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Revival of a Revoked Will

THE question whether the revocation of a will which itself revoked a former one operates to revive or restore¹ the earlier will is no new legal problem. More than a century ago different answers to it seem to have been given by the common law courts on the one hand and the ecclesiastical courts on the other. Many American jurisdictions today apply the doctrines of one or the other of these courts. A rule which differs substantially from both, however, has been adopted by statute in England² and in nearly one-half of the states,³

¹ There is merit in the suggestion that the term "restoration" may be preferable to the orthodox one of "revival," since the latter implies that the earlier will is revoked immediately upon the execution of the later will—a controversial subject. Alvin E. Evans, *Testamentary Revival* (1927) 16 Ky. L. J. 47.

² 7 Wm. IV & 1 Vict. (1837) c. 26, §22. (Quoted *infra*, p. 269).

³ ALA. CODE ANN. (Michie, 1928) §10601; ARK. DIG. STAT. (Pope, 1937) §14528; CAL. PROB. CODE §75; GA. CODE (1933) §§113-403, 113-409; IDAHO CODE ANN. (1932) §14-310; IND. ANN. STAT. (Burns, 1926) §3455; KAN. GEN. STAT. ANN. (Corrick, 1935) §22-242; KY. STAT. ANN. (Carroll, 1930) §4834; MO. REV. STAT. (1929) §524; MONT. REV. CODES ANN. (Anderson & McFarland, 1935) §6999; NEV. COMP. LAWS (Hillyer, 1929) §9913; N. M. STAT. ANN. (Courtright, 1929) §154-110; N. Y. DECEDENT ESTATE LAW (1909) §41; N. D. COMP. LAWS ANN. (1913) §5665; OHIO ANN. CODE (Throckmorton, 1930) §10562; OKLA. STAT. (Harlow, 1931) §1561; ORE. CODE ANN. (1930) §10-511; S. D. CODE (1939) §56.0222; UTAH REV. STAT. (1933) §101-1-23; VA. CODE ANN. (Michie, 1936) §5234; WASH. REV. STAT. ANN. (Remington, 1932) §1405; W. VA. CODE (1931) c. 41, art. 1, §8.

The provisions of the Alabama, Idaho, Indiana, Kansas, Montana, New York, North Dakota, Ohio, Oklahoma, South Dakota, and Utah statutes are substantially the same as those of section 75 of the California Probate Code (quoted p. 266, *infra*).

The wording of the Kentucky, Virginia, and West Virginia statutes is similar to that of section 22 of the English Wills Act of 1837 (quoted p. 269, *infra*). These statutes, however, substitute for the concluding phrase of the first sentence of the English statute, after the word "required," the provision "and then only to the extent to which an intention to revive the same is shown." They omit the entire second sentence of the English statute which refers specifically to the revival of a will or codicil which has been first partially and then wholly revoked.

The Nevada statute is practically identical with section 75 of the California Probate Code, except that the last word is "reexecuted" instead of "republished."

The Arkansas, Missouri, Oregon, and Washington statutes differ from the California Probate Code section in that they omit the concluding clause "or unless, after such destruction, or other revocation the first will is duly republished."

The prohibitions of the Georgia statute apply only to wills which expressly revoke former wills.

The New Mexico statute provides that where a second will annulling an earlier one has been made, the annulling of the second does not revive the first "unless the validity

including California. It may be of interest to note that among the legal literature on the subject are an opinion of the Supreme Court of Nebraska by Dean Roscoe Pound, then a commissioner of the Nebraska court,⁴ and a law review article by Justice Owen D. Roberts, then a young instructor in the Law School of the University of Pennsylvania.⁵

The California statute was originally enacted in 1850,⁶ was subsequently taken over as section 1297 of the Civil Code, and now appears in substantially its original form as section 75 of the Probate Code. It reads as follows:

"If, after making a will, the testator makes a second will, the destruction or other revocation of the second will does not revive the first will, unless it appears by the terms of such revocation⁷ that it was the intention to revive and give effect to the first will, or unless, after such destruction or other revocation, the first will is duly republished."⁸

Although the general impression seems to be that the suggestion for this and similar legislation in other states came from the English Wills Act of 1837,⁹ in fact this "anti-revival" provision appears in

of the first will be acknowledged." The uncertainty as to what is required to constitute an acknowledgment within the terms of this statute has apparently not been removed by any reported decision.

⁴ *Williams v. Miles* (1903) 68 Neh. 463, 94 N. W. 705, (1906) 110 Am. St. Rep. 431, (1904) 62 L. R. A. 383.

⁵ *The Revival of a Prior by a Revocation of a Later Will* (1900) 48 AM. L. REV. (N. S.) 505.

⁶ Cal. Stats. 1850, p. 178, § 11.

⁷ The prevailing, and, it would seem, the correct interpretation of the qualification, "unless it appears by the terms of such revocation," is that it is applicable only to a written revocation. Oral declarations made by the testator at the time of revoking the later will to the effect that he intends thereby to revive the earlier will are not sufficient, under a statute so worded, to make the earlier will effective. *In re Lones* (1895) 108 Cal. 688, 41 Pac. 771; *Matter of Stickney* (1899) 161 N. Y. 42, 55 N. E. 396, (1901) 76 Am. St. Rep. 246; *Matter of Kuntz* (1914) 163 App. Div. 125, 148 N. Y. Supp. 382; *Collins v. Collins* (1924) 110 Ohio St. 105, 143 N. E. 561, (1925) 38 A. L. R. 230. It must be admitted, however, that the phrase "terms of such revocation" is not free from ambiguity. Law students, the writer has found, are apt to assume that it includes oral declarations made contemporaneously with the physical destruction of the will; and in support of their assumption they have no less an authority than Chancellor Kent. 4 KENT COMM. *532; see also *Beaumont v. Keim* (1872) 50 Mo. 28.

⁸ The restrictions of the statute against revival are applicable where the earlier will was revoked by virtue of the inconsistent provisions of the later one as well as where the later will contained an express revocatory clause. *Estate of Bassett* (1925) 196 Cal. 576, 238 Pac. 666.

It has been held that the first will is "duly republished," within the meaning of the statute, only if the testator declares to the same persons who were witnesses to its original execution that he now intends it to be his will. *Matter of Stickney*; *Collins v. Collins*, both *supra* note 7.

⁹ 7 WM. IV & 1 VICT. (1837) c. 26, § 22.

the New York Revised Statutes of 1830.¹⁰ In recommending to the legislature in 1827 that such a restriction or prohibition against the revival of wills be adopted as the law of New York, the Revisers said:

“What is the precise effect of the cancelling or revocation of a subsequent, in setting up a prior, will, seems very questionable, and particularly in relation to wills of personal property. In the courts of common law, the presumption (it is said) is in favor of the revival of the former will; but in the ecclesiastical courts, (to the decisions of which, it is supposed by many that our surrogates are bound to conform), either an opposite presumption prevails, or the case is considered to be open without prejudice to the examination of testimony. In both courts, however, the law is undisputed, that parol evidence is admissible to ascertain the real intentions of the testator, and to determine the fact of a revival of his will, or a designed intestacy. . . . It is this rule which the Revisers propose to change in the above section, by adopting the presumption against a revival, and excluding evidence to contradict it. It seems to them that the admission of parol evidence in any case to ascertain the intentions of the deceased, is contrary to the whole spirit and policy of the statute of wills, and is calculated to let in all the mischiefs which its salutary provisions were framed to prevent. It is true, that the rigid rule proposed by the Revisers may operate in some cases to defeat the intention of testators; but it is obvious that the same objection may be urged against the observance of any of the solemnities which the statute requires. The whole statute proceeds on the principle that the hazard, that in some cases the real intentions of the deceased may be violated, and his bounty be intercepted from the persons he designated to share it; is not to be compared with the danger, that the claims of those whom the law would entitle to his estate, may be defeated by fraud and perjury, if any other than the most certain and solemn evidence of intention is permitted to be introduced. In this country especially, we should not hesitate to carry the principle of the statute to its full extent. We may safely lean in favor of intestacy; since it rarely happens that the dispositions of a disputed will are as just and equitable as those which, in the event of its being set aside, the law provides.”¹¹

The statute proposed by the Revisers and enacted by the New York legislature (and, subsequently, by the California legislature) was a marked departure from the rules previously existing under either the common or the ecclesiastical law. As stated by the Revisers, the ecclesiastical rule was that while the revocation of the revoking will did not necessarily revive the revoked will, such revival took place if that was the testator's intention, *i. e.*, if it was proved that he revoked the later will with the intention thereby to restore the earlier

¹⁰ 2 N. Y. REV. STAT. (1st ed. 1829) 66, § 53.

¹¹ Report of Revisers of N. Y. Statutes of 1827-1828, pt. II, c. VI, § 61, in 3 N. Y. REV. STAT. (2d ed. 1836) App. 633-634.

one. This rule obtains in a number of American jurisdictions today.¹² The ecclesiastical court rule is generally stated as recognizing no presumption either for or against the revival of the earlier will from the mere revocation of the later one.¹³ An occasional American case that purports to follow this rule may possibly go a step further and recognize a presumption in favor of revival.¹⁴ It has also been suggested¹⁵ that other cases¹⁶ furnish another variation from the ecclesiastical court rule, and recognize a presumption against revival. It is not clear, however, that these cases go any further than to hold that there is no presumption in favor of revival. It may also be doubted whether there is much practical difference between refusing to recognize that there is any presumption, and holding that there is a presumption against revival. In either case, the proponent seems to assume the burden of persuading the court or jury that the testator intended that the earlier will should be revived. Whether a presumption against revival amounts to anything more than this, depends upon the legal treatment of a presumption in the particular jurisdiction—a topic not within the scope of this article.¹⁷

The common law rule is usually understood as being even more opposed to the rule established by the New York Revised Statutes than the above-quoted statement by the Revisers would indicate. "It seems to have been held generally by the common law courts, that in such a case [*i.e.*, on the revocation of the later will] it was a necessary conclusion of law, admitting of no proof to the contrary, that the former will was revived. This rule was deduced from the nature of the revoking instrument, which is itself revocable and never becomes final and absolute until the death of the testator; and it was considered that the effectual revocation of such instrument, restored the former

¹² *Blackett v. Ziegler* (1911) 153 Iowa 344, 133 N. W. 901, (1912) 37 L. R. A. (N. S.) 291; *Colvin v. Warford* (1863) 20 Md. 357; *Pickens v. Davis* (1883) 134 Mass. 252, (1884) 45 Am. Rep. 322; *Williams v. Miles*, *supra* note 4; *Lane v. Hill* (1895) 68 N. H. 275, 44 Atl. 393, (1900) 73 Am. St. Rep. 591; *McClure v. McClure* (1887) 86 Tenn. 173, 6 S. W. 44; *In re Gould's Will* (1900) 72 Vt. 316, 47 Atl. 1082.

¹³ *Usticke v. Bawden* (1824) 2 Add. Ecc. 116; *cf. Wilson v. Wilson* (1821) 3 Phill. 543; *ATKINSON, WILLS* (1937) 423; 1 *PAGE, WILLS* (2d ed. 1926) § 443.

¹⁴ *Linginfelter v. Linginfelter* (1807) 3 Ky. (1 Hardin) 127; *Colvin v. Warford*, *supra* note 12, *semble*; *Lawson v. Morrison* (Pa. 1792) 2 Dall. 286, (1886) 1 Am. Dec. 288. It is not clear whether the courts in the Kentucky and Pennsylvania cases mean to recognize a presumption in favor of revival or to approve of the common law rule of revival regardless of intention.

¹⁵ *ATKINSON, loc. cit. supra* note 13.

¹⁶ *Pickens v. Davis*; *Lane v. Hill*, both *supra* note 12.

¹⁷ See *Morgan, Instructing the Jury Upon Presumptions and Burden of Proof* (1933) 47 HARV. L. REV. 59; *Morgan and Maguire, Looking Backward and Forward at Evidence* (1937) 50 *ibid.* 909, 911-913.

will and left it to operate in like manner and with like effect as if the revoking will had never been executed."¹⁸ This statement is representative of the common law rule as it exists in a number of American states today.¹⁹ It has been pointed out by Justice Roberts, however, that the original English common law doctrine was not as clearly established in favor of automatic revival of the earlier will regardless of the testator's intention, as seems now to be generally accepted.²⁰ In a few states the common law rule is applied only where the later will operates as a revocation because of its inconsistent provisions. Where the later will contains an express revocatory clause, no revival is permitted.²¹

Several years after the enactment of the New York statute a somewhat similar provision was adopted in England as part of the Wills Act of 1837. This statute, which is still in force, provides:

"XXII. And be it further enacted, That no Will or Codicil, or any Part thereof, which shall be in any Manner revoked, shall be revived otherwise

¹⁸ Rudisill's Ex'r v. Rodes (Va. 1877) 29 Gratt. 147, 149.

¹⁹ Whitehill v. Halbing (1922) 98 Conn. 21, 118 Atl. 454, (1924) 28 A.L.R. 895; cf. James v. Marvin (1821) 3 Conn. 576 (distinguished in Whitehill v. Halbing as having been decided upon basis of an earlier statute subsequently repealed), holding that there could be no revival where later will contained an express revocatory clause. Dawson v. Smith (1864) 8 Del. (3 Houst.) 92; Shaefer v. Voyle (1924) 88 Fla. 170, 102 So. 7; Stetson v. Stetson (1903) 200 Ill. 601, 66 N. E. 262, (1903) 61 L. R. A. 258; Succession of Dambly (1938) 191 La. 500, 186 So. 7 (The Louisiana court did not, of course, purport to adopt the "common law" rule as such, or to follow cases in other states which apply that rule, but rested its decision on a Louisiana Civil Code section [on its face not decisive of the question] and general civil law principles. Apparently civil law commentators are no more in agreement on the problem of revival than are those whose sphere is the common or the ecclesiastical law. See authorities cited in Note (1939) 1 LA. L. REV. 464); Cheever v. North (1895) 106 Mich 390, 64 N. W. 455, (1898) 58 Am. St. Rep. 499, (1897) 37 L. R. A. 561; *In re* Block (1937) 15 N. J. Misc. 233, 190 Atl. 315; Bates v. Hacking (1907) 28 R. I. 523, (1908) 29 R. I. 1, 68 Atl. 622, (1909) 125 Am. St. Rep. 759, (1908) 14 L. R. A. (N. s.) 937; Taylor v. Taylor (S. C. 1820) 2 Nott & McC. 482; Kollock v. Williams (1925) 131 S. C. 352, 127 S. E. 444.

²⁰ Roberts, *loc. cit. supra* note 5.

²¹ Michigan seems to be the only state where it has been squarely held that the common law rule as to revival applies when the later will revoked the earlier one because of its inconsistent provisions but where no revival is permitted when the later will contained an express revocatory clause. Cheever v. North, *supra* note 19; Danley v. Jefferson (1908) 150 Mich. 590, 114 N. W. 470, 121 Am. St. Rep. 640, (1909) 13 Ann. Cas. 242. In refusing to permit revival where an express revocatory clause was present in the later will, Texas and Wisconsin decisions, especially the latter, imply that a different result might have obtained had the revocatory clause been absent. Hawes v. Nicholas (1899) 72 Tex. 481, 10 S. W. 558, 2 L. R. A. 863; cf. Brackenridge v. Roberts & McIntyre (1924) 114 Tex. 418, 267 S. W. 244; *In re* Noon's Will (1902) 115 Wis. 299, 91 N. W. 670, (1904) 95 Am. St. Rep. 944; Estate of Laege (1923) 180 Wis. 32, 192 N. W. 373. See also Blackett v. Ziegler, *supra* note 12, where the Iowa court applied the ecclesiastical court rule to a situation where the later will had an express revocatory clause, but implied that without such a clause the common law rule of automatic revival would have been applicable.

than by the Re-execution thereof, or by a Codicil executed in manner herein-before required, and showing an Intention to revive the same; and when any Will or Codicil which shall be partly revoked, and afterward wholly revoked, shall be revived, such Revival shall not extend to so much thereof as shall have been revoked before the Revocation of the whole thereof, unless an Intention to the contrary shall be shown."²²

Whether the recommendations of the New York Revisers had anything to do with the adoption of the English legislation, the present writer has been unable to ascertain. No evidence has come to his attention which would indicate that the New York statute was even known in England at the date of the passage of the Wills Act. It is worthy of note, however, that in the Fourth Report of the Real Property Commissioners of 1833, on which the Wills Act was largely based, there appears a recommendation for a revival statute almost precisely contra to the "anti-revival" one which was actually enacted. The Commissioners said:

"We propose that no Will shall be revived, or be made to speak as from a subsequent date, except by re-execution, or by a Codicil showing an intention to revive or confirm the Will.

"The only exception we think necessary to this rule is, where a Will, which has been wholly or partially revoked by a subsequent Will or Codicil, is left perfect, and the subsequent Will or Codicil is cancelled or otherwise destroyed. If this exception were not allowed, Wills might be defeated by parol evidence that subsequent Wills had been made and destroyed."²³

Nothing has come to the attention of the present writer which gives an inkling as to why the recommendation of the Commissioners was not adopted. Several references to the Wills Act appeared in English law periodicals while it was pending in Parliament and shortly after it was enacted, but apparently there are none which lay any emphasis on the "anti-revival" provision of the Act or comment on its departure from the recommendation of the Commissioners.

The wording of the Wills Act, it may be noted, is not as unqualifiedly against the revival of a revoked will by the destruction of the revoking will as is the statute drafted by the New York Revisers and now embodied in the California Probate Code. While the New York-California "anti-revival" statute makes no express reference to the earlier will as having been revoked, the restrictions of the English Act are made applicable only to wills "which shall be in any Manner

²² 7 W.M. IV & 1 VICT. (1837) c. 26, § 22.

²³ Fourth Report By Commissioners on the Law of England Respecting Real Property (1833) 34.

revoked.” It seems clear that the language of the Wills Act abrogates the ecclesiastical court rule, by which a revival of the revoked will takes place if that was the intention of the testator. It has been pointed out, however, that the wording of the Act is not incompatible with the common law doctrine of automatic revival.²⁴ The basis of the latter rule is the ambulatory character of the revoking will, the theory being that the revocation of the earlier will never becomes effective, since the revoking will itself has subsequently been revoked. In other words, the common law doctrine does not proceed on the theory of revival of a revoked will but on that of prevention of the revocation of the will. Since, therefore, the common law rule is that the earlier will was never effectively revoked, it seems arguable that that rule was not affected by section 22 of the Wills Act which only forbids the revival of revoked wills. A few years after its enactment, however, the Wills Act was judicially construed as preventing the earlier will from becoming effective upon the destruction of the revoking will,²⁵ and this seems to have become the recognized interpretation of that statute.²⁶

The defect in the common law rule in its now generally accepted form is that it restores the earlier and once revoked will even though the decedent intended to die intestate. The practical justification, if any, for so rigid a doctrine of automatic revival seems to rest upon the conviction of the undesirability of resorting to parol evidence to ascertain what the testator actually intended as to revival, plus the assumption that in the great majority of instances testators do intend to revive their earlier wills when they revoke their later ones. This assumption, however, would seem to be without sufficient foundation in fact, since it is not confined to situations where the earlier will is found among the testator's important papers or is proved to have been carefully preserved by the testator.

On the other hand, in absolutely inhibiting the revival of an earlier will on the revocation of a later one which itself revoked the former, even though it is clear that the testator intended that the earlier will should be effective, California and other jurisdictions with similar statutes have provided a pitfall for unsuspecting testators. In their desire that the establishment of a will should not be dependent upon the uncertainties of parol evidence of the testator's intention as to

²⁴ 1 PAGE, *op. cit. supra* note 13, § 446.

²⁵ *Major & Mundy v. Williams & Iles* (1843) 3 Curt. Ecc. 432.

²⁶ 1 JARMAN, WILLS (7th ed. 1930) 178-179; see also the English cases cited *infra* note 36.

revival, they have provided a remedy that is perhaps worse than the malady it was designed to cure. It would be difficult to contend successfully that there is no validity in the view expressed by the New York Revisers "that the admission of parol evidence in any case to ascertain the intentions of the deceased, is contrary to the whole spirit and policy of the statute of wills." The problem, however, would seem to be whether the practical consequences of excluding parol evidence are not so objectionable where the revival of a previously validly executed will is involved as to justify the admission of such evidence. There are other instances in which resort to parol evidence to ascertain a testator's intentions is not precluded. It is virtually axiomatic, for example, that parol evidence is admissible to explain so-called "latent ambiguities" in wills. Again, according to a number of decisions, the lack of testamentary intent in the execution of what appears to be a will may be shown by parol evidence.²⁷ It should also be remembered that although in one way an "anti-revival" statute prevents resort to parol evidence, in another way it necessitates reliance upon just that kind of evidence. As the English Commissioners of 1833 pertinently observed, if the exception which they recommended the Wills Act should contain were not made, "Wills might be defeated by parol evidence that subsequent Wills had been made and destroyed." It cannot fairly be said, however, that the New York Revisers overlooked this difficulty. They apparently felt that the parol evidence which their rule would let in would be less mischievous than that which it would keep out; that their statute would, at the worst, result in a disposition of the property according to the rules of intestacy²⁸ instead of as the decedent desired; while to admit evidence of intent to revive an earlier will might result in a disposition which not only failed to carry out his desires but which could also be of any conceivable character. Admission of parol evidence of intent to revive a revoked will, however, does not open the door as widely as

²⁷ Estate of Siemers (1927) 202 Cal. 424, 261 Pac. 298; Davis v. Rogers (1855) 6 Del. (1 Houst.) 44; Fleming v. Morrison (1904) 187 Mass. 120, 72 N. E. 499, (1905) 105 Am. St. Rep. 386; Clark v. Hugo (1921) 130 Va. 99, 107 S. E. 730; Nichols v. Nichols (1814) 2 Phill. 180; Lister v. Smith (1863) 3 Swa. & Tr. 282. *Contra*: Barnewell v. Murrell (1895) 108 Ala. 366, 18 So. 831; Brown v. Avery (1912) 63 Fla. 355, 58 So. 34, 31 Ann. Cas. 1914A 90; Heaston v. Krieg (1906) 167 Ind. 101, 77 N. E. 805, (1908) 119 Am. St. Rep. 475; *In re Kennedy's Estate* (1910) 159 Mich. 548, 124 N. W. 516, (1910) 28 L. R. A. (n. s.) 417.

²⁸ The Revisers disclose a bias in favor of intestacy with which many may well disagree. It seems an over-generalization to say that "it rarely happens that the dispositions of a disputed will are as just and equitable as those which, in the event of its being set aside, the law provides." Report of Revisers of N. Y. Statutes of 1827-1828, *loc. cit. supra* note 11.

might be supposed. Although such evidence may occasionally result in the probating of a will which, since its original revocation, the testator never actually intended should be effective, it will not permit of the establishment of a testamentary disposition which he never at any time desired.

If the effect of an "anti-revival" statute were a matter of fairly common knowledge among laymen, the principle objections to its practical operation would be eliminated. It is natural, however, for one unfamiliar with the technicalities of the law to assume that any will which he has properly executed will be effective so long as it is the only will which he leaves on his death. It is a common practice, moreover, for a testator to preserve among his papers a will which has been superseded by a later one. When he concludes that he prefers will number one to number two, it seems reasonable that he should simply destroy the latter. The will which he desires to have effective was properly executed and bears no evidence of revocation. It is unlikely to occur to him that there could be any question as to its validity, now that he has destroyed his later will. Nevertheless, wherever an "anti-revival" statute is in force, will number one remains revoked, and unless the testator re-executes or republishes it, or makes another will, he will die intestate.

In addition to providing a pitfall for testators who can scarcely be expected to know of its provisions, another serious objection to the "anti-revival" statute is that there is no reasonable certainty or uniformity in its application. No evidence of the execution of a later revoking will, which was itself subsequently revoked, will frequently be forthcoming in opposition to the probate of an earlier will. All witnesses and other persons having knowledge of the revoking will may have died; or although living, they may not be aware of the attempt to probate the earlier will, or may not be interested in opposing its probate or in aiding the heirs at law; or, like the testator himself, they may be unaware of the rule of law by which the revocation of the earlier will remains effective notwithstanding the later and revoking will has itself been revoked. Thus, whether the rule of Probate Code section 75 and similar statutes will actually apply or not is left pretty much to chance.

The operation of these "anti-revival" statutes is particularly capricious in the case of holographic wills. Here, the chances are even greater than in the case of witnessed wills that the earlier document will actually be probated notwithstanding the fact that it has been

revoked and has not been revived, re-executed or republished. It frequently happens that no one but the testator himself ever knows of the execution of the second holographic will which he subsequently destroys.

When the "anti-revival" rule as applied to holographic wills is compared with the established doctrine that effective alterations and additions may be made to a holographic will by the testator himself, an anomalous result is reached. Alterations or additions in the testator's handwriting become effective without any dating or signing, and without his re-dating or re-signing the will as a whole.²⁹ Where, however, the testator desires to have an earlier holographic will effective after having destroyed a latter will, the "anti-revival" statute requires, it seems, that he at least re-sign, if not entirely recopy, the earlier will. Apparently it is not enough that it already sets forth his testamentary wishes and conforms precisely to the statutory requirements of being "entirely written, dated and signed"³⁰ by his own hand.

Another situation of considerable hardship results in a number of states, including California, from the combined application of the "anti-revival" rule and the statutory provisions against the probate of lost or destroyed wills.³¹ In addition to requiring the testimony of two witnesses as to the contents of a lost or destroyed will, the California statute forbids the probate of lost or destroyed wills unless it can be shown that the will was either (1) in existence at the date of the testator's death, or (2) destroyed in his lifetime, either fraudulently or by public calamity, without his knowledge. Where a testator completely destroys a later will, intending thereby to restore an earlier will, the requirements of the "lost or destroyed will" statute cannot

²⁹ Estate of Finkler (1935) 3 Cal. (2d) 584, 46 P. (2d) 149; Succession of Guiraud (1927) 164 La. 620, 114 So. 489; La Rue v. Lee (1908) 63 W. Va. 388, 60 S. E. 388, (1910) 129 Am. St. Rep. 978, (1908) 14 L. R. A. (N. S.) 968.

³⁰ CAL. PROB. CODE § 53.

³¹ "No will shall be proven as a lost or destroyed will unless proved to have been in existence at the time of the death of the testator, or shown to have been destroyed fraudulently or by public calamity in the lifetime of the testator, without his knowledge; nor unless its provisions are clearly and distinctly proved by at least two credible witnesses. . . ." *Ibid.* § 350.

In at least eleven of the other states in which "anti-revival" statutes have been enacted there is also legislation restricting the probate of lost or destroyed wills, similar in effect to the foregoing California statute. See ARK. DIG. STAT. (Pope, 1937) § 14563; IDAHO CODE ANN. (1932) § 15-231; IND. ANN. STAT. (Burns, 1926) § 3495; KAN. GEN. STAT. ANN. (Corriek, 1935) § 22-249 *et seq.*; MONT. REV. CODES ANN. (Anderson & McFarland, 1935) § 10050; NEV. COMP. LAWS (Hillyer, 1929) § 9624; N. Y. DECEDENT ESTATE LAW (1909) § 204; N. D. COMP. LAWS ANN. (1913) § 8643; OHIO ANN. CODE (Throckmorton, 1930) § 10543; S. D. CODE (1939) § 35.0211; WASH. REV. STAT. ANN. (Remington, 1932) § 1390.

be complied with.³² As a result, the doctrine of so-called "dependent relative revocation," by which probate of the later will might be effected notwithstanding its apparent revocation,³³ is unavailable. The provisions of the two wills may be substantially the same and it may be unmistakable that the testator would greatly have preferred either one to intestacy. The "anti-revival" statute nevertheless prevents the probate of the earlier and existing will. The "lost or destroyed will" statute makes it impossible to probate the later and destroyed will.

Perhaps the most striking instance of the undesirability of the "anti-revival" rule is its operation in the case of the revocation of a codicil which provided for an additional legacy and therefore effected a partial revocation of the original will. To be more specific, suppose that a testator has made a will containing the usual residuary clause. Subsequently he makes a codicil giving a \$10,000 legacy to a particular beneficiary. He later concludes that he does not wish the residue of his estate diminished by the amount of this legacy and, accordingly, he destroys the codicil. In jurisdictions having "anti-revival" statutes, the \$10,000 will be deducted from the property which otherwise would have passed under the residuary clause of the will and the testator will die intestate as to this amount.³⁴ The codicil giving the \$10,000 legacy, of course, revoked the residuary clause of the will *pro tanto*. Because of the provisions of the "anti-revival" statute, however, the revocation of the codicil did not restore that amount to the residue. This conclusion, which seems inescapable, was reached by the New York Court of Appeals.³⁵ Similar decisions have been made in two English cases under somewhat analogous facts.³⁶

³² See (1927) 15 CALIF. L. REV. 164 for a discussion of the California statute and cases in which it has been applied.

³³ *E.g.*, as in *Powell v. Powell* (1866) L. R. 1 P. & D. 209. See also Joseph Warren, *Dependent Relative Revocation* (1920) 33 HARV. L. REV. 337.

³⁴ In some of these jurisdictions the doctrine of dependent relative revocation might permit the destroyed codicil to be probated and thus prevent the partial intestacy. In California, New York, and several other states, however, because of the provisions of the "lost or destroyed will" statutes, that doctrine would be unavailable in this situation.

³⁵ *Osburn v. Rochester Trust & Safe Deposit Co.* (1913) 209 N. Y. 54, 102 N. E. 571, 35 Ann. Cas. 1915A 101, (1913) 46 L. R. A. (N. S.) 983.

³⁶ In the *Goods of Hodgkinson* [1893] P. 339; In the *Goods of Debac* (1897) 77 L. T. R. 374. But *cf.* *Estate of Schnoor* (1935) 4 Cal. (2d) 590, 51 P. (2d) 424. The decedent executed a will leaving all her real and personal property to a designated person. Subsequently she executed another will which contained several specific gifts of personal property and left the residue of her estate to the same person who was the sole beneficiary under the earlier will. The second will did not contain any express revocation of the first. The decedent later destroyed this second will with the intention of revoking it. The order of the trial court admitting the first will to probate over the objection of the heirs was affirmed by the supreme court. On behalf of the heirs it was unsuccessfully contended that the second will was wholly inconsistent with the first

Contrast with the foregoing situation where the testator would die intestate as to \$10,000, the contrary result which would obtain had the \$10,000 legacy been a part of the original will. In that case, the revocation of the legacy by cancellation or destruction of that particular provision of the will would, according to the prevailing view, increase the residue by the amount of the revoked legacy.³⁷ There would be no intestacy.

Beyond any doubt, the "anti-revival" statute recommended over a century ago by the New York Revisers has had a widespread, though not universal, legislative approval. As pointed out, however, the uniformity and certainty of application which it seems to offer is illusory, while its practical effect is often harsh as well as anomalous. In the light of these considerations, the question may well be asked, has not the abrogation of the doctrine of automatic revival and the elimination of all parol evidence of a testator's intention as to revival been purchased at too great a price?

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and consequently revoked it, and that the first will should not have been admitted to probate. The court held, however, that the second will was in effect a codicil to the first and did not revoke it. Apparently only the issue as to the total revocation of the first will was considered by the court. The opinion gives no indication that the court had in mind any question of revocation *pro tanto* caused by the specific gifts in the second will.

³⁷ *Bigelow v. Gillett* (1877) 123 Mass. 102, (1879) 25 Am. Rep. 32; *Collard v. Collard* (Prerog. Ct. N. J. 1907) 67 Atl. 190; *Barfield v. Carr*. (1915) 169 N. C. 574, 86 S. E. 498; *Brown v. Brown* (1912) 91 S. C. 101, 74 S. E. 135; see also *Swinton v. Bailey* (1878) 4 App. Cas. 70. *Contra*: *Miles' Appeal* (1896) 68 Conn. 237, 36 Atl. 39, (1897) 36 L. R. A. 176.