fink*, *supra*, p. —; *Cheever v. North*, *supra*, p. —.

Supreme Court takes the most logical and consistent view of the problem, and the one which, it is submitted, ought to prevail in jurisdictions where the Statute of Frauds or similar enactments are in force, and where there is no such statute as 1 Victoria, C. 26, Sec. 22. It would tend greatly to simplification of the now hopeless confusion, were all the states to follow the lead of England and the states heretofore mentioned,⁵⁴ by direct legislation covering the point in controversy. The statute of 1 Victoria was suggested by long experience in England, and has been found quite satisfactory in its operation.

Owen J. Roberts.

Philadelphia, August 1, 1900.

⁵⁴*Supra*, p. —.