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REVOCATION AND REVIVAL OF WILLS

Part II*

THE PRECEDING discussion has illuminated the fact that there is no ready answer to be found in existing statutory enactments to the many confusing questions that may arise with respect to revocation and revival of wills. It may likewise be observed, at the outset, that the judicial decisions bearing on the subject are similarly confusing when examined in the mass. When analyzed by states, however, it is sometimes possible to note partial, if not complete, treatment within a given jurisdiction to the fundamental problems and sometimes even to the collateral ones. For that reason, it is proposed to give local treatment, in alphabetical order, to the judicial decisions before attempting any generalized resume of the entire subject.

In Alabama, for example, the existing statutory provisions, which purport to cover both revocation and revival,¹ have received some amplification through the decided cases. Thus, in *Barker v.*

* The first section of this article appeared in 25 CHICAGO-KENT LAW REVIEW, pp. 185-215.

¹ Ala. Code 1940, Tit. 61, § 26, indicates that revocation may be accomplished either by "some other will in writing, or some other writing subscribed by the testator, and attested as prescribed. . . ." Section 27, relating to revival, declares: "The making of any subsequent will or writing, and the cancellation, destruction, or revocation thereof do not revive any will previously executed, unless it appear, by the terms of such revocation, that it was the intention of the testator to revive and give effect to the first will; or unless, after such cancellation or destruction, he duly republish the first will."

Bell,² the testator made a will in January of 1868 but subsequently he mutilated the same by tearing off the signature and the attestation clause. He made another in May of that year which he likewise subsequently destroyed. Thereafter, from time to time, he made oral statements indicating that he considered the first as his real will. Upon his death, the earlier mutilated document was offered for probate but admission was denied on the ground that any attempted republication thereof was inadequate in the absence of proper re-execution. The court did not indicate whether the first of the wills was nullified by the making of the second or by its physical destruction, nor did it appear that the revocation of the second was simultaneously accompanied by any evidence of an intention to revive and give effect to the first will. Under the circumstances, therefore, the court was obliged to apply the statutory requirement for a complete republication in order to revive the mutilated document. It was claimed, in *Barnewall v. Murrell*,³ that a scrap of paper found on a public street evidenced the testatrix' intention to revoke an existing will so as to be "some other writing" sufficient, under the statute, to accomplish that objective. The court doubted that the paper so found belonged to or had been prepared by the testatrix but, assuming it did, found it insufficient because it was not attested, hence applied the presumption that a party wants his duly executed will to remain in force until altered or revoked in the mode prescribed by law. The holding in *Allen v. Bromberg*⁴ indicates that the making of a second will produces a revocation of an earlier one even though the second be executed in violation of the terms of a contract between the spouses to make identical wills in favor of certain charities. The mere fact that the earlier will, executed pursuant to the contract, remained in existence was treated as having no significance in the face of the standard revival provision which indicates that the making and later destruction of a subsequent will does not, *ipso facto*, revive an earlier revoked will. The beneficiaries of the contract were denied the right to probate the earlier will but were

² 46 Ala. 216 (1871).

³ 108 Ala. 366, 18 So. 831 (1895).

⁴ 147 Ala. 317, 41 So. 771 (1906).

directed to proceed to secure specific performance of the contract. While there is no specific indication as to when revocation takes place, the Alabama law would seem to indicate, at least by implication, that if accomplished by mutilation, by the execution of a second will, or by a sufficiently executed other writing, the earlier instrument is effectively and instantly nullified and may be revived only by due observance of the statutory provision respecting revival.

There is a dearth of judicial precedent in Arizona, the only case having dealt with revocation by physical destruction,⁵ so the manifold questions which could arise there at present remain unanswered. They could well be perplexing ones for the only statutory treatment concerns revocation and is substantially no more than a re-enactment of the provisions of the Statute of Frauds except it does require that any "declaration in writing" intended to serve as a revoking instrument must be executed with the full formalities required for the making of a will in the first instance. It would be nothing more than sheer guess to predict whether a will thus revoked could be revived and, if so, whether revival could be produced by the mere destruction of the revoking instrument or would require a republication.

Arkansas law is, however, much more complete for the statutes of that state speak on both aspects of the general problem⁶ and some amplification is found in the judicial decisions. In *Newboles*

⁵ In *re Welch's Estate*, 60 Ariz. 215, 134 P. (2d) 701 (1943), was a case in which the testator was found murdered. In his residence two wills were located, the first executed, the other not. Both had been torn in half. The issue was as to whether the executed will had been intentionally destroyed by the testator. The second instrument could possess no legal effect in view of Ariz. Code Ann. 1939, Ch. 41, § 103, which provides that no will "made in conformity with the preceding section, nor any clause or devise therein, shall be revoked except by a subsequent will, codicil or declaration in writing executed with like formalities. . . ."

⁶ Pope Dig. 1937, § 14519, deals with revocation by providing that: "No will in writing . . . shall be revoked or altered otherwise than by some other will in writing, or some other writing of the testator, declaring such revocation and alteration, and executed with the same formalities with which the will itself was required by law to be executed, or unless such will be burnt. . . ." Section 14528, concerning revival states: "If, after making any will, the testator shall duly make and execute a second will, the destruction, cancelling 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 he shall duly republish his first will."

v. *Newboles*,⁷ for example, a will had been made devising certain land to the testatrix's son. Subsequently the testatrix prepared a written paper which read, "This is to certify that I have this day decided not to will my land to my son, James Newboles." It was signed and attested. Upon testatrix' death, the will, in sound physical condition, was offered for probate but contest was made on the ground that it had been revoked by the subsequent instrument which was designed to serve as "some other writing" of the testatrix "declaring such revocation."⁸ The court, nevertheless, admitted the will for the reason that the instrument, although duly signed, did not meet statutory requirements for it did not refer to or identify any particular will nor did it expressly declare a revocation thereof. It was also held to be insufficient as a codicil, hence the will stood as originally drafted. By that decision, the court has substantially imported a phrase from the New Mexico statute which demands that the revoking instrument must "distinctly refer to such will"⁹ which its purports to revoke. Which, of two wills, is actually the later one, hence the only valid will, was treated as a question of fact in *Austin v. Fiedler*¹⁰ for when that fact was determined the legal consequence was dictated by clear statutory language.¹¹ There was, however, no problem of revival since both instruments were in existence at the time of the maker's death and the most recent expression of the testator's intention

⁷ 169 Ark. 282, 273 S. W. 1026 (1925).

⁸ Pope Dig. 1937, § 14519.

⁹ New Mex. Stats. Ann. 1941, Vol. 2, Ch. 32, § 32-108.

¹⁰ 40 Ark. 144 (1882). The decedent therein had made two holographic instruments each bearing the same date, to-wit: April 7, 1848. A schedule of property was attached to each, one of these schedules being undated, the other dated April 24, 1848. A codicil was affixed to the will and the undated schedule which had the effect of making the two wills identical except for the residuary clause. That codicil was dated April 12, 1848. It was claimed that the will bearing the dated schedule was later in point of time to the one bearing the codicil, hence was the last will. The court held that, from internal evidence, such was the case and revoked probate of the will and codicil, regarding these papers as no more than a rough draft of the finished product.

¹¹ For a discussion as to whether a subsequent will must declare "an intention to revoke" or whether that phrase, as found in statutes dealing with revocation, is grammatically confined to apply only to other writings, see 25 CHICAGO-KENT LAW REVIEW pp. 201-2. The court, in *Austin v. Fiedler*, 40 Ark. 144 (1882), gave no attention to the point, and therefore seems to be of the view that the mere presence of a later will is enough, at least at the moment of the testator's death, to revoke an earlier will even though the later will is silent on the point of revocation.

will usually control in the absence of any statutory rule on the point.¹²

The California statute is quite elaborate,¹³ yet not so complete as to make litigation unnecessary to settle doubtful issues. Like certain other states, it is the rule there that if two or more wills are found in sound physical existence they merely serve to supplement one another unless (1) the provisions thereof are wholly inconsistent, or (2) the later one contains an express revocatory clause. In the absence thereof, no question of revival is presented since the earlier documents have never been revoked. If either revocatory factor is found present, then the statute declares that the nullification of the revocatory feature does not, *ipso facto*, revive the older will.¹⁴ Illustrating the operation of such statute, it was decided quite early, in *Clarke v. Ransom*,¹⁵ that in the absence of express revocatory language several testamentary instruments had to be read together particularly where they were not wholly inconsistent in their terms. Absence of total inconsistency was urged, in the case of *In re Iburg's Estate*,¹⁶ as the reason for probating two wills left by the testator, the first of which named

¹² See 25 CHICAGO-KENT LAW REVIEW pp. 203-4.

¹³ Deering, Probate Code Ann. 1944, Ch. 3, §§ 72, 74 and 75. Section 72 recites: "A prior will is not revoked by a subsequent will, unless the latter contains an express revocation, or provisions wholly inconsistent with the terms of the prior will. In other cases the prior will remains effectual so far as consistent with the provisions of the subsequent will. . . ." Section 74 indicates that except "as hereinabove provided, no written will, nor any part thereof, can be revoked or altered otherwise than: (1) By a written will, or other writing of the testator, declaring such revocation or alteration and executed with same formalities required for the execution of a will, or. . . ."

¹⁴ *Ibid.*, § 75, declares: "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 revocation 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."

¹⁵ 50 Cal. 594 (1875). Testatrix there made a will leaving a portion of her estate in trust for the benefit of her daughter. Following the daughter's death, testatrix executed a codicil mentioning this fact and distributed the portion left in trust. Still later she made a holographic instrument in the form of a letter to a friend which read: "Dear Old Nance; I wish to give you my watch, 2 shawls, and also \$5,000." There was some discussion as to whether this instrument was testamentary in nature, but the court found it was. It was then argued that the instrument was ineffective either to revoke or to alter the earlier will since it contained no declaration on that point. The court, at page 602, said that the words: "'declaring such revocation or alteration,' as employed in the statute, mean nothing more than it shall appear from the provisions of the last will, that it was intended to alter or revoke the former, in whole or in part."

¹⁶ 196 Cal. 333, 238 P. 74 (1925), noted in 24 Mich. L. Rev. 319.

an executor while the second, containing an entirely different dispositive scheme, did not. The court, nevertheless, refused to accept the earlier will as sufficient to support appointment of an executor preferring to believe that the statutory provision with respect to implied revocation meant total inconsistency between the dispositive features and not as to every aspect of the two wills. It was for much the same reason that the court could find no revocation, hence no need to find a revival, in the case of *Estate of Schnoor*¹⁷ where the residuary clause in both wills was identical although there was marked dissimilarity as to the other provisions. It was urged that the second will, lacking an express clause of revocation, had nullified the former because of the major inconsistencies between them and, there being no indication of a desire to produce a revival, the former was not reinstated when the later will was intentionally destroyed. The court, however, probated the earlier will on the theory that partial inconsistency is not enough to produce an implied revocation, either total or partial, so it was unnecessary to investigate for an intention to revive.¹⁸

Where the subsequent will contains an express revocatory clause, however, there is reason to believe that the California view is to give such revocation immediate operative effect so as to require republication if the earlier will is ever again to possess any validity. That is the nature of the holding in the case of *Lones v. Lones*¹⁹ where testator executed a series of three wills, the second and third of which each contained express clauses of revocation. All three instruments were found in existence at the testator's death but the third had been marked cancelled so could not be probated. It was argued that the first will was still valid on the theory that the revocatory provision of the second will had been nullified by the execution of the third and the express clause therein had, in turn, been nullified by the subsequent cancellation

¹⁷ 4 Cal. (2d) 590, 51 P. (2d) 424 (1935).

¹⁸ The same result was obtained in *In re Shute's Estate*, 55 Cal. App. (2d) 573, 131 P. (2d) 54 (1943), where the two wills were identical as to the disposition of approximately three-fourths of the estate, but differed as to the remainder. The subsequent will was later intentionally destroyed leaving the original will intact. The court held that, lacking an express revocatory clause, the second will was no more than a codicil to the earlier one so merely amended rather than revoked it. Talk about revival was, then, unnecessary.

¹⁹ 108 Cal. 688, 41 P. 771 (1895).

of that will. The court, however, declared for intestacy saying: "The mere execution of a subsequent revocatory will ends the first will, and such will is not revived by the revocation of the last will unless it is revived by the terms of such revocation."²⁰

The major difficulty, however, has been experienced in connection with establishing the fact that the later will actually did contain a clause revoking all former wills. In the Lones case just mentioned, the latest will remained in physical existence, although it was otherwise inoperative because marked cancelled, hence the important factor could be readily ascertained. By contrast, in the case of *In re Thompson's Estate*,²¹ probate of an earlier will was contested on the alleged ground that a later will, which could not be found, expressly revoked the earlier one. Proof of a lost will and its contents must be made by two witnesses, but only one witness could be produced to establish the existence thereof. It was admitted that the later will could not be probated as a will for lack of the necessary proof but it was argued that one witness would suffice to establish the quondam existence of the revoking clause since that quantum of proof would have been sufficient to establish the existence of any other lost writing. The court, however, refused to accept such proof on the basis that the revoking clause, being a part of the lost will and not something separate and distinct from it, had to be attested in full statutory fashion. On the other hand, according to *In re Johnston's Estate*,²² if it appears that the later will containing the revoking clause was itself deliberately destroyed, or can be so presumed because it was last seen in the testator's possession, then the testimony of only one witness will be sufficient to prove that it did once exist, thereby preventing probate of the earlier will which it purported to revoke.²³ Why the doctrine of dependent relative revocation

²⁰ 108 Cal. 688 at 690, 41 P. 771 at 772.

²¹ 185 Cal. 763, 198 P. 795 (1921).

²² 188 Cal. 336, 206 P. 628 (1922).

²³ Much the same view has been followed where the later will, itself intentionally destroyed, would operate to produce a revocation because it was totally inconsistent: *Estate of Bassett*, 196 Cal. 576, 238 P. 666 (1925). That holding would intimate that the mere execution of a later inconsistent will is sufficient, *ipso facto* and instantly, to revoke an earlier will so that, upon destruction of the subsequent will, some act of republication is essential to revive the former. See Cal. Deering Probate Code Ann. 1944, Ch. 3, § 75.

should be applied in the first of these instances to preserve the original will but should be rejected in the other is not readily apparent. The clause of revocation ought, logically, operate instantly upon execution in either situation or else be itself regarded as ambulatory and of no vitality unless shown to be in full existence upon the testator's death. If the former, any legal evidence should be sufficient to show an intention to revoke the earlier will so as to nullify it for all purposes unless republished, whether the revoking instrument was thereafter lost or destroyed. If the latter, for failure to prove a valid later will left by the testator, the earlier will should be admitted as the mere fact of testator's multiple attempts to leave an effective testamentary document outweigh any presumption of intention to die intestate.

Colorado law on the subject is, relatively speaking, quite inadequate. The present statute deals only with the subject of revocation, and requires that such act be accomplished by a physical destruction of the will or else by the due execution of a subsequent will or codicil.²⁴ No other subsequent writing will suffice for that purpose, so the decedent must either die intestate for lack of an effective will of some sort or, having once made a will, must remain testate to some degree. The only decision to be found in that state, that in the case of *Twilley v. Durkee*,²⁵ introduced a novel feature not to be found elsewhere. There a will had been offered for probate but was contested on the ground that, as it contained a clause of revocation, it was invalid because it had not been signed in the presence of witnesses. The statute then in force contained two sections, one with respect to the execution of wills which required publication but not signing in the presence of witnesses, and the other dealing with revocation which required that a revoking will or codicil be signed by the testator while witnesses were present. The majority of the court held that while the dispositive provisions of the later will had been effectively executed still, because the revoking clause was not properly signed

²⁴ Colo. Stats. Ann. 1935, Vol. 4, Ch. 176, § 40, provides: "No will shall be revoked otherwise than by . . . some other will or codicil in writing, declaring the same, executed . . . as provided in the last preceding section, and no words spoken shall revoke or annul any will in writing executed, declared and attested as aforesaid."

²⁵ 72 Colo. 444, 211 P. 668 (1923).

and attested, the whole will failed for all purposes,²⁶ thereby presumably leaving the earlier will in full force and effect. As most statutes require the same formalities for the execution of a testamentary instrument in the first place as well as for the execution of a revocatory instrument²⁷ it is unlikely that the identical problem will arise again. If it does, there would seem to be better sense in holding that, if the later will is to be regarded as ineffective to serve as a revoking will, it still should be accepted as a testamentary document to be read parallel with the earlier one and as an amendment thereof rather than to be rejected *in toto*. That at least would seem to come closer to the testator's probable intention than does the holding in the case last mentioned. The decision does, however, serve to point out the necessity for careful preparation of statutory language. If there is a blunder in a prior decision, a court may correct the error by overruling the prior holding; it is powerless in the face of a poorly drafted statute.

While the present Connecticut statute limits revocation to physical destruction or the due execution of a later will or codicil,²⁸ it is silent on the subject of revival. As a consequence, the courts of that state have been obliged to determine a number of significant matters. The earliest case, that of *James v. Marvin*,²⁹ involved the typical situation of a first will left intact at death, a second containing an express clause of revocation which was sub-

²⁶ The dissent by Denison, J., is predicated on the idea that the will offered was good as a testamentary scheme, even if not a good revocatory instrument, and should have been accepted for probate subject to the production of the original will if it remained in existence and could be produced or could be established in some other fashion.

²⁷ See 25 CHICAGO-KENT LAW REVIEW 205-6, particularly note 70.

²⁸ Conn. Gen. Stats. 1930, Tit. 50, Ch. 256, § 4880, directs: "No will or codicil shall be revoked in any other manner except by burning . . . or by a later will or codicil." Before any statute existed, the court held that a signed but unattested statement that a will was invalid was sufficient to produce a revocation: *Witter v. Mott*, 2 Conn. 67 (1816). In *Card v. Grinnan*, 5 Conn. 164 (1821), it was also indicated that parol statements by testator would be sufficient, under the circumstances there presented, to nullify a will. It appeared that testator asked that his will be destroyed but it had been fraudulently preserved against his wishes. The court indicated that it was not possible to prove the fraud other than by accepting testator's parol statements.

²⁹ 3 Conn. 576 (1821). In *Appeal of Fitzpatrick*, 87 Conn. 579, 89 A. 92 (1913), the court found there was insufficient evidence to show that the later will, intentionally destroyed, contained an express clause of revocation so refused to pass on the question as to whether or not the subsequent statute had changed the rule of *James v. Marvin* in any respect.

sequently intentionally destroyed, and no evidence as to the republication or revival of the first will. In the absence of any statute, the court declared that "a clause of revocation is something more than a declared intention; it is an act consummated, by the execution of the deed, or will, in which it is contained, and operating immediately."³⁰ The fact that the revoking instrument was thereafter destroyed was held to be, alone, ineffective to revive the earlier will. The court, by way of dictum, indicated that a different result might follow if the second will had purported to revoke the first one because inconsistent in terms. That dictum became a rule of law in 1883 when the court passed upon the case of *Peck's Appeal*,³¹ wherein the second will, inconsistent with the first one but not expressly revoking it, was not found and was presumed to have been intentionally destroyed although the earlier will was found intact in testator's possession at the time of death. In the meantime, between the decision in *James v. Marvin*³² and the instant case, the Connecticut legislature had enacted a statute declaring that no will should be revoked except by a later will or codicil. The court concluded that such statute meant that the earlier will was to be deemed revoked only if, at the time of testator's death, some later operative will could be produced and that, lacking such, the earlier will was admissible to probate on the theory that the obvious intention was to die testate rather than intestate. Much the same view was followed in the case of *Security Company v. Snow*³³ where the earlier will had been purportedly modified by a codicil which violated rules of law respecting the disposition of property. To the argument that the property covered by the codicil passed by the laws of intestate succession, the court again affirmed the idea that, in the absence of express clauses on the subject of revocation, earlier wills must stand if later valid ones cannot be produced.

³⁰ 3 Conn. 576 at 578.

³¹ 50 Conn. 562 (1883).

³² See note 29, ante.

³³ 70 Conn. 288, 39 A. 153 (1888). The testator there made a will giving the residue of his estate to his children. By a codicil, he purported to appoint his wife trustee over a portion of the residue for the benefit of one daughter giving the trustee wide powers of discretion with regard to the payment of the principal. Upon the wife's death, it was held that the trust failed since the discretionary powers could not be exercised by any other person. The instant litigation followed.

To that point, the Connecticut decisions had been to some extent paralleling the ideas followed by the ecclesiastical courts in England. A noteworthy change, however, was produced by the decision in *Whitehill v. Halbing*³⁴ which virtually reproduced the situation found in *James v. Marvin*³⁵ but attained an opposite result. There the second will, containing an express clause of revocation, was destroyed by the testator at a time when he knew the original will was still in existence. Despite the argument that the clause of revocation had been immediately effective to nullify the earlier will so as to require its republication, the court concluded that the statute, since it did not permit revocation by some "other writing," required the production of a later will or codicil in probatable condition otherwise the earlier will had to stand. By regarding a will as an ambulatory instrument with respect to its provisions, and by regarding the revocatory clause as merely a part of a will, the court achieved the result that even an express clause of revocation is ambulatory until the testator's death gives it finality. In Connecticut, therefore, substantially as was the common-law rule, revocation except by physical destruction never takes place so that there is no occasion to talk about the necessity for revival.

Delaware, much like Connecticut, seems to follow common-law principles on the subject. Its statutory provision concerns itself only with the aspect of revocation and permits some "other writing" to accomplish that purpose so long as it is "attested and subscribed" in testator's presence by two or more credible witnesses.³⁶ It does, however, recognize the possibility of an "implied revocation" such as might arise from some change in the testator's circumstances. Only once has a case arisen in that state which might have bearing and it is not conclusive. The will offered for probate in the case of *Dawson v. Smith*³⁷ was executed in 1852.

³⁴ 98 Conn. 21, 118 A. 454, 28 A. L. R. 895 (1922), noted in 32 Yale L. J. 70.

³⁵ See note 29, ante.

³⁶ Dela. Rev. Code 1935, Ch. 93, § 3715, states: "A last will and testament, or any clause thereof, shall not be altered, or revoked, except . . . by a valid last will and testament, or by a writing signed by the testator . . . and attested and subscribed in his presence by two or more credible witnesses; but this clause shall not preclude nor extend to an implied revocation."

³⁷ 8 Dela. (3 Houst.) 92 (1864).

Contest was based on the fact that another will had been made in 1857 but it could not be shown whether such will contained a revocatory clause nor what disposition had been made thereof other than that it had last been seen in the possession of the testatrix. By applying the presumption of intentional destruction, the court reached the question as to whether or not the earlier will was valid and on that score said: “. . . the legal effect and necessary consequence of it would be, without making any other, to leave the will of 1852 to stand as it originally stood before the making of any other, and to become her last will and testament upon her death.” Nothing more was said, so one is left to surmise whether the execution of the second will revoked the first instantly but the subsequent destruction thereof automatically revived the earlier one or whether the alleged revocatory will was merely ambulatory in nature. More probably the latter was the case, but the court did not so state and there is little to guide the local practitioner in settling problems that may arise.

The code of the District of Columbia touches on both revocation and revival but the revival provision is ambiguous unless the revocation section be treated as contemplating that the revocatory instrument should possess immediate effect.³⁸ There is some intimation to that effect to be found in *Wolfe v. Snyder*³⁹ although the issue there was primarily one of dependent relative revocation rather than revival. It appeared that testatrix had made a will some time prior to 1936. During the period between 1936 and 1940, she wrote various cancellations across the face of certain of the paragraphs of the will and, apparently, simultaneously prepared holographic memoranda of contemplated changes. The

³⁸ D. C. Code 1940, Tit. 19, § 103, states: “. . . and, moreover, no devise or bequest, or any clause thereof, shall be revocable otherwise than by some other will or codicil in writing or other writing declaring the same, or by burning.” Section 108, dealing with revival, declares: “No will or codicil, or any part thereof, which shall be in any manner revoked shall, after being revoked, be revived otherwise than by the re-execution thereof, or by a codicil executed in the manner hereinbefore required, and then only to the extent to which an intention to revive is shown.” If the words “in any manner revoked” mean what they would seem to say, the inference can only be that the revocatory instrument mentioned in Section 103 is effective upon execution otherwise there is no sense to the setting forth of a method of revival.

³⁹ 48 F. Supp. 227 (1942).

marked-up will and the memoranda slips were found in testatrix' desk after her death. The court recognized that partial revocation was possible⁴⁰ and indicated that any such act would be regarded as a final one in the absence of evidence that dependent relative revocation was the thing desired, but, on finding that testatrix contemplated no change to be effective until a new will was executed, granted probate to the will as it had been first drafted. While the revival statute is not phrased like the standard provision,⁴¹ its general tenor is so similar as to support the construction indicated by the dicta to be found in the Wolfe case and the views adopted in other jurisdictions possessing such statutes,⁴² so the presence thereof would lend support to the argument that revocation is a completed act when made, thereby requiring republication or re-execution if the original will is again to possess vitality.

It had one time been the law in Florida, following common-law principles, that a later will, even though containing an express clause of revocation, possessed no immediate effect upon an earlier will so that, if the revoking will was subsequently destroyed and the earlier will allowed to remain in full physical existence, the earlier will might be deemed to be the testator's last and only will.⁴³ That view has, however, been definitely overthrown by the present statute of that state which now recites: "The revocation of a will expressly revoking a former will shall not revive the former will, even though such former will be in existence at the date of the revocation of the subsequent will."⁴⁴ It should be noticed that the quoted provision applies if the subsequent will expressly revokes the former one. It leaves out of consideration the possibility of an implied revocation because of inconsistency

⁴⁰ The statute quoted in note 38, ante, expressly permits revocation of part of the earlier will by using the phrase "or any clause thereof."

⁴¹ See 25 CHICAGO-KENT LAW REVIEW 210, particularly note 88.

⁴² As to the effect of inconsistency between the two wills, see, for example, *In re Iburg's Estate*, 196 Cal. 333, 238 P. 74 (1925); for operation of an express clause of revocation, see *Lones v. Lones*, 108 Cal. 688, 41 P. 771 (1895).

⁴³ *Shaefer v. Voyle*, 88 Fla. 170, 102 So. 7 (1925). The will containing the clause of revocation was not found but was presumed destroyed because last seen in the testator's possession. Reliance was placed on *Stetson v. Stetson*, 200 Ill. 601, 66 N. E. 262, 61 L. R. A. 258 (1903).

⁴⁴ Fla. Stats. 1941, Tit. 41, Ch. 731, § 731.15.

between the provisions of the two wills. As a consequence, a situation could arise in that state where a later will, with inconsistent provisions but lacking a clause of revocation, has been destroyed and the earlier one has been left intact. Since the statutory provision concerning revocation indicates that, to be effective for that purpose, the subsequent written will, codicil, or other writing should be one "declaring such revocation or alteration,"⁴⁵ there is intimation that the two wills, even though executed at different times, should be read together so far as possible assuming they both remain in existence. If that is to be the construction, then it would seem as though the making of the second will which lacked a clause of revocation, followed by its subsequent destruction, would not nullify the earlier one but would permit the continued application of former principles.⁴⁶ What would, on the surface, appear to be a reasonably complete statutory treatment of the subject may, nevertheless, still present questions which must yet be decided.

Early decisions in Georgia would indicate that the courts of that state, before any statute on the subject, were inclined to follow English views, treating the statute of *1 Vict. c. 26* as if it were a part of the common law of that state even though enacted subsequent to the Revolution. Thus, in *Barksdale v. Hopkins*,⁴⁷ probate of an earlier will was contested on the ground that a subsequent will contained an express clause of revocation. Objection to proof of the contents of the subsequent will was based on the ground that such subsequent will had not been admitted to probate, hence lacked any nullifying effect. The court indicated that the English statute permitted revocation either by will or by some "other writing" and that the revocatory clause could be considered, separately from the other provisions of the purported

⁴⁵ *Ibid.*, § 731.13. The section, in full, reads: "A will or any part thereof may be revoked or altered by a subsequent written will, codicil or other writing, declaring such revocation or alteration, provided such will, codicil or other writing is executed with the same formalities required for the execution of wills under this law."

⁴⁶ To avoid any possible adverse decision, the testator may, according to Fla. Stats. 1941, Tit. 41, Ch. 731, § 731.18, re-execute any will which may have been "revoked or if it be invalid for any reason," and thereby restore it or give it vitality.

⁴⁷ 23 Ga. 332 (1857).

second will, as such an "other writing" if that was the testator's intention. Again, in *Lively v. Harwell*,⁴⁸ it was held that a subsequent will, even though later destroyed, had operated, at the time of its execution, to nullify the earlier one merely because of the fact that its provisions were inconsistent with those of the latter. A republication was deemed necessary to revive the earlier will for, while the making of the second showed an intention to substitute a different scheme of distribution, it was said that the destruction of the later will carried no inference of any intention to restore the provisions of the earlier one.⁴⁹ The present statutory treatment to be found in Georgia is quite specific for, after expressly recognizing a testator's right to revoke any will by him made,⁵⁰ and after specifying that such revocation may be either express or implied,⁵¹ the statute declares that the destruction of a will containing an express clause of revocation shall not revive any former revoked will unless the same is republished.⁵² The statute also emphasizes the idea that, in the absence of an express clause of revocation, the several wills made by a testator are to be read together so far as is possible,⁵³ hence revival problems are necessarily confined to cases where the subsequent will is specific on the point of revocation.

⁴⁸ 29 Ga. 513 (1859), affirmed in 30 Ga. 315, 76 Am. Dec. 649 (1860).

⁴⁹ See discussion of this point at 25 CHICAGO-KENT LAW REVIEW 189-90, particularly note 15.

⁵⁰ Ga. Code 1933, Ch. 113, § 401, states: "A will, having no effect until the death of the testator, is necessarily revocable by him at any time before his death. . . ."

⁵¹ *Ibid.*, § 402, declares: "A revocation may be either express or implied. An express revocation is effected when the maker by writing or acts annuls the instrument. An implied revocation results from the execution of a subsequent inconsistent will. The former takes effect instantly or independently of the validity or ultimate fate of the will or other instrument containing the revocation. The latter takes effect only when the subsequent inconsistent will becomes effectual, and hence, if from any cause it fails, the revocation is not completed." It, and perhaps the Louisiana statute, are the only ones expressly indicating when the act of revocation shall take effect.

⁵² *Ibid.*, § 403, points out that: "An express revocation by written instrument shall be executed with the same formality and attested by the same number of witnesses as are requisite for the execution of a will. The destruction of a will expressly revoking all former wills shall not revive a former will unless the former will is subsequently republished; in such cases the republication may be proved by parol." It should be noted that permitting parol proof of republication has not gone without criticism: 25 CHICAGO-KENT LAW REVIEW 213-4, particularly note 98.

⁵³ *Ibid.*, § 406, states: "An implied revocation extends only as far as the inconsistency exists. Any portion of the first will, which can consistently stand with the testamentary scheme and bequests made in the last shall remain unrevoked."

There are no judicial decisions in either the Territory of Hawaii or in the State of Idaho, so testators located there must glean what they can from existing legislative enactments. In the case of the former, revocation is limited to the making of some other will⁵⁴ and revival of the earlier will is to be accomplished by a republication thereof.⁵⁵ In Idaho, however, an existing will may be revoked or altered by a written will, or other writing declaring such revocation,⁵⁶ while revival may be produced either by destroying the subsequent will, if such is the testator's intention, or by republication.⁵⁷ Neither statute indicates the potential effect of a subsequent will which contains terms that are totally or partially inconsistent with those found in the earlier one but which lacks an express revocatory clause. Similarly, neither statute specifies what shall constitute a "republication" of the earlier will. There is, then, room for argument as to the precise meaning of these provisions; argument that can be settled only after judicial construction of the statutory language.

The decisions in Illinois, all promulgated before the enactment of the present Probate Act, have undoubtedly helped to shape the law in some of the other American states hence are worthy of more than passing mention. The first case dealing with the subject

⁵⁴ Hawaii Rev. Laws 1945, Tit. 31, Ch. 295, § 12177: "No will shall be revoked, unless . . . by some other will in writing, executed as prescribed in this chapter; but nothing contained in this section shall prevent the revocation implied by law, from subsequent changes in the condition or circumstances of the testator."

⁵⁵ *Ibid.*, § 12178, declares: "If, after the making of any will, the testator shall duly make and execute a second will, the . . . revocation of the second will, shall not revive the first will, unless after such . . . revocation, the first will shall be duly republished." Republication would, no doubt, be effectively completed by use of a codicil since *ibid.*, § 12182, indicates that the "term 'will' as used in this chapter, shall be so construed as to include all codicils as well as wills."

⁵⁶ *Ida. Code Ann.* 1932, Vol. 1, Tit. 14, § 14-307, says: "Except in the cases in this chapter mentioned, no written will, nor any part thereof, can be revoked or altered otherwise than: (1) By a written will, or other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which a will should be executed by such testator. . . ."

⁵⁷ *Ibid.*, § 14-310. That section reads: "If, after making a will, the testator duly makes and executes a second will, the destruction, cancellation or revocation of such second will does not revive the first will, unless it appears by the terms of such revocation that it was the intention to revive and give effect to the first will, or unless, after such destruction, cancellation or revocation, the first will is duly republished." It should be noted that the statute does not specify how the testator is to evidence his intention to revive, if he does not use the republication method, although it does require that such be contemporaneous with the revocation of the second will.

was that of *Stetson v. Stetson*⁵⁸ wherein the facts disclosed that a second will, containing a clause of revocation, had last been seen in testator's possession but could no longer be found. It was, of course, presumed that such will had been deliberately destroyed with intent to revoke it, but the question then arose as to the effect of such second will upon the first one then being offered for probate. The court, after reviewing both the common law and the ecclesiastical rules, said: "The common law rule best harmonizes with the course of legislation and judicial decisions in this state, for the reason that the common law of England, so far as the same is applicable and of general nature, is considered as of full force in this State where it is not repealed by legislative authority."⁵⁹ The existing legislation then provided that a will could be revoked, among other methods, by a subsequent will or codicil declaring such revocation.⁶⁰ To be effective under this statute and according to the common law, the revocatory clause had to be a part of a will or codicil. A testamentary instrument, however, being ambulatory until death, no subsequent will, nor any clause that it is a necessary part thereof, could affect any other will theretofore made until death gave it validity. As the subsequent will, being destroyed, never possessed such effect, it followed that the original will had to be probated. To that point, despite dicta concerning the effect of two inconsistent wills, the court had made a logical application of the doctrines which it conceived to be the law. It did, however, perpetrate the same error that Lord Mansfield committed in *Harwood v. Goodright*⁶¹ by continuing with the illogical statement that the loss or destruction of the subsequent will had "operated as a revival of the former will."⁶² Pursuant to the rationale in the *Stetson* case, the same court, in *Moore v. Row-*

⁵⁸ 200 Ill. 601, 66 N. E. 262, 61 L. R. A. 258 (1903).

⁵⁹ 200 Ill. 601 at 617, 66 N. E. 262 at 266.

⁶⁰ See Ill. Rev. Stat. 1939, Ch. 148, § 19, which reads: "No will, testament or codicil shall be revoked, otherwise than by . . . some other will, testament or codicil in writing, declaring the same, signed by the testator or testatrix, in the presence of two or more witnesses, and by them attested in his or her presence; and no words spoken shall revoke or annul any will, testament or codicil in writing, executed as aforesaid, in due form of law."

⁶¹ 1 Cowp. 87, 98 Eng. Rep. 981 (1871), noted ante: 25 CHICAGO-KENT LAW REVIEW 191.

⁶² 200 Ill. 601 at 618, 66 N. E. 262 at 267.

lett,⁶³ concluded that a purported second will designed to produce an express revocation of the first one failed in its purpose because attested by an incompetent witness by reason of which it could not be admitted to probate.⁶⁴

The extraneous suggestions in the Stetson case noted above were productive of two other significant decisions. In *Lasier v. Wright*,⁶⁵ the court was obliged to consider the effect of a subsequent will containing inconsistent provisions to those disclosed in an earlier will, both wills being found in sound physical condition upon the testator's death. The Stetson case had intimated that, in the absence of an express clause "declaring the same" purportedly made necessary by the then statute, mere inconsistency would be insufficient to produce a revocation.⁶⁶ Despite this, the court recanted from that position, admitted error, and held that the inconsistencies in the later will effectively nullified the former one.⁶⁷ Whether such decision was correct or not is now moot since the present Probate Act has made provision for the problem.⁶⁸

In the other case, that of *Grotts v. Casburn*,⁶⁹ the court seemingly reiterated the idea that the execution of a subsequent will

⁶³ 269 Ill. 88, 109 N. E. 682 (1915).

⁶⁴ In *Crooker v. McArdle*, 332 Ill. 27, 163 N. E. 384 (1928), a case on identical facts to the Stetson case, the Illinois Supreme Court reaffirmed this position saying: "No will can be shown to revoke a previous will until that subsequent will has been admitted to probate." See 332 Ill. 27 at 30, 163 N. E. 384 at 385.

⁶⁵ 304 Ill. 130, 136 N. E. 545 (1922), noted in 21 Mich. L. Rev. 487.

⁶⁶ In *Limbach v. Limbach*, 290 Ill. 94, 124 N. E. 859 (1919), the court had held that a nuncupative will made in 1916 and silent on the subject of revocation did not revoke an earlier written will dated in 1912 because (1) it was not such a writing of express revocatory character as was made necessary by statute, and (2) was a mere oral transaction which, following the Statute of Frauds, could not overcome a written will executed in due form of law. That holding was subsequently repudiated in *Lasier v. Wright*, 304 Ill. 130, 136 N. E. 545 (1922), but would present only an academic question today inasmuch as the present Illinois Probate Act does not permit the use of holographic or nuncupative wills for any purpose.

⁶⁷ The majority of the court found support for this view in English cases decided both before and after the Statute of Frauds. A dissent by Dunn and Cartwright, JJ., however, was predicated on the idea that since the then Illinois statute designated one specific way of revoking an existing will, to-wit: by "some other will, testament or codicil in writing . . . declaring the same," it should be given literal construction and treated as denying efficacy to any other attempted mode of revocation.

⁶⁸ Ill. Rev. Stat. 1945, Ch. 3, § 197, among other things, declares that: "A will may be revoked . . . (c) by a later will to the extent that it is inconsistent with the prior will."

⁶⁹ 295 Ill. 286, 129 N. E. 137 (1920).

containing an express clause of revocation, despite its ambulatory nature, had somehow nullified the earlier will so as to make its revival necessary. The testator there had made a will in 1914. In 1918 he made another in favor of one Grotts. Thereafter he drew up an instrument, the text of which is appended below,⁷⁰ designed to revoke the subsequent will. It was contended that this instrument could have no effect as a revoking instrument, in the form of some "other writing" as that method of revocation was not encompassed by the then existing statute nor could it operate as a will or codicil since it was not of testamentary character. The court, nevertheless, concluded that inasmuch as the memorandum incorporated the 1914 will by reference it amounted to a re-execution thereof and, by virtue of its compliance with statutory requirements as to execution, was entitled to probate along with the 1914 will. If such memorandum had lacked indication of any intention whatever with respect to the status of the 1914 will, the court would have been face to face with the fundamental problem as to what effect should be given to a revocatory instrument once duly executed but subsequently destroyed. From the strenuous effort made to treat the memorandum in the Casburn case as possessing probatable character, one gathers that the offhand remark in the Stetson case concerning the "revival of the former will" might yet result in some court concluding that some action to revive the earlier will is essential.

It should be remembered, however, that all of these Illinois decisions antedate the present Probate Act. That statute now declares that:

A will may be revoked only (a) by burning, cancelling, tearing, or obliterating it, by the testator himself or by some other person in his presence and by his direction and consent, (b) by some other will declaring the revocation, (c) by a later will to the extent that it is inconsistent with the prior will, or (d) by an instrument in writing declaring the revocation and

⁷⁰ That document read: "To whom it may concern: This is to certify that I hereby revoke the will made last winter favor of Ed. Grotts and desire that the will made and dated October 5, 1914 be my last will." It was signed and sealed by the testator and attested by two witnesses.

signed and attested in the manner prescribed by this Article for the signing and attestation of a will. Marriage by the testator shall be deemed a revocation of any existing will executed by the testator prior to the date of the marriage.⁷¹

It is worthy of some note that the statute is silent as to revival, hence all questions with regard thereto must be settled by interpretation of statutory language or gathered from earlier decisions not nullified by the present provisions for revocation.

The first method, that of destruction, merely restates former provisions.⁷² The second, revocation by a later will, likewise reiterates former concepts. Only in the case of the third and fourth methods would there appear to be any addition or revision. The third, concerning the effect of a later inconsistent will which lacks a clause of revocation, represents a codification of ideas inherent in the earlier case of *Lasier v. Wright*⁷³ which had rejected a dictum of the *Stetson* case on the point. Only the fourth method, dealing with the operation of a non-testamentary revocatory instrument executed under adequate safeguards, is entirely new although even it contains a recognition of the problem involved in *Grotts v. Casburn*.⁷⁴ One thing, however, stands out in sharp emphasis; the statute nowhere indicates when revocation takes effect hence leaves the problem of revival still open for determination.

On that score, physical destruction must necessarily operate

⁷¹ Ill. Rev. Stat. 1945, Ch. 3, § 197. The text is the same as Section 46 of the Probate Act.

⁷² It should be noted that this method can operate only to produce a total destruction as the act makes no provision for any partial cancellation. See *Casey v. Hogan*, 344 Ill. 208, 176 N. E. 257 (1931), and *Boyd v. Gorrell*, 376 Ill. 132, 33 N. E. (2d) 190 (1941). In *Dowling v. Gilliland*, 286 Ill. 530, 122 N. E. 70 (1919), it was held that the obliterating or cancelling marks had to touch the will itself and that crossing off part of the attestation clause would not suffice. The enclosing of a will bearing pencil marks on its face in an envelope bearing the legend "not to be executed" was held insufficient in *Board of National Missions, etc. v. Sherry*, 372 Ill. 272, 23 N. E. (2d) 730 (1939), because the legend was not adequately attested and it could not be proven that the legend was written contemporaneously with the cancellation marks so as to indicate a present intent to revoke the whole will.

⁷³ 304 Ill. 130, 136 N. E. 545 (1922), noted in 21 Mich. L. Rev. 487.

⁷⁴ 295 Ill. 286, 129 N. E. 137 (1920).

instantly if it is to operate at all, so a complete rewriting and re-execution would seem necessary to revive. The mere making of a subsequent revoking will, if wills still retain ambulatory character in Illinois as was once the case in England, should not, however, have the effect of making revival necessary. Unless the rule of *Stetson v. Stetson*⁷⁵ has been unwittingly overthrown, the statute contemplates not only the making of a subsequent will of probatable character but its actual admission to probate, for until then it is not the *will* of the testator.⁷⁶ The execution of a later inconsistent will lacking express revocatory features is not, by any conceivable interpretation of the statute, sufficient to produce any more than a partial revocation, in the absence of total inconsistency, so both instruments should be admitted to probate leaving their construction or rationalization to be worked out later on.⁷⁷ Only in the fourth instance, involving the use of a non-testamentary revocatory writing, could it be said that the mere execution thereof is intended to have immediate operative effect as "something more than a declared intention" and more nearly "an act consummated."⁷⁸ As such a writing is not designed as a testamentary scheme of disposition, hence need not be offered for probate,⁷⁹ and is probably designed for use in situations where the testator, not being in possession of the earlier will, is unable to bring about a physical destruction, it should have just as immediate an effect as would the physical cancellation for which it is a substitute. If so, then some evidence of revival of the earlier will would be necessary, but it can only be left to surmise as to what form such revival must take since the present Illinois statute offers no help in that regard.⁸⁰

⁷⁵ 200 Ill. 601, 66 N. E. 262, 61 L. R. A. 258 (1903).

⁷⁶ Compare *Lones v. Lones*, 108 Cal. 688, 41 P. 771 (1895), holding that probate of the later revocatory will is unnecessary with *Whitehill v. Halbing*, 98 Conn. 21, 118 A. 454, 28 A. L. R. 895 (1922), noted in 32 Yale L. J. 70, which demands that the revocatory will be presented in probatable condition. See also *Moore v. Rowlett*, 269 Ill. 88, 109 N. E. 682 (1915).

⁷⁷ As to just how "total" the inconsistency must be to produce revocation of the earlier will, compare the California cases discussed ante, notes 15-18.

⁷⁸ *James v. Marvin*, 3 Conn. 576 at 578 (1821).

⁷⁹ *Barksdale v. Hopkins*, 23 Ga. 332 (1857). But see *In re Harrison's Estate*, 316 Pa. St. 15, 173 A. 407 (1934).

⁸⁰ *Grotts v. Casburn*, 295 Ill. 286, 129 N. E. 137 (1920), may be helpful in that connection.

It has been argued that a subsequent will containing an express clause of revocation is really an instrument of dual nature, ambulatory as to its testamentary features but operative instantly upon execution as to its revocatory ones. On that theory, revival of the earlier will would become a matter of necessity, if revival be desired, even though the later will fail as a testament because of subsequent circumstances. Such an argument might well be justified in states possessing the standard revival statute,⁸¹ and has been followed even where such a provision is absent,⁸² but it would appear inapplicable in Illinois in view of the precision used in specifying the several alternative methods of revocation. The revocatory instrument either falls in the second group, in which case it possesses only an ambulatory significance, or else belongs in the fourth. To say that one writing belongs in both groups is to defeat not only the evident legislative purpose but also to contravene what is most probably the intention of the testator, *i.e.* to have his latest will operate if he leaves it in probatable condition at the time of his death but, if not, then to have the earlier one control the disposition of his estate rather than to die intestate.⁸³ There is, then, room for improvement over the present statutory language, if not as to the means of revocation then at least on the points as to the time when revocation occurs and the methods, if any, to be pursued to produce revival.

Indiana decisions, to say the least, have consistently applied

⁸¹ That argument would be particularly applicable under Fla. Stats. 1941, Tit. 41, Ch. 731, § 731.15, and Ga. Code 1933, Ch. 113, § 403, which require positive revival after destruction of a subsequent will which expressly revoked an earlier one.

⁸² See *James v. Marvin*, 3 Conn. 576 (1821); *Blackett v. Ziegler*, 153 Iowa 344, 133 N. W. 901, 37 L. R. A. (N. S.) 291 (1911); *Scott v. Fink*, 45 Mich. 241, 7 N. W. 799 (1881); *In re Ford's Estate*, 301 Pa. St. 183, 151 A. 789 (1930); *Hawes v. Nicholas*, 72 Tex. 481, 10 S. W. 558, 2 L. R. A. 863 (1899).

⁸³ It is understood that these views do not coincide with those expressed by a former incumbent of the Probate Court of Cook County in a matter there pending: *Estate of Kathryn Imogene Smith*, 45-P-2591. There an earlier will had been followed by a later will containing an express clause of revocation but only the earlier will survived. It was argued that the addition of the provision respecting the making of an "instrument in writing declaring the revocation," found in the present Probate Act, evidenced a legislative intention to overrule the holdings in the cases of *Stetson v. Stetson*, 200 Ill. 601, 66 N. E. 262, 61 L. R. A. 258 (1903), and *Moore v. Rowlett*, 269 Ill. 88, 109 N. E. 682 (1915), so as to make the revocation final immediately upon execution. The court so held. No appeal was taken from that decision so a more authoritative determination on the point is yet to be forthcoming.

the plain language of the statute to be found there,⁸⁴ which statute deals with both revocation and revival. That statute, incidentally, specifies that the revocation can be accomplished by the execution of an "other writing for that purpose" without indicating whether such "other writing" must be of testamentary character or not. It was, however, decided in *Burns v. Travis*⁸⁵ that the existence of a subsequent will provided grounds for contesting probate of an earlier will, whether the later will expressly provided for revocation or was simply inconsistent and regardless of whether or not the subsequent will was operative as a testamentary document.⁸⁶ The subject of revival was considered in the case of *Kern v. Kern*⁸⁷ where testator had made a will in 1890 and then made another, wholly inconsistent with the former but lacking a clause of revocation, in 1894. The 1894 will, last seen in the hands of the testator, was presumed to have been intentionally revoked but its contents were established by the testimony of the attorney who had prepared the same and attended to its execution. On the strength thereof and pursuant to statutory mandate, it was held that the destruction of the 1894 will did not operate to revive the will of 1890 in the absence of proof of intention to revive disclosed in the terms of the revocation or proof of a subsequent republication. It would, therefore, appear that revocation, in Indiana, is a final and completed act operating instantly upon the execution of a subsequent will, whether that instrument is one expressly so declaring or one which evidences a total inconsistency between the new and the old. Necessarily, then, a ceremony of revival is required. It has not, however, been decided what effect should be given to a later will only partly inconsistent with the former will, nor has there been any interpretation as to what would be necessary to show an intention to revive a revoked will at the time, and

⁸⁴ Burns Ind. Stat. Ann. 1933, Vol. 3, Ch. 3, § 7-301, provides: "No will in writing, nor any part thereof . . . shall be revoked, unless the testator . . . shall execute other writing for that purpose, signed, subscribed and attested as required in the preceding section. And if, after the making of any will, the testator shall execute a second, a revocation of the second shall not revive the first will, unless it shall appear by the terms of such revocation to have been his intent to revive it, or, unless, after such revocation, he shall duly republish the previous will."

⁸⁵ 117 Ind. 44, 18 N. E. 45 (1888).

⁸⁶ See also *Heaston v. Krieg*, 167 Ind. 101, 77 N. E. 805, 119 Am. St. Rep. 475 (1906).

⁸⁷ 154 Ind. 29, 55 N. E. 1004 (1900).

“by the terms,” of the revocation of a subsequent will. As revocation may be accomplished either by physical destruction or by a “writing for that purpose,” the question may yet arise whether oral declarations of the testator concerning revival accompanying an act of physical destruction exercised on the subsequent will would be sufficient for the purpose, particularly since the statutory requirement as to republication is expressed as an alternative method of revival for use on some other and different occasion.

Testators living in Iowa may find little help in the present statute which speaks only on the point of revocation, authorizing either total or partial revocation by the execution of a subsequent will,⁸⁸ and says nothing about revival. The earlier case of *Blackett v. Ziegler*,⁸⁹ however, probably represents the leading American application of rules developed under the ecclesiastical system. The testatrix there, having a will dated in 1895, made another in 1904 containing an express clause of revocation. She thereafter destroyed the second will, simultaneously stating to certain persons then present that she wanted her first will to be in effect. She also executed a document, adequately witnessed, by which she appointed an executor without bond. On proceedings to probate the 1895 will, it was contended that such instrument had been instantly nullified by the execution of the 1904 will and had not been revived by anything occurring thereafter. The court agreed that upon the “execution of such an instrument the prior will is revoked, no matter whether the revoking instrument be probated or not. It is the execution of the instrument in proper form which effectuates the revocation.”⁹⁰ On the question of revival, the court indicated such was possible either by re-execution or by means of a codicil amounting to a republication, but found that the memorandum appointing an executor was insufficient for that purpose since it was not attached to the 1895 will nor did it make reference thereto. The court was, therefore, obliged to decide whether or not the act of destroying the revoking will had, in some way,

⁸⁸ Iowa Code 1946, Vol. 2, Ch. 633, § 633-10, states: “Wills can only be revoked in whole or in part by . . . the execution of subsequent wills.”

⁸⁹ 153 Iowa 344, 133 N. W. 901, 37 L. R. A. (N. S.) 291 (1911).

⁹⁰ 153 Iowa 344 at 353, 133 N. W. 901 at 904.

revived the earlier will. In that respect, the court approved ecclesiastical ideas on the subject by saying: "The safest doctrine, we think, is that announced by the ecclesiastical courts of England, to the effect that it is a question of testator's intent, to be gathered from admissible parol testimony,"⁹¹ in the absence of any presumption on the point. Evidence having been offered in regard thereto, the 1895 will was admitted to probate.

Not content with settling the problem before it, the court went on to affirm that a subsequent inconsistent will, being ambulatory, would not produce a revocation prior to the death of the testator and would do so then only if it remained in existence, but that, as in the instant case, if it contained a clause of revocation it would operate instantly on execution.⁹² This expression by way of dictum has not yet been confirmed, but the case of *In re Cameron's Estate*⁹⁴ indicates what would clearly establish revival of an earlier will revoked by the execution of a subsequent one expressly so declaring. There a will dated 1914 was followed by another, in 1915, which effectively revoked the former. In 1929, a paper was executed and attested by which the testatrix declared that the 1914 will was her "one and only will." Unlike the memorandum in *Blackett v. Ziegler*,⁹⁵ this document was treated as a codicil to the 1914 will, was deemed to have incorporated its provisions by reference, and the two then presenting provisions inconsistent with the 1915 will the latter was deemed revoked and the 1914 will republished and revived. Inasmuch as the present Iowa statute fails to mention revival, these doctrines may still prevail in that state for it cannot be said that there is anything in the statute intended to overrule the cases mentioned.

⁹¹ 153 Iowa 344 at 354, 133 N. W. 901 at 905.

⁹² The rule of *Blackett v. Ziegler* was affirmed in the case of *In re Farley's Estate*. — Iowa —, 24 N. W. (2d) 453 (1946), a case in which a husband and wife, in 1929, executed reciprocal wills. Following a divorce decree, the husband executed another will expressly revoking the former one, but that will could not be found at the time of the testator's death and was presumed to have been destroyed. The case was remanded for trial to ascertain, if possible, the testator's intention on the question of revival.

⁹³ In the case of *In re Sloan-Rutledge's Will*, 210 Iowa 1256, 232 N. W. 674 (1930), the court held that it was the burden of the person claiming revocation to prove that the revoking instrument was executed.

⁹⁴ 215 Iowa 63, 241 N. W. 458 (1932).

⁹⁵ See note 89, ante.

Kansas likewise presents the picture of a state which has recently engaged in statutory revision on the subject, although the principal change there concerns the formalities necessary to revive a revoked will.⁹⁶ Dictum in the first Kansas case touching on the point, that of *Ross v. Woolard*,⁹⁷ intimates that the court there would be inclined to follow common law principles if it were not for the express statutory provision dealing with revival. In *Derr v. Derr*,⁹⁸ however, the court was presented with a clear-cut problem. The testator there concerned had executed a will in 1921 but made another in May, 1925. In October of that year he executed a paper reading: "I wish my first will to be in effect this date," which paper was duly attested. The statute then permitted revocation either by the making of a will or codicil or "by some other writing signed, attested and subscribed in the manner provided by this act for the making of a will."⁹⁹ Absence of an express clause of revocation in such "other writing" was regarded as of no consequence and since it clearly disclosed an intention to revive the original, but revoked, will the same was given renewed effect. The court also indicated that, as the testator wanted his first will reinstated, he necessarily desired to revoke the second. If the first will had itself contained a clause of revocation, such rationalization would be proper since, by its revival, the revocatory clause therein would have become the testator's most recent expression on the subject. If the memorandum had declared

⁹⁶ Kas. Gen. Stats. 1945 Supp., Ch. 59, Art. 6, § 59-611, deals with revocation and specifies: ". . . no will in writing shall be revoked or altered otherwise than by some other will in writing; or by some other writing of the testator declaring such revocation or alteration and executed with the same formalities with which the will itself was required by law to be executed. . . ." Section 59-612, touching revival, declares: "If the testator shall make a second will, the revocation of the second will shall not revive the first will, unless it appears by the terms of such revocation that it was his intention to revive the first will, or unless after such revocation he shall duly republish his first will in the presence of two or more competent witnesses who shall subscribe the same in the presence of the testator." The former statute, Kas. Gen. Stats. Ann. 1935, Ch. 22, § 22-242, merely required that the testator should "duly republish his first will."

⁹⁷ 75 Kas. 383, 89 P. 680 (1907). The language used was clearly not necessary inasmuch as both the first and second wills were subjected to physical cancellation and no case holds that revival, short of re-execution, is possible in such situations.

⁹⁸ 123 Kas. 681, 256 P. 800 (1927).

⁹⁹ See Kas. Gen. Stats. Ann. 1935, Ch. 22, § 22-241. The present law declares that it may be "by some other writing of the testator *declaring such revocation or alteration* executed" pursuant to statutory formalities. See 1945 Supp., Ch. 59, § 59-611. Italics added.

that testator wished the first will to be his "one and only will,"¹ one could again agree with the court's holding. But might it not have been testator's intention to have both stand, particularly since he did not destroy the 1925 will nor expressly evidence an intention to revoke it.² There is intimation, in *Mann v. Haines*,³ that a testator may leave two or more valid wills, so long as the latest one does not expressly revoke the former nor present a totally inconsistent scheme of testamentary disposition, hence it cannot be said that the testator in the Derr case "necessarily desired to revoke" the second will. The case does indicate, however, that in Kansas a revocation produced pursuant to statute is an accomplished act thereby making it necessary to resort to principles of revival.

At a very early date, it was decided in Kentucky, in the case of *Linginfelter v. Linginfelter*,⁴ that the execution of a subsequent will containing an express clause of revocation, but which will was subsequently destroyed, would not necessarily prevent probate of the earlier will which it was designed to revoke. The rationale behind the decision, however, is not too clear for the court did not make it apparent whether the holding was based on the idea that the subsequent will was merely ambulatory and failed to take effect or whether it was giving effect to oral declarations of the testator that he wished his first will to become operative as his last one.⁵ Whatever the rationale, the present statute is so framed

¹ See *In re Cameron's Estate*, 215 Iowa 63, 241 N. W. 458 (1932).

² Doubt has been cast on the present validity of the decision by the change in the Kansas statute set out in note 99, ante.

³ 146 Kas. 988, 73 P. (2d) 1066 (1937). The court there refused to reject the earlier will because of lack of proof as to the contents of the subsequent document, a purported will, which could not be found. See also *Hill v. Kennedy*, 134 Kas. 560, 7 P. (2d) 88 (1932), and *In re Rinker's Estate*, 158 Kas. 406, 147 P. (2d) 740 (1944). In the last mentioned case, the court (1) placed the burden of proving the contents of the subsequent instrument on the contestant, and (2) declared that the mere writing of the words "null and void—later will" on the earlier will, but which statement was not signed or attested, was not sufficient to amount to a revocatory "other writing" within the meaning of the statute.

⁴ 3 Ky. (1 Hardin) 127 (1807).

⁵ The court said: "The cases . . . clearly prove that the bare act of making a subsequent will, which is itself cancelled by the testator in his lifetime, shall not amount to a revocation of a former will, which has remained in the possession of the testator until his death, uncancelled. . . ." Up to that point, the court seems to have proceeded on the theory that the subsequent will was still ambulatory. Nevertheless, it went on to say: ". . . and much less should it be considered as a revocation, when such last will (as in the present case) has been destroyed by the testator, with an avowed intention of giving efficacy to the first." See 3 Ky. (1 Hardin) 127 at 128.

as to warrant the assumption that a revocation made in statutory fashion is now designed to possess immediate effect.⁶

One method of revocation mentioned in the Kentucky statute contemplates the use of a subsequent will or codicil. It became necessary, in the case of *Slaughter's Administrator v. Wyman*,⁷ for the court to determine the sufficiency, for this purpose, of a codicil which made mistaken reference to the will it purported to effect. The testatrix there had made a will, dated August 1906, and by clauses 11, 12 and 14 thereof she made provision for her nephew in the event he lived with her for the remainder of her days. She subsequently made a codicil referring to a will dated July, 1906, and particularly clauses 7 and 8 thereof, containing provisions favoring such nephew on the condition aforementioned, indicating that he had breached the condition, and declaring that she, as a consequence, revoked those provisions.⁸ Upon testatrix's death, the nephew claimed that the codicil had no effect upon the August will because of the mistaken references, but that it showed an intention to revive an earlier will which had been revoked by the August will yet which, through the codicil, was now being republished thereby nullifying the August will by indirection. Since no will bearing date in July, 1906, could be found, he argued that any codicil dependent thereon was invalid and that the testatrix had died intestate. The court acknowledged the ingenuity of the argument but held that the codicil was obviously intended to produce a partial revocation of the August will, despite the mistaken references, so permitted probate of the unrevoked portions thereof. It did, however, admit that if the argument were sound the August will, once revoked, would not have been revived merely by the destruction of the revoking instrument.⁹ The case of *Minor*

⁶ Ky. Rev. Stat. 1946, Ch. 394, § 394.080, states: "No will or codicil, or any part thereof, shall be revoked, except: . . . (2) By subsequent will or codicil; (3) By some writing declaring an intention to revoke the will or codicil, and executed in the manner in which a will is required to be executed. . . ." Section 394.100 declares: "A will or codicil, or part thereof, that has been revoked shall be revived only by re-execution or by a codicil executed in the manner required for making a will, and then only to the extent to which an intention to revive is shown thereby."

⁷ 228 Ky. 226, 14 S. W. (2d) 777 (1929).

⁸ The statute permits partial revocation. See note 6, ante.

⁹ In *Singleton v. Singleton*, 269 Ky. 330, 107 S. W. (2d) 273 (1937), the court likewise indicated that a will dated 1923 could not be probated after proof that another will had been made in 1934 expressly revoking all former wills, even though

v. *Guthrie*¹⁰ would also have reached the same result but for the fact that the contestants were unable to show what had happened to the subsequent will, got no benefit from any presumption of its destruction because unable to prove that it had ever been in testator's possession, and were denied the right to offer secondary proof as to its contents on the ground that if the subsequent will was still in existence production thereof would furnish the best evidence that it was designed to revoke the earlier will.

The Kentucky statute, recognizing the possibility of revival, indicates that partial revival can be accomplished for it declares the revoked will shall be revived "only to the extent to which an intention to revive is shown thereby."¹¹ That provision produced the interesting decision in *Spradlin v. Adams*,¹² in which case testator's will dated 1909 had been revoked by his subsequent marriage. In 1912, after his marriage, he made another will recognizing this fact, making provision for his spouse, and declaring that in all other respects he wished the 1909 will to stand. Thereafter the testator divorced his spouse, made another will reciting the existence of the second will, stating that the same had been lost, that he did not wish his ex-wife to share in his estate and that he, therefore, wished to revoke that will. On these facts, the court held that the second will had revived the first and the third had revoked the second only so far as it related to the provision for the divorced spouse, so that it was error to instruct the jury that the first will had been revoked. It is safe to say, in the light of the statute and these decisions, that at least the major problems are adequately answered in that state.

While the terminology used in the Louisiana code provides clear evidence of its civil law origin, the sections dealing with revocation are quite explicit, recognize the elsewhere generally

the 1934 will could not be located. The case is weakened somewhat by the fact that the surviving spouse was the contestant and the court indicated that, whatever the situation might be, the spouse was free to renounce any existing will and claim the statutory share or would receive the same in any event if the court decided that the decedent died intestate.

¹⁰ 9 Ky. L. R. 113, 4 S. W. 179 (1887).

¹¹ See note 6, ante.

¹² 182 Ky. 716, 207 S. W. 471 (1919).

assumed power of a testator to revoke or change his will, by express or tacit means, and specify that, in the absence of express revocatory features, the several testaments made from time to time are to be construed together as far as possible.¹³ The framers thereof, doubtless assuming that this last idea makes unnecessary any consideration of stipulations as to revival, have made no express provision on that point so questions of that nature have been left to judicial determination. Most of the Louisiana cases have been concerned with matters of revocation. Thus, in *Succession of Boudreau*,¹⁴ it was asserted that a formal written will had been nullified by a subsequent nuncupative will disclosing an express intention to revoke the former. The operation of the nuncupative will was challenged on the ground that, inasmuch as it contained a clause of non-testamentary character, it could not operate as a will and hence also failed as a revoking instrument. The court observed, however, that as the code merely required that the act of revocation "be made in one of the forms prescribed for testaments and clothed with the same formalities" the provision for revocation satisfied statutory requirements even though the subsequent will was inoperative as a testamentary device. By so holding, the court was seemingly advancing the theory that an express revocation operates instantly upon execution and does not depend upon the future outcome of the will in which it appears provided that will satisfies all requirements concerning

¹³ Dart Civ. Code 1945, Vol. 1, Ch. 6, Art. 1690, in part states: "Testaments are revocable at the will of the testator until his decease. . . ." Article 1691, defining revocation, declares: "The revocation of testaments by the act of the testator is express or tacit, general or particular. It is express when the testator has formally declared in writing that he revokes his statement or that he revokes such a legacy or a particular disposition. It is tacit when it results from some other disposition of the testator, or from some act which supposes a change of will. It is general when all the dispositions of a testament are revoked. It is particular when it falls on some of the dispositions only, without touching the rest. . . ." Article 1692 specifies that: "The act by which a testamentary disposition is revoked, must be made in one of the forms prescribed for testaments, and clothed with the same formalities." Article 1693 reads: "Posterior testaments, which do not, in express manner, revoke the prior ones, annul in the latter only such of the dispositions therein contained as are incompatible with the new ones, or contrary to them, or entirely different." Article 1694 provides: "A revocation made in a posterior testament has its entire effect, even though this new act remains without execution, either through the person instituted, or of the legatee, or through his refusal to accept it, provided it is regular as to its form."

¹⁴ 10 La. Ann. 709 (1855).

execution and attestation.¹⁵ It might, however, have been proceeding on the theory that the later instrument was, at least, such an "other writing" as would have satisfied courts in states more closely allied to common law views. At any rate, the earlier will was denied probate.

Implied revocation growing out of inconsistency between two existing wills is classed as a "tacit" revocation in the Louisiana code and was found present in the case of *Succession of Bowles*¹⁶ where the later will not only made a different disposition as to parts of the estate but also designated a different executor. In the light of the clear statutory language, it is not surprising to find the court, in *Succession of Lefort*,¹⁷ declaring that in the absence of an express clause of revocation a subsequent will could produce only a partial revocation unless total inconsistency exists on all points. Similarly, since revocation must take "one of the forms prescribed for testaments," the mere fact that a formal will is found among worthless papers,¹⁸ or that testator has made oral statements disclosing a design to revoke,¹⁹ will be insufficient to nullify it just as would a change in the testator's family relationships of such character that it would ordinarily be accompanied by a desire to revoke an existing will.²⁰

It was not until quite recently that the Louisiana court had to pass on the question of revival, and what it said then tends to belie the earlier suggestion that an express clause of revocation operates instantly on execution. In the case of *Succession of Dambly*²¹ contest against the probate of a formal will dated in 1927

¹⁵ If it does not, the purported revocation will fail according to *Holingshead v. Sturgis*, 21 La. Ann. 450 (1869). In that case revocation was attempted by (1) a letter, and (2) a nuncupative will, neither of which met legal requirements; the first, because not in the form of a testament, the second, because not read by testatrix to the witnesses nor read by one of them to her in the presence of the others. See also *Succession of Guiraud*, 164 La. 620, 114 So. 489 (1927); *Succession of Feitel*, 187 La. 596, 175 So. 72 (1937).

¹⁶ 3 Rob. 31 (La., 1842).

¹⁷ 139 La. 51, 71 So. 215, Ann. Cas. 1917E 769 (1916).

¹⁸ *Succession of Blakemore*, 43 La. Ann. 845, 9 So. 496 (1891).

¹⁹ *Succession of Hill*, 47 La. Ann. 329, 16 So. 819 (1895).

²⁰ *Succession of Cunningham*, 142 La. 701, 77 So. 506 (1918). The will there made provision for "my dear wife." Before testator's death, a divorce had been granted and a property settlement made. These facts alone were treated as being insufficient to produce a revocation.

²¹ 191 La. 500, 186 So. 7 (1938), noted in 1 La. L. Rev. 464.

was predicated on the idea that a later will had been made expressly revoking the earlier one. It appeared that this later will had, sometime after its execution, been deliberately torn in half although the pieces thereof had been preserved. There was no evidence whatever as to any intention to revive the earlier will, nor had the same been re-executed or republished. Probate thereof was allowed when the court said: "The question in this case is not whether the first will was revived when the revoking will was revoked, but whether the first will was ever revoked,"²² and then proceeded to answer that question by indicating that under Louisiana law a will does not become operative until it is probated and, as the subsequent will had been destroyed, it could never possess operative effect.²³ If, then, the act of the testator designed to produce revocation possesses only an ambulatory character, the absence of any revival provision in a code which is otherwise quite complete is readily explained.

In Maine, as in many another state on the eastern seaboard, the statute speaks merely as to the means by which a will may be revoked.²⁴ It is, moreover, somewhat remarkable that no case has arisen there which has called for a full treatment of the subject. That the statutory method of revocation is not the only one was suggested in *Carter v. Thomas*²⁵ where testator's will devised portions of his estate to his several children, leaving the residue to his two sons. During his lifetime he sold certain of the residuary real estate to one of these sons. It was urged that the statutory method of revocation did not exclude the possibility of an implied one from the ademption which had taken place and that such ademption had impliedly revoked the whole will. The court agreed that implied revocation was possible, but regarded the sale

²² 191 La. 500 at 517, 186 So. 7 at 13.

²³ That decision was followed in the case of *Succession of Moore*, 196 So. 79 (La. App., 1940), where, although the case turned on other grounds, the court indicated that if a will is revoked and then the revoking paper is cancelled the first will becomes the testator's last will.

²⁴ Me. Rev. Stat. 1944, Vol. 2, Ch. 155, § 3, recites: "A will executed under the provisions of section 1 is valid until . . . a subsequent will, codicil, or writing [is] executed as a will is required to be . . ."

²⁵ 4 Me. *341 (1826). The case of *Caine v. Barnwell*, 120 Miss. 209, 82 So. 65 (1919), indicates that a conveyance of land to the same persons as those named as devisees will not operate to revoke the will naming them.

as producing only a *pro tanto* nullification of the will so admitted the same to probate. In the case of *Thompson, Appellant*,²⁶ the doctrine of dependent relative revocation was applied to permit probate of a will which had been subjected to physical destruction, on the ground that revocation through a subsequent will is possible only if the same is "executed as a will is required to be." Necessarily, then, according to *Lord's Appeal*,²⁷ if an adequately executed subsequent will cannot be produced to prove the revocation and it is impossible to establish that such a will ever existed by competent secondary proof, the earlier will must stand as the only will. Only in the case of *O'Brion, Appellant*²⁸ did the court come close to the problem of revival but found it unnecessary to pass thereupon for the reason that it decided a revocation had never occurred. The testatrix there made a will in 1912 and a codicil thereto in 1914, both of which were in existence at the time of her death. She had been induced, in 1916, to execute a document purporting to be a will but which instrument was denied probate when offered because it had been obtained by undue influence. When the earlier documents were thereafter propounded, it was argued that the 1916 instrument was effective as a revocation even though it had been denied probate. The trial court so agreed, but the

²⁶ 116 Me. 473, 102 A. 303 (1917). Testatrix had made a valid will in 1911. In 1913 she signed another and still later that year she made a codicil, both of which were inadequately witnessed. At some time not indicated, the 1911 will was subjected to physical destruction by testatrix on the assumption she possessed a valid will. A true copy thereof existed, however, and was accepted for probate on the theory that the testatrix "meant the revocation of the old to depend upon the efficacy of the new disposition intended to be substituted." The court in *Townshend v. Howard*, 86 Me. 285, 29 A. 1077 (1894), however, concluded that if testator had, at one time, contemplated revocation only provided a new will was effectively made still, by changing his mind to encompass a positive design to revoke absolutely and totally, the old will was effectively nullified by reason of the cancelling marks placed across his signature.

²⁷ 106 Me. 51, 75 A. 286 (1909). A will dated 1903 was found in a secretary with other miscellaneous and worthless papers. It bore cross marks in lead pencil through some provisions and interlineations through others but was otherwise in sound physical condition. Probate thereof was contested on the ground that another will, dated 1905, had been made but had since been lost or destroyed. Two alleged drafts of this will were produced; one in the handwriting of testator's lawyer, the other in that of his housekeeper. These copies varied in some particulars and both the lawyer and the housekeeper were hazy about the contents of the original and the manner of its execution. Admission of the 1903 will to probate was affirmed.

²⁸ 120 Me. 434, 115 A. 169 (1921).

decision was reversed when the upper court held that it was invalid, for all purposes, saying:

The defeat of that will, if for verbal convenience it may be styled a will, did not operate to revive the earlier will and codicil. They did not need to be revived. They were and are still living . . . The second will, the discredited document, never had a legitimate making. And never having had the distinction of bespeaking the mind and heart of her whose will it spuriously pretended to be, it is an outcast . . . with no recognizable rights, least of all the right of having its revocatory clauses controlling.²⁹

In the light of these decisions, it must be said that in Maine there is, as yet, no indication when a properly prepared revocatory instrument will take effect nor what steps, if any, must be taken to revive a revoked will.

An early Maryland court, in the case of *Colvin v. Warford*,³⁰ unaided by statute and confused by the inaccurate reporting of the decision in the English case of *Goodright v. Glazier*,³¹ announced that revocation based on inconsistency between two wills necessarily had to await the testator's death, since both wills were ambulatory, but decided that an express clause in the subsequent will was not merely an expression of a purpose to revoke the previous will but was an actual consummation of it. Such being the case, the court then proceeded to apply ecclesiastical rules to determine the effect of the subsequent destruction of the revoking will and concluded that that fact did not, necessarily, revive the earlier will since that might be contrary to the testator's intention, but that a prima facie presumption of intent to revive would be indulged in.

No particular recognition seems to have been accorded to that decision when Maryland adopted its present statute for it appears simply to paraphrase the English Statute of Frauds and deals

²⁹ 120 Me. 434 at 436, 115 A. 169 at 170.

³⁰ 20 Md. 357 (1863).

³¹ 4 Burr. 2512, 98 Eng. Rep. 317 (1770). See also 25 CHICAGO-KENT LAW REVIEW 190-1.

only with revocation.³² Like other statutes, it requires that the revoking instrument be in the form of an adequately safeguarded and authenticated writing, so the court, in *Bird v. Bird*,³³ refused to accept hearsay testimony of declarations by the testator that he had made, but subsequently destroyed, a will designed to revoke an earlier one locked away in his safety deposit box. It is not necessary that the writing, if in the form of a will, should specifically declare the revocation, according to *Gardner v. McNeal*,³⁴ for a subsequent will that is inconsistent in terms will produce a revocation by implication. An unusual blending of the principle involved in the last mentioned case and that announced in *Colvin v. Warford*,³⁵ produced the decision in the more recent case of *Rabe v. McAllister*,³⁶ a decision which would indicate that Maryland is still committed to ecclesiastical views on the subject of revival. In that case, a formal will had been made in 1927. Subsequently the testator, while in Germany, drew up two holographic wills, one dated 1933 and the other in 1935. These wills were valid where made and were treated as valid in Maryland. The first holographic will was inconsistent with that dated in 1927, so the formal will was thereby tacitly revoked. The second holographic will expressly referred to and revoked the one made in 1933 but said nothing about the earlier formal will. It was held that the ambulatory character of the tacit revocation in the first holo-

³² Md. Ann. Code 1939, Vol. 2, Art. 93, § 337, states: "No will in writing devising lands, tenements or hereditaments, or bequeathing any goods, chattels or personal property of any kind, as heretofore described, nor any clause thereof, shall be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same . . . signed as hereinbeforesaid in the presence of two or more witnesses declaring the same."

³³ 165 Md. 349, 168 A. 885 (1933). The testator there concerned and his wife had executed wills in 1926 which were placed in sealed envelopes and put away in a safety deposit vault where they remained until testator's death when his will was removed and probated. Contest by the heir was based on the alleged fact that testator had, subsequent to 1926, made another will but had thereafter destroyed the same by reason of his wife's opposition to its terms. The only proof offered consisted of oral declarations by testator to witnesses, prior to his death, as to the alleged fact. Held: testimony properly excluded and contest denied, the court saying: "It would be a dangerous practice to hold that a duly executed and attested will in existence at the death of the testator was or could be revoked by the declarations of the testator."

³⁴ 117 Md. 27, 82 A. 288, Ann. Cas. 1914A 119 (1911). The phrase "declaring the same" found in the Maryland statute would seem to be grammatically confined to the "other writing" there referred to.

³⁵ See note 30, ante.

³⁶ 177 Md. 97, 8 A. (2d) 922 (1939).

graphic will had failed to take effect because of its revocation and that the formal will together with the second holographic will had to be admitted to probate on the theory that the express revocation of the 1933 will made possible the use of a prima facie presumption of an intent to revive the one dated in 1927 while the 1935 instrument was, in effect, a codicil thereto. The Maryland law, therefore, seems to be substantially complete albeit it represents a view not widely followed.

Revocation of an existing will should be a matter requiring exercise of deliberate intention, so it was decided quite early in Massachusetts, by the holding in *Laughton v. Atkins*,³⁷ that a purported revoking will the execution of which had been obtained by undue influence could not nullify an earlier will. The court recognized that a will valid when made might fail to operate because of subsequent circumstances but that its subsequent failure should not, and would not, nullify the clause of revocation contained therein. It refused to apply such rule to the situation before it, however, since neither the second will nor the revocatory clause there concerned ever had validity.³⁸ Tacit in such a decision, of course, was the thought that an express clause of revocation would necessarily have to possess immediate operative effect and not be made to depend upon the continued existence of the will containing it; a thought which was later to be translated into reality. In still later cases, such as *Giles v. Giles*³⁹ and *Aldrich v. Aldrich*,⁴⁰ the issue turned on whether an alleged revoking will had ever been made, but in *Wallis v. Wallis*⁴¹ the court announced that if it could be established that a later will had been made

³⁷ 18 Mass. (1 Pick.) 535 (1822).

³⁸ The same rationale was applied in *Sewall v. Robbins*, 139 Mass. 164, 29 N. E. 650 (1885), where the subsequent will containing an express clause was held ineffective because it was found that the testatrix lacked testamentary capacity at the time of its execution.

³⁹ 204 Mass. 383, 90 N. E. 595 (1910). Declarations of testator concerning the existence of a lost second will, supposedly revoking an earlier one because of inconsistent provisions, were rejected on the ground there was no proof that the second will, if one ever existed, had been executed in the manner required by the statute quoted in note 42 post.

⁴⁰ 215 Mass. 164, 102 N. E. 487, Ann. Cas. 1914C 906 (1913). The contestants were held not to have sustained the burden of proving the existence of the purported subsequent revoking will.

⁴¹ 114 Mass. 510 (1874).

expressly revoking a former will such revocation would have to be given effect even though the later will was lost and it was impossible to probate it as a lost will for lack of evidence as to its dispositive provisions. While the Massachusetts statute does not so state, being content merely to declare the means of revocation,⁴² judicial interpretation thereof has assigned to it a meaning comparable to the ecclesiastical doctrines developed in England.⁴³

It was not until considerably later that the Massachusetts court reached the problem of revival, but when it did, in the case of *Pickens v. Davis*,⁴⁴ it produced a result which could well have been expected in view of its predilection toward ecclesiastical rules concerning revocation. In that case, two wills had been made, the second expressly revoking the first. The second will was later intentionally destroyed while the first continued in existence up to the moment of testator's death. That fact alone was held insufficient to evidence an intention to revive the earlier will, the court saying:

It is more reasonable and natural to assume that such revocatory clause shows emphatically that he has abandoned his former intentions, and substituted therefor a new disposition of his property, which for the present, and unless again modified, shall stand as representing his wishes on the subject. But when the new plan is in turn abandoned, and such abandonment is shown by a cancellation of the later will, it by no

⁴² Mass. Ann. Laws 1933, Vol. 6, Ch. 191, § 8, merely declares: "No will shall be revoked except by . . . some other writing signed, attested and subscribed in the same manner as a will. . . ." There is no provision dealing with revival.

⁴³ The case of *Brown v. Thorndike*, 32 Mass. (15 Pick.) 388 (1834), decided under a former statute, involved a will disposing of both real and personal property. Appended to the attestation clause was a memorandum in writing which would have been operative, the court said, had it been duly attested but it was not. At that time different rules applied to the attestation of wills as contrasted with testaments. It was argued, in obverse fashion, that if an unattested document could serve as a testament of personal property, an unattested revocatory instrument should at least suffice to nullify the provisions in the will bequeathing personalty. The court refused to accept such argument, declaring that if a will covering both real and personal estate is ineffective as to the realty then it is ineffective for any purpose. That holding was achieved on the assumption that the testator must have intended the will to operate in its entirety or not at all. Conversely, a revocation would have to produce a total revocation or itself be a nullity. The reasoning may still be applicable in view of the fact that the present statute apparently contemplates total, rather than partial, revocation.

⁴⁴ 134 Mass. 252, 45 Am. Rep. 322 (1883).

means follows that his mind reverts to the original scheme. In point of fact, we believe that this would comparatively seldom be found to be true. It is only by an artificial presumption, created originally for the purpose of preventing intestacy, that such a rule of law has ever been held.⁴⁵

It did, however, indicate a willingness to accept testimony of oral declarations of the testator as evidence of an intention to revive the earlier will.⁴⁶ That state, then, may well be classed as one that has carried ecclesiastical principles into full operation.

The present Michigan statute is as inconclusive on the general subject as most, dealing as it does solely with methods for revocation,⁴⁷ but a number of decisions exist in that state which make it possible to chart the law quite clearly. The first case, that of *Scott v. Fink*,⁴⁸ required the court to declare its position both as to revocation and revival. Testator there had made three wills. The second was apparently inconsistent with the first but lacked express revocatory features. The third, however, did contain an express clause on the point. Both the second and the third of these wills were intentionally destroyed so that only the first remained in existence at the testator's death. The court indicated that the second will had not served to nullify the first since it was only an ambulatory instrument which "being cut off before having its dispositions of property awakened into life . . . could have no affirmative operation."⁴⁹ The third will, however, had produced an entirely different result for its provision concerning revocation was regarded as being operative at once, was treated as something

⁴⁵ 134 Mass. 252 at 256.

⁴⁶ In *Williams v. Williams*, 142 Mass. 515, 8 N. E. 424 (1886), the evidence of intention to revive was regarded as acceptable in a case where testator had made three different wills each of which contained an express clause of revocation but had declared that he would keep all three until he made up his mind and then would destroy two of them. He did destroy the first and the third, leaving the second intact and it was admitted to probate.

⁴⁷ Mich. Stats. Ann., 1943 Revision, Vol. 23, Ch. 266, § 27.3178(79). It states: "No will nor any part thereof shall be revoked unless . . . by some other will or codicil in writing, executed as prescribed in this chapter; or by some other writing, signed, attested and subscribed in the manner provided in this chapter for the execution of a will. . . ."

⁴⁸ 45 Mich. 241, 7 N. W. 799 (1881).

⁴⁹ 45 Mich. 241 at 246, 7 N. W. 799 at 802.

separable from the will in which it appeared, and was not affected by the ultimate fate of that instrument. Such being the case, the first will had been revoked but the question still remained as to whether or not it could have, or had been, revived. In that regard, the court pointed out that the mere destruction of the third will was not *per se* sufficient to produce a revival and, for want of other proof, held that the decedent had died intestate.

Amplifying on that holding, the same court later indicated, in *Stevens v. Hope*,⁵⁰ that it was error to charge a jury that a second will, if found to contain an express clause of revocation, could have no effect unless found to be in full force and existence at the time of the testator's death. Likewise, in *Dudley v. Gates*,⁵¹ the court held that if a subsequent revoking will was properly executed it was effective for that purpose even though its main dispositive provisions were inoperative because of indefiniteness. Naturally, however, it is the burden of the contestant, according to *Connery v. Connery*,⁵² to prove that the subsequent will did contain a clause of revocation before it can serve as a revoking will and no presumption of any kind to that effect can be indulged in merely from proof that a subsequent will of some sort was executed.⁵³

The rule of *Scott v. Fink*⁵⁴ respecting the effect of a subsequent inconsistent will was challenged in the case of *Cheever v. North*⁵⁵ on the ground that a statute, adopted after the earlier holding,⁵⁶ had made all subsequent wills immediately effective as revoking instruments whether expressly so stating or merely pro-

⁵⁰ 52 Mich. 65, 17 N. W. 698 (1883).

⁵¹ 124 Mich. 440, 83 N. W. 97 (1900).

⁵² 175 Mich. 544, 141 N. W. 615 (1913).

⁵³ In *Dingman v. Dingman*, 199 Mich. 384, 165 N. W. 712 (1917), only one of contestant's witnesses swore that the second will, presumed revoked because last seen in testator's possession, did contain an express clause. The court, quoting a statute which was later repealed but which had provided that no "revoking clause in any alleged lost, destroyed or suppressed will . . . shall be sufficient . . . unless . . . established by at least two reputable witnesses, having knowledge thereof," held it was proper to admit the first will to probate. It also decided that such statute, effective after the will had been offered but in operation at the time of the hearing, amounted to a rule of procedure which controlled the disposition of the case.

⁵⁴ See note 48, ante.

⁵⁵ 106 Mich. 390, 64 N. W. 455, 58 Am. St. Rep. 499, 37 L. R. A. 561 (1895).

⁵⁶ The text of the statute is set out in note 47, ante. It will be noted that it does not expressly fix any time for the taking effect of the subsequent will, regardless of its character.

ductive of that result by reason of inconsistency. The court, however, declined to so hold, preferring the view that the statute should be read with what it called "common-law distinctions" in mind. Unless a testamentary instrument can possess a dual character, *i.e.* be both immediately effective and also ambulatory, a point which common-law courts were not willing to concede,⁵⁷ it is illogical to draw the distinction thus made, but it was so fixed as the law for that state.

Only one Michigan case has carried the major problem through all of its stages and that is the case of *Danley v. Jefferson*.⁵⁸ The testatrix there, having a valid will which remained in existence up to the time of her death, prepared and signed another some seven or eight weeks later, which subsequent will expressly declared her intention to revoke the former will. On another and still later occasion, in the presence of four witnesses, she took the second will and burned it, saying that she wanted the earlier will to be good. Probate thereof was upheld on the theory that the first will, although once revoked, had been effectively revived by a republication thereof and that oral statements, made in the presence of witnesses, constituted a sufficient republication.⁵⁹ While the Michigan statute speaks only as to the formalities necessary for the execution of a valid will in the first instance, or those required to produce a sufficient revocatory instrument, the emphasis therein on signing and attestation, plus the fundamental basis of the Statute of Frauds, leads to the query as to whether or not permitting oral republication, especially in the presence of persons other than the original attesting witnesses, allows the testator to give effect to his testamentary intention without due compliance with safeguards designed for his protection. If it does, then the decision in question exposes the estate of the Michigan testator to dangerous hazards if he inadvertently permits a revoked will to remain in uncanceled existence.⁶⁰

⁵⁷ See 25 CHICAGO-KENT LAW REVIEW 190-2.

⁵⁸ 150 Mich. 590, 114 N. W. 470, 121 Am. St. Rep. 640, 13 Ann. Cas. 242 (1908).

⁵⁹ Ostrander, J., while concurring in the result on the basis of earlier ecclesiastical decisions, expressed the belief that republication required the execution of an instrument in writing.

⁶⁰ Consider the discussion in 25 CHICAGO-KENT LAW REVIEW 213-4 relating to defects in existing statutes concerning revival of revoked wills.

It is not clear, either from the Minnesota statute⁶¹ or the decisions of that state, when revocation is to take effect, hence it is not possible to speak authoritatively on the matter of revival. Perhaps the inference to be gathered from the case of *In re Cunningham*⁶² is that an express clause of revocation will operate instantly upon execution, but the court only decided that it was not necessary to probate the second will so long as its proper execution was proven and satisfactory explanation was given for its non-production. The facts there indicated that an earlier will was followed by a later one declaring an express revocation of the former. The second will was destroyed by the testator at a time when he was mentally incompetent so that act did not amount to a true revocation thereof. While the testimony adequately established the presence of the revocatory clause, it was not possible to show the testamentary provisions of the second will, hence the same could not be probated as an accidentally destroyed will. The court refused to speculate on whether the testator, had he known of the failure of his testamentary scheme, would or would not have wished the revoking clause to stand, but contented itself with holding that the second will did not have to be probated before its revoking clause operated to nullify the former will. So, too, in the case of *In re Scott's Will*,⁶³ a codicil which declared the revocation of a portion of the earlier will and substituted other provisions in place thereof failed as a dispositive instrument because the substitute was void in law, yet the revocatory part, in the absence of internal evidence that it was conditioned solely upon the effectiveness of the alteration, was given operation so as to produce a partial revocation of the will to which it was attached.

Any argument based on these decisions, to the point that an express revocation operates immediately, must face the emphatic denunciation that such is the law to be found in the case of *In re*

⁶¹ Minn. Stat. 1941, Ch. 525, § 525.19, recites: "No will in writing shall be revoked or altered otherwise than by some other will in writing, or by some other writing of the testator declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed. . . ."

⁶² 38 Minn. 169, 36 N. W. 269 (1888).

⁶³ 88 Minn. 386, 93 N. W. 109 (1903).

Tibbett's Estate,⁶⁴ yet again the holding therein is not conclusive. The testatrix in that case, having a will dated in 1915, made another with a revoking clause in 1918. She thereafter destroyed the second in the presence of two witnesses to whom she declared she wanted the first will to become effective. That will was admitted to probate after the court wrote an opinion which straddled the issue. After commenting on the varied views as to when a revoking will takes effect, and the equally varied views as to the consequence of its subsequent destruction, the court discussed the several theories of revival and the presence or absence of presumptions from the continued existence of the earlier will, but announced that it was unnecessary to make any choice as there was clear evidence of an intention to revive the former will. If the case decides anything, it does establish that oral declarations, made in the presence of witnesses at the time of the destruction of the subsequent will to the effect that the earlier will should stand, will support probate of a will which might otherwise at some time or another have been revoked. But beyond that the decision is inconclusive. It might be argued that Minnesota favors ecclesiastical views on the subject but, if so, a precise decision is yet to be forthcoming.

One year before England adopted its present statute, the highest court of Mississippi felt called upon to announce a rule which, to some extent, is declaratory of the operation of that statute. In *Bohanon v. Walcot*,⁶⁵ the testator, having one will dated in 1828, made another in 1831 which expressly revoked the former. Thereafter he revoked the second instrument, telling the drafter thereof that he wanted to make a new will but that, if he did not, he wanted the first will to go into effect. He died before carrying out such purpose, but the court refused to accept the 1828 will on the ground that once a will is revoked the mere destruction of the revoking instrument is not enough to revive the earlier one nor, for that matter, is any act sufficient for that purpose and the most that could be done was to adopt the old as a present, subsisting

⁶⁴ 153 Minn. 53, 189 N. W. 401 (1922), noted in 8 Corn. L. Q. 183, 21 Mich. L. Rev. 356, 7 Minn. L. Rev. 158.

⁶⁵ 2 Miss. (1 How.) 336, 29 Am. Dec. 631 (1836).

will. In the words of the court, it must be "some express and distinct 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."⁶⁶ Since an act, or series of acts, would be necessary to make a will in the first instance, it was logically deduced that mere oral statements would be insufficient, leaving aside all question of the conditional nature thereof. While the court there expressed the common-law idea that a will is only ambulatory, it subsequently recognized that even an inconsistent will may serve as an immediately operative revoking instrument. Thus, in *Hairston v. Hairston*,⁶⁷ the testator made three different wills, the second of which was merely inconsistent with the first although the third contained a clause of revocation. The testamentary provisions of the third will were inoperative because it was held that the legatee was not capable of taking the property. The court expressed the idea that the second will necessarily revoked the first, so then proceeded to decide whether the second might stand in view of the invalidity of the third. In that regard, the court held that the revoking clause should be treated as being something separate from the other provisions and was unaffected by the invalidity thereof unless it appeared that the intention to revoke was conditioned upon the taking effect of the changed testamentary scheme. Finding no such conditional intent, the court declared for intestacy.⁶⁸ As the Mississippi statute contemplates that the revocation shall be produced in some reasonably authenticated form but is silent as to when it shall operate,⁶⁹ these decisions must be regarded as still of significance in the law of the state especially as they relate to revival for on that score there is no legislation.

For many years Missouri has possessed statutory provisions

⁶⁶ 2 Miss. (1 How.) 336 at 339-40.

⁶⁷ 30 Miss. 276 (1885).

⁶⁸ *Vining v. Hall*, 40 Miss. 83 (1866), actually involved an attempt to probate a lost will which failed because proponents were unable to prove the contents thereof with sufficient clarity. They did establish, however, that the will had contained a clause of revocation which, the court said, would have been given operation except for the fact that there was inadequate proof of due execution.

⁶⁹ Miss. Code Ann. 1930, Ch. 72, § 3551, declares: "A devise so made, or any clause thereof, shall not be revocable but . . . by subsequent will, codicil, or declaration, in writing, made and executed. . . ." There is no revival statute.

on both revocation and revival⁷⁰ the meaning of which must be regarded as free from doubt in that state if the lack of judicial interpretation is any criterion. Only two cases have arisen there and the first of them, that of *Beaumont v. Keim*,⁷¹ so clearly fell under the revival provision that it evokes some wonder that any appeal was taken therein. The other, that of *Neibling v. Methodist Orphans' Home Association*,⁷² also involved two totally inconsistent wills bearing different dates which testatrix had placed in an envelope on which she had written a notation that the contents represented her last will and testament and should be probated. The court held that the later will *ex necessitate* revoked the earlier one and the written declaration was insufficient to revive it supposing that such had been the intention of the testatrix. It did intimate, however, that if there had been only a partial inconsistency, so that some property could have been passed under the prior will, both wills would have been accepted. Certainly, there was no republication of the first will if, by that term, is meant re-execution or re-attestation. Whether or not the notation would have been sufficient under the revival statute, which requires that it be made to "appear, by the terms of the revocation" that testatrix intended to revive the earlier will, was not answered inasmuch as the true meaning and purpose of the notation on the envelope could not be gleaned from the language used.

Montana possesses statutory provisions which should serve to satisfy most sceptics. Revocation may be accomplished there, either wholly or partially, by will or writing which declares such to

⁷⁰ Mo. Rev. Stat. Ann. 1939, Vol. 1, Ch. 1, Art. 20, § 521, on revocation, states: "No will in writing, except in the cases hereinafter mentioned, nor any part thereof, shall be revoked, except by a subsequent will, in writing, or . . ." Section 525, the common revival provision, is worded: "If, after making any will, the testator shall duly make and execute a second will, the destruction, cancelling or revocation of any 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 the first will, or unless he shall duly republish his first will."

⁷¹ 50 Mo. 28 (1872). There two wills purported to dispose of the entire estate but the second, while not expressly declaring the revocation of the first, did so in an entirely different fashion. The second will could not be found at testator's death and was presumed revoked. It was argued that an inconsistent will does not produce a revocation so no revival was necessary. The court held otherwise, and rightly so, since both the revocation statute and the revival one referred to a "subsequent will" rather than a subsequent will "expressly declaring" the revocation.

⁷² 315 Mo. 578, 286 S. W. 58 (1926), noted in 40 Harv. L. Rev. 329.

be the testator's purpose,⁷³ but the existence of two or more wills does not accomplish that result unless the later one so declares or presents a wholly inconsistent testamentary scheme to the former.⁷⁴ There is also a provision as to revival of revoked wills.⁷⁵ The effect of certain of these provisions was involved in the case of *In re Toomey's Estate*⁷⁶ where the decedent, by holographic writing, the language of which is presented below,⁷⁷ purported to give his entire estate consisting of cash in bank to a cousin and disowned his more immediate kindred. He thereafter left the state but wrote another letter which read, in part, ". . . Say Tim one request Im asking you is to have my body brought to Butte and Buried beside Mother and Con. And I would like you to give Tom & Leo \$1,000 each so you keep the rest, out in a kind of Trust fund so none of the rest will know. . . ." The "Tom" and "Leo" referred to were children of testator's deceased sister who would have been excluded under the first instrument. When the person named in the earlier document had secured his appointment as executor, the heirs sought to have the subsequent letter admitted as a codicil and claimed that it produced a total revocation of the first instrument. It was, however, held that both documents should be probated together as the letter could not serve as a revocatory instrument inasmuch as it lacked an express clause so stating and its provisions were not wholly inconsistent with the terms of the earlier will. To the argument that the recognition of the nephews

⁷³ Mont. Rev. Code 1935, Vol. 3, Ch. 77, § 6995, reads: "Except in the cases in this chapter mentioned, no written will, nor any part thereof, can be revoked or altered otherwise than: (1) By a written will, or other writing of a testator, declaring such revocation or alteration, and executed with the same formalities with which a will should be executed by such testator. . . ."

⁷⁴ *Ibid.*, § 6998, states: "A prior will is not revoked by a subsequent will, unless the latter contains an express revocation, or provisions wholly inconsistent with the terms of the former will; but in other cases the prior will remains effectual so far as consistent with the provisions of the subsequent will."

⁷⁵ *Ibid.*, § 6999, declares: "If, after making a will, the testator duly makes and executes a second will, the destruction, cancellation, or revocation of such second will does not revive the first will, unless it appears by the terms of such revocation that it was the intention to revive and give effect to the first will, or unless, after such destruction, cancellation, or revocation the first will was duly republished."

⁷⁶ 96 Mont. 489, 31 P. (2d) 729 (1934).

⁷⁷ "I John Toomey Do here by give to Tim Harrington A cousin of mine Every Cent of Money on deposit on 1st National Bank of Butte Mont. He to administer same as he sees fit for Burial purposes and Masses & Sc. No Riley family is got to have no handling anything in regard to Burial or So forth in conclusion I will say I disown them. As ever Signed Jno Toomey Kenwood Block Butte Mont."

had operated to cancel the language of disherison, the court answered by saying it was only a partial repudiation thereof to the extent of \$2,000 so that the nominee could properly "keep the rest." No case appears to have arisen in that state dealing with revival, but in view of the similarity between the language there found and that present in several other states, decisions on the point from other jurisdictions should possess persuasive authority at least.⁷⁸

In Nebraska, as in many another plains state, the statute speaks only as to revocation⁷⁹ but a hotly contested and long drawn out piece of litigation has supplemented its meaning. When the case of *Williams v. Miles*⁸⁰ first appeared in the Supreme Court of that state the issue was one as to the effect of a subsequent will which could not be found upon the testator's death. It was argued that if such a will had been made, and regardless of its contents, it could not nullify a former will which was produced for probate unless it remained in existence in probatable condition. After canvassing the entire law on the subject, the court chose to adopt ecclesiastical principles and announced that if the second will ever had existence and was proven to contain an express revocatory clause it would have possessed an immediate effect, even though the statute did not so state, and that its ultimate destruction would not, *ipso facto*, revive the earlier will. The value of this decision should not be regarded as shaken by the fact that when the case again appeared in the Nebraska Supreme Court⁸¹ it was then decided to affirm probate of the earlier will, for at that time the court agreed that there was insufficient proof to show either the due execution or the contents of the later will. As the contestants failed to establish that the first will was revoked, anything that was said concerning revival was clearly by the way but it is

⁷⁸ See, for example, Okla. Stats. Ann. (Perm. Ed.), Tit. 84, Ch. 2, § 106, and *Puckett v. Brittain*, 152 Okla. 184, 3 P. (2d) 876 (1931).

⁷⁹ Neb. Rev. Stats. 1943, Vol. 2, Ch. 30, Art. 2, § 30-209, recites: "No will, nor any part thereof, shall be revoked, unless by . . . some other will or codicil in writing, executed as prescribed in section 30-204; or by some other writing signed, attested and subscribed in the manner provided in said section for the execution of a will. . . ."

⁸⁰ 68 Neb. 463, 94 N. W. 705, 62 L. R. A. 383 (1903), reh. den. 68 Neb. 483, 96 N. W. 151 (1903).

⁸¹ *Williams v. Miles*, 87 Neb. 455, 127 N. W. 904 (1910).

reasonable to suppose that when that issue is squarely presented the court would, logically, apply ecclesiastical principles in full, including the one that there is no presumption either way from the fact of destruction of the revoking will.

Nevada presents the situation of being one of the few states where, thus far, no judicial consideration has been given to the problems here discussed. It should not be supposed, however, that this will always be the case for the statute on revocation⁸² does not (1) expressly declare when the revocatory act takes effect, nor (2) whether it must be accomplished by direct designation or can be affected by indirection, and (3) whether the same must be total in character. For that matter, the revival section⁸³ also contains the seeds of dispute as to what "terms" of revocation of a subsequent will may be deemed sufficient to revive a former one. It is precise, however, on the point that if revival is to be produced at a time after the destruction of the revoking will it must be done by due re-execution and not by some doubtful republication.

Two important decisions in New Hampshire have added significance to a brief statute enacted in that state which treats solely with revocation.⁸⁴ In the first of them, that of *Marston v. Marston*,⁸⁵ the first will disposed of all of the testator's real and personal property. A later instrument, making a different disposition as to a single legacy, was duly signed but attested by only one witness; a method then sufficient for a testament but not for a will. A question therefore arose as to whether or not this instrument produced a partial revocation in view of the statutory requirement that the revocatory instrument should be executed in the "same manner as a will." The court held that partial revocation was

⁸² Nev. Comp. Laws 1929, Vol. 4, § 9912, states: "No will in writing shall be revoked unless by . . . some other will or codicil in writing, executed as prescribed by this act. . . ."

⁸³ *Ibid.*, § 9913, declares: "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 the intention to revive and give effect to the first will, or unless, after such destruction, canceling or revocation the first will shall be duly re-executed."

⁸⁴ N. H. Rev. Laws 1942, Vol. 2, Ch. 350, § 13, declares: "No will or clause thereof shall be revoked unless by some other valid will or codicil, or by some writing executed in the same manner as a will."

⁸⁵ 17 N. H. 503 (1845).

clearly possible and, as the provision sought to be revoked dealt with personalty, the second instrument was sufficiently a "will" to accomplish that purpose as it was not necessary that the same be executed with the formalities which would be required to revoke the entire will. In the other case, that of *Lane v. Hill*,⁸⁶ the precise question concerned the admissibility of declarations made by the testator designed to establish the due execution of a subsequent will and also as to its contents and the court held the same good on the latter point and available to corroborate the testimony of other witnesses respecting the former. It then proceeded to announce, perhaps for the guidance of future proceedings on the new trial that was granted, that:

Whether the second will was destroyed is important, so far as the probate of the present will is concerned, only if the effect of such cancellation of the second will would be to revive the first. Although, up to this point, the authorities are in conflict, the better opinion seems to be that, in the absence of statute provisions upon the subject, such destruction would not have that effect without evidence that such was the intention of the testator, especially if the later will contained a clause of revocation, which, in view of the fact that there is no evidence upon these points, is as far as is necessary for us to go at the present.⁸⁷

There being no statute concerning revival in New Hampshire, the dictum thus announced might some day be translated into law and put that state in the same category as others which have accepted ecclesiastical principles.

It was many years before the confusion generated by two early New Jersey cases was dispelled and the statute there extant, speaking only on the subject of revocation,⁸⁸ was of little help in

⁸⁶ 68 N. H. 275, 44 A. 393, 73 Am. St. Rep. 591 (1900).

⁸⁷ 68 N. H. 275 at 283, 44 A. 393 at 397.

⁸⁸ N. J. Stat. Ann. (Perm. Ed.), Tit. 3, Ch. 2, § 3:2-4, points out that "no written will, or any devise or bequest therein, or any clause thereof, may be revoked except by: . . . (b) Another will or codicil in writing revoking or altering the same, or other writing declaring the revocation executed in the manner in which wills are required by law to be executed."

clearing up the situation. The old case of *Day v. Day*⁸⁹ is sometimes cited as a problem of revival but on close examination it appears to be one in which the latest will had been defectively executed and the earlier one had been subjected to physical destruction. Attempts to establish the earlier will failed, primarily because of an inability to establish its contents, but the court did remark that there was "no evidence that he ever intended to restore it." This chance statement might support the inference that New Jersey was committed to ecclesiastical doctrines from the start, yet almost fifty years later, in *Randall v. Beatty*,⁹⁰ the court still had not definitely committed itself for the result there could be, and was, supported by both common law and ecclesiastical reasonings. There a will dated in 1870 had been followed by another made in 1873 which was not only completely inconsistent but also contained a clause of revocation. The 1873 will was thereafter cancelled by the testatrix, leaving the earlier one intact, and it was admitted to probate. On common law grounds, the revoking will, being ambulatory, failed to survive to accomplish its purpose, hence justified admission of the earlier one. In that regard, the court even said: "The true rule on the subject is, that where one will is revoked by another, the revocation is testamentary, and the revocation of the later will revives the former."⁹¹ However, the court also quoted ecclesiastical cases as supporting the idea that the preservation of the earlier will was evidence that the testatrix desired to revive the same,⁹² so that the admission of the earlier will to probate could rest on either ground.

Some time later, in the case of *In re Moore's Estate*,⁹³ the preceding decision was urged on the court as ground for admitting an earlier will despite evidence of the fact that there had been a later will both expressly and impliedly revoking the one so offered.

⁸⁹ 3 N. J. Eq. (2 Gr.) 550 (1831).

⁹⁰ 31 N. J. Eq. (4 Stew.) 643 (1879).

⁹¹ 31 N. J. Eq. (4 Stew.) 643 at 646.

⁹² It relied on *Usticke v. Bawden*, 2 Add. Ecc. 116, 162 Eng. Rep. 238 (1824). That case, however, would indicate that the legal presumption is neither favorable or unfavorable, but the matter is purely one of intention to be gathered from extrinsic facts or circumstances.

⁹³ 72 N. J. Eq. 371, 65 A. 447 (1907).

The circumstances attending the discovery of the earlier will were somewhat suspicious and it bore evidence of having been subjected to fire to the extent that one important provision could not be made out. These facts may have led the court to attain the result that once a will has been revoked there must be clear evidence of an intent to revive the same, evidence which the court found lacking. To attain that result, the court interpreted the local statute, which provides for revocation by either "another will . . . revoking or altering the same"⁹⁴ or by an "other writing declaring the revocation," to mean that a later will can accomplish the revocatory purpose merely by implication but the "writing" referred to must do so expressly and should, therefore, operate immediately. That being so, an express revoking clause in a later will, being actually a "writing declaring the revocation" which could be considered as something distinct from the will in which it appeared, would possess the same effect. The court was then forced to pass on the question of revival. It met the decision in the *Randall* case by pointing out that the judge there admitted that there could be no revival without an intent to revive, so ultimately arrived at a result which was clearly consonant with ecclesiastical cases. But the matter was still not settled, for in the case of *In re Block's Estate*⁹⁵ the court picked up the interpretation placed on the statute as indicative of the fact that a subsequent will, whether express on the point of revocation or not, was only an ambulatory instrument which had to survive the testator to possess any effect. It asserted that it was not logical to suppose that one part of a will should take effect at one time and other parts at still another time. It decried the confusion produced by complicated and conflicting rules respecting revival. It also stressed that laymen understand that wills do not take effect until death intervenes so that it would

⁹⁴ A codicil may also accomplish that result, but in the case of *In re Diamant's Estate*, 84 N. J. Eq. 135, 92 A. 952 (1915), affirmed in 88 N. J. Eq. 552, 103 A. 199 (1918), the court held that the destruction of a codicil leaves the original will in force since there is nothing to read along with it which could modify the same. It should be noted that the codicil there concerned did not expressly revoke the will. There is language in the opinion which would indicate that if it had the same result would follow as in a case where a subsequent revoking will was later destroyed.

⁹⁵ 15 N. J. Misc. 233, 190 A. 315 (1937).

be irrational to suppose they possessed an intention with respect to revocation which would be in direct conflict with the extent of their legal knowledge. That being the case, the court announced what it considered a simple solution, to-wit: that the destruction of the later will prevented its clause of revocation from taking effect and permitted probate of the earlier will which had been preserved in a safe place.⁹⁶

In the latest New Jersey case, that of *In re Davis' Estate*,⁹⁷ the whole problem was carefully surveyed as it applied to a situation in which an earlier will was followed by two others, almost identical in form, the last of which contained a revocatory clause. The third will, last seen in testator's possession, could not be found at the time of his death. Probate of the first will was successfully contested after the court had canvassed the law generally, noticed that a large number of the American jurisdictions had evinced a preference for ecclesiastical views and that England itself now, by statute, required republication after a subsequent revoking will had been destroyed. It did not adopt the English system by judicial fiat, as had been done years ago in Georgia, but it did say that since the New Jersey statute provided no direct answer it would adopt what it considered to be a sound policy and one in harmony with prevailing opinion. Over a century of legal development, therefore, was necessary to effectuate a chance remark.

The New Mexico statute permits revocation either by some subsequent writing or by the making of a subsequent "valid"

⁹⁶ Preservation of the later will, under this theory, should produce the revocation of an earlier one, and it was so held in the case of *In re Drake*, 15 N. J. Misc. 484, 192 A. 428 (1937), where testator's first will left his entire estate to his wife if she survived him, but if not then to his children equally. He later executed another will which lacked an express revocatory clause but did start out with the words "This is my last will." By it, he gave his estate absolutely to his wife, naming her. Shortly thereafter the wife died. Testator remarried and, at the time of his death, left his second wife surviving him. She claimed that the second will, still in existence, should be probated in place of the earlier will and that, being inoperative for want of a legatee, testator died virtually intestate so that the surviving wife could participate in the estate. The court agreed, saying that the later inconsistent will effectively nullified the earlier one and that it should be probated even though "its practical effect now is purely revocatory."

⁹⁷ 134 N. J. Eq. 393, 35 A. (2d) 880 (1944).

will.⁹⁸ Both that statute and the one concerning revival⁹⁹ are worded differently than most provisions, and the clarity of the language used may have obviated most problems, but there are still some points over which doubt may exist. For example, while the statute recognizes the possibility of revocation by implication where the subsequent will disposes of the "same property" as that covered by the first will it says nothing about the effect of one which makes an inconsistent devise or bequest of only some of the same property. Furthermore, the revival provision concerns itself with the cancellation of a second "will," but says nothing about the legal consequence of destroying a subsequent "writing." On these, and other, points the courts of that state have yet to speak for only one decision exists having any bearing on the subject. That case, entitled *In re Roeder's Estate*,¹ involved a most unusual set of facts. The testator there prepared his own three-page will even to the point of doing his own typewriting. That will, dated July 7, 1937, was properly executed and attested. Testator apparently later detached the first page of the will, which contained the scheme of disposition, and substituted another in its place. As so altered, the changed page named the only relative of the testator's who had been given any part of the estate. This altered will was found in testator's safety deposit box but probate thereof was denied for the reason that the whole instrument had not been properly authenticated. Not long thereafter, a sealed envelope was found among testator's papers at home. It contained a carbon copy of the altered will with its substituted first page but fastened to the back thereof, held by an ordinary paper clip, was a page of carbon copy typewriting which, from staple marks and the like, indicated that it was the carbon copy of the original

⁹⁸ N. M. Stats. Ann. 1941, Vol. 2, Ch. 32, § 32-108, indicates that any will may be revoked "by the testator by an instrument in writing, executed and attested in the same manner as is required by law for the execution and attestation of a will, by which instrument the maker distinctly refers to such will and declares that he revokes it; or such will may be revoked by the making of a subsequent valid will disposing of the same property covered by the first will, although no reference be made in the later will to the existence of the earlier one."

⁹⁹ *Ibid.*, § 32-109, declares: "If a person having made a first will, should make a second, annulling the first, and afterwards annuls the second, the first will is not thereby made valid, unless the validity of the first will be acknowledged."

¹ 44 N. Mex. 578, 106 P. (2d) 847 (1940).

first page destroyed as aforesaid. This carbon copy sheet and pages two and three were then offered for probate as an attempt to establish a lost, or partly lost, will. Contest was based on the theory that the entire first will and every part thereof had been nullified so that the deceased died intestate. The court refused to agree with the contestants, relying on the statutory requirement that the subsequent will, to be effective, must be a "valid" one, and that fact had already been determined adversely to them. It was then argued that the deceased had intended to die intestate, witness the fact that he had destroyed a valid will and had not provided an adequate substitute, but the court applied the doctrine of dependent relative revocation on the ground that the facts did not show an unconditional intent to revoke. It may be said, then, that New Mexico has not yet had occasion to inquire into problems of revival, having only reached the first stage of the questions here under consideration.

To be continued

NOTES AND COMMENTS

TEN MONTHS OF UNCERTAINTY

Problems concerning the nature of the title, if any, received by the surviving spouse during the ten-month period following upon the issuance of letters of administration of the deceased spouse's estate, and also whether that title is transferable, occupied the attention of the Illinois Supreme Court in the case of *Bruce v. McCormick*.¹ The decision therein, while eminently sound under the present state of the law, prompts some inquiry as to whether or not the law might not well be changed by legislative revision of the present Probate Act.

According to the facts in that case, Samuel Wood died intestate owning certain Illinois real estate and leaving a widow and several descendants surviving him. Letters of administration were issued on his estate on March 12, 1943. In April of that year, the widow and two of the descendants conveyed their respective interests in the realty to the plaintiff by quit-claim deed. The following month, the widow released her interest in the land to the remaining descendants. After all claim to dower rights had been barred by lapse of time, the widow executed a warranty deed to the plaintiff who thereafter filed a partition action alleging that he had acquired title to the widow's undivided one-third interest by reason of her deeds to him. The trial court so found and decreed partition in the plaintiff's favor. Upon direct appeal to the Illinois Supreme Court, it was held that the decree should be reversed. The precise issues involved in the case were (1) is the barring of the dower right still a condition precedent to the vesting of an interest in the fee in the surviving spouse, and (2) can the dower interest be effectively released before being barred by lapse of time and, if so, to whom. Intimately connected with such issues, of course, was the further question as to whether or not the present Probate Act had wrought any change in the law which heretofore controlled on such questions.

Dower rights today are frequently regulated and modified by statute so they are seldom the same in any two jurisdictions.² In Illinois, certainly, while dower is still based on common-law doctrines it has been enlarged and modified by statute³ so that a surviving spouse has an alternative of claiming either the common-law dower, preferred over the claims of creditors, or else may take an interest in the fee after all debts have been dis-

¹ 396 Ill. 482, 72 N. E. (2d) 333 (1947).

² See 17 Am. Jur., Dower, § 7.

³ In general, see James, Illinois Probate Act Annotated (The Foundation Press, Inc., Chicago, 1940), pp. 12 and 29.

charged. The two potential interests are so co-mingled that an accurate analysis of one is impossible without fully considering the effect of the other.

Prior to the enactment of the present statute, Section 1 of the former Descent Act⁴ provided that the surviving spouse should receive as his or her absolute estate, in lieu of dower, one-third of each parcel in which such surviving spouse should waive his or her right of dower. The present statutory provision, Section 11 of the Probate Act,⁵ directs that the surviving spouse shall receive one-third of each parcel in which the surviving spouse does not perfect his or her right to dower pursuant to the statutory manner so provided.⁶ The other heirs, therefore, receive the remaining two-thirds of each parcel in which the surviving spouse does not perfect his or her right to dower and, subject to the dower of the surviving spouse, all of each parcel in which dower is perfected. Section 1 of the former Dower Act⁷ had likewise provided that the surviving spouse should be endowed of a third part of the lands unless dower should have been relinquished in legal form. The idea there expressed has been carried over into a corresponding section of the Probate Act which states that the surviving spouse is endowed of a third part of all real estate unless dower has been released or is barred.⁸ Another section thereof declares that dower is barred unless written intention to take dower is filed within ten months after issuance of letters of administration and within the lifetime of the surviving spouse.⁹ These statutory changes produced by the present Probate Act evoked the issues presented in the instant case.

In order to decide that the same devolution of real estate resulted under the Probate Act as was formerly the case, the court was obliged to construe the varied sections of the statute together in order to garner the legislative intent.¹⁰ A comparison of Section 1 of the Descent Act with Section 11 of the Probate Act makes it evident that the same principle underlies both sections albeit the idea is expressed in different terms. Formerly, the surviving spouse received an absolute estate upon waiving dower rights. Now the fee is received by not perfecting dower. Lapse of time and inaction by the surviving spouse is regarded as being as effec-

⁴ Ill. Rev. Stat. 1937, Ch. 39, § 1.

⁵ Ill. Rev. Stat. 1945, Ch. 3, § 162.

⁶ *Ibid.*, Ch. 3, § 170.

⁷ Ill. Rev. Stat. 1937, Ch. 41, § 1.

⁸ Ill. Rev. Stat. 1945, Ch. 3, § 170.

⁹ *Ibid.*, Ch. 3, § 171.

¹⁰ *Classen v. Heath*, 389 Ill. 183, 58 N. E. (2d) 889 (1945); *Schoellkopf v. DeVry*, 366 Ill. 39, 7 N. E. (2d) 757, 110 A. L. R. 511 (1937); *Sisk v. Smith*, 6 Ill. 503 (1844). See also *James*, op. cit., p. 14.

tive for purpose of waiving dower as it is in not perfecting dower. The same result, therefore, is obtained in either case despite the different language used.

In holding that the Probate Act had not changed the prior law, special emphasis was placed by the court on the word "the" found in the clause "unless the dower has been released or barred" to be found in Section 18 of the Probate Act.¹¹ It was held to relate to the right of dower previously given and not to indicate that dower was to come into being by election after a fee interest had vested in the surviving spouse. Again, the close similarity in language between the former and the present statute, except for a slight change in terms from "relinquished" to "released" or "barred," certainly fails to disclose any legislative purpose to change the rules.

It may be deduced, therefore, that now, as before, the surviving spouse's inchoate dower becomes dower consummate on the death of the spouse owning the land, but that the fee to the real estate descends to the heirs subject to the surviving spouse's alternative right to claim dower or to receive a third of the fee.¹² The surviving spouse's right to perfect dower is a right resting in action only. That action is limited to perfecting dower, releasing the dower right, or allowing dower to be barred by lapse of time. In the last mentioned case, the fee vests in the survivor at the moment the right to perfect dower becomes barred.¹³ Until then, the heirs hold the full fee title encumbered by the surviving spouse's right of dower. When the dower is barred, the several interests of the respective heirs automatically become reduced proportionately in order to give the statutory dower substitute of an undivided one-third in fee to the surviving spouse.¹⁴

In the light of these principles, it seems clear that the widow in the instant case did not have any estate to convey to the plaintiff during the ten-month period following the issuance of letters of administration and while she held only an unassigned dower right. What then was the effect of her release to some of the heirs? It is established law in this state that unassigned dower is not such an estate that can be conveyed by deed to

¹¹ Ill. Rev. Stat. 1945, Ch. 3, § 170. Italics added.

¹² *Braidwood v. Charles*, 327 Ill. 500, 159 N. E. 38 (1927); *Steinhagen v. Trull*, 320 Ill. 382, 151 N. E. 250 (1926); *Kryczka v. Brzozowski*, 328 Ill. App. 220, 65 N. E. (2d) 619 (1946); *Wilson v. Hilligoss*, 278 Ill. App. 564 (1935).

¹³ *Liesman v. Liesman*, 331 Ill. 287, 162 N. E. 855 (1928); *Maring v. Meeker*, 263 Ill. 136, 105 N. E. 31 (1914); *Sloniger v. Sloniger*, 161 Ill. 270, 43 N. E. 1111 (1896); *Anderson v. Smith*, 159 Ill. 93, 42 N. E. 306 (1895); *Hart v. Burch*, 130 Ill. 426, 22 N. E. 831, 6 L. R. A. 371 (1889); *Best v. Jenks*, 123 Ill. 447, 15 N. E. 173 (1888); *Hoots v. Graham*, 23 Ill. 79 (1859); *Summers v. Babb*, 13 Ill. 483 (1853).

¹⁴ *Ruwaldt v. McBride, Inc.*, 388 Ill. 285, 57 N. E. (2d) 863, 155 A. L. R. 1209 (1944).

a stranger, although it may be released to the owner of the fee. This rule was succinctly stated in the case of *Best v. Jenks*¹⁵ where the court said: "It [dower] may be released so as to bar the right of asserting it against the owner of the fee, but it cannot be invested in another separately from the fee."¹⁶ The determination therein has been followed with approval many times,¹⁷ so it was proper to hold, in the instant case, that the quit-claim deed by the widow to some of the heirs was sufficient to release her right of dower but only to the extent of removing the incumbrance thereof from the interests held by those named as grantees in that deed.¹⁸ She did not release her right of dower in the shares of the estate held by the descendants who were not named in that deed, nor did she effectively transfer the same to the plaintiff for he was then a stranger to the fee. Since that deed was only a quit-claim instrument it could not operate to divest her of an after-acquired title.¹⁹ When that dower was eventually barred by lapse of time, the widow received a one-third in fee of the undivided estate held by the descendants who were not named in the release and this was the only interest she had to convey to the plaintiff by her subsequent warranty deed. The decision in the instant case, then, clears the air of any doubts which may have existed that the present Probate Act had been designed to change the prior law. The basic law, rules, and doctrines remain unchanged and the new statute merely restates, codifies and consolidates the earlier statutes on this point.²⁰

The court, of course, determined no problems in the instant case other than the ones before it. A discussion of this sort, however, would not be complete without considering some of the possibilities which could arise. Suppose, for example, the facts were slightly changed and the quitclaim deed to plaintiff had been executed after he had received deeds from some of the heirs. It could be argued, following the decision therein, that plaintiff then held a sufficient fee interest in the land to give legal effectiveness to the widow's release of her unassigned dower right to him, but only as it related to the proportion of the estate held

¹⁵ 123 Ill. 447, 15 N. E. 173 (1888).

¹⁶ 123 Ill. 447 at 456, 15 N. E. 173 at 178.

¹⁷ *Maring v. Meeker*, 263 Ill. 136, 105 N. E. 31 (1914); *Fletcher v. Shepherd*, 174 Ill. 262, 51 N. E. 212 (1898); *Sloniger v. Sloniger*, 161 Ill. 270, 43 N. E. 1111 (1896); *Anderson v. Smith*, 159 Ill. 93, 42 N. E. 306 (1895); *Heisen v. Heisen*, 145 Ill. 658, 34 N. E. 597 (1893).

¹⁸ *Fletcher v. Shepherd*, 174 Ill. 262, 51 N. E. 212 (1898); *Hart v. Burch*, 130 Ill. 426, 22 N. E. 831 (1889).

¹⁹ *O'Malley v. Deany*, 384 Ill. 484, 51 N. E. (2d) 583 (1943); *Thornton v. Louch*, 297 Ill. 204, 130 N. E. 467 (1921); *DuBois v. Judy*, 291 Ill. 340, 126 N. E. 104 (1920).

²⁰ Any other interpretation would have been in direct conflict with the views expressed by the framers of the statute: James, *op. cit.*, p. 14. See also Fins, "Analysis of the Illinois Probate Code," 34 Ill. L. Rev. 405 (1940) at 411.

by him. In the event that the situation were the same as in the instant case except that the widow had originally given a warranty deed instead of a quitclaim, the same decision as in the instant case should result. The theory then to be employed would be that after release given to the heirs the widow would never receive an interest in the fee which could inure to the plaintiff as after-acquired title unless she subsequently received a reconveyance from the heirs. On the other hand, if no release was given and no action taken to claim dower, a warranty deed given in the ten-month period should vest the grantee with a one-third interest in the fee when acquired by the surviving spouse, and would probably be similarly effective as to the dower interest if action should be taken by the spouse to claim the same.²¹ It is obvious, however, that despite these possibilities there would be a period of time during which the eventual ownership of the property would be a matter of doubt and uncertainty.

As stability, alienability, and certainty of titles to real estate is desirable, and the foregoing discussion indicates the existence of several doubtful contingencies, the legislature might well consider the wisdom of amending the Probate Act so as to vest a fee title in the surviving spouse immediately upon death of the owner just as the common law provided should be the case with respect to the heir. In that way, a conveyance at any time by the surviving spouse would serve to pass an immediate interest to the grantee. The statute might then well direct that any such conveyance made before election to take dower should just as effectively bar the right to perfect dower as would a release to the heirs. If retention of common-law dower as an elective interest is desirable, and there are times when it might be, the statute could indicate that the surviving spouse should take the statutory share in the form of a vested fee subject to be defeated by a positive election to take the common-law interest within a limited time and before any conveyance. The requirement of a positive act of election would be no more onerous than the present statute while the uncertainty as to the eventual outcome of the title, forced by the present state of the law during the ten-month waiting period, could readily be avoided. Certainly, if this were the law, the surviving spouse would be able to find a wider market and, probably, a better price for the estate thereby vested than is presently the case.

L. C. TRAEGER

²¹ See *Thornton v. Louch*, 297 Ill. 204, 130 N. E. 467 (1921), to the effect that a deed reciting that grantor was seized or possessed of the land conveyed would estop the grantor from denying the grantee's right to an after-acquired title. See also Ill. Rev. Stat. 1945, Ch. 30, § 6.

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DISCUSSION OF RECENT DECISIONS

AMBASSADORS AND CONSULS — PRIVILEGES, IMMUNITIES AND DISABILITIES — WHETHER OR NOT ACCREDITED MINISTER PASSING THROUGH THE UNITED STATES ON WAY TO POST IS IMMUNE FROM SERVICE OF CIVIL PROCESS—The federal district court decision in *Bergman v. De Sieyes*¹ may possess an effect and an importance which may become the more greatly appreciated as innovations in international co-operation and advancements in trans-world transportation become accepted facts. The defendant therein was the duly accredited Minister of the Republic of France to the Republic of Bolivia. En route from France to his post in

¹ 71 F. Supp. 334 (S. D., N. Y., 1946).

Bolivia, he travelled by way of New York. While awaiting transportation there, he was served with civil process in an action instituted by plaintiff. Defendant answered by claiming immunity from service by reason of his status. Plaintiff moved to strike the defendant's answer and contended that, under the provisions of a federal statute regulating foreign relations,² defendant was not immune as he was not then an ambassador or foreign minister who had been received as such by the President of the United States. Plaintiff's motion was denied when the court held that not only is a foreign minister immune from the jurisdiction, both civil and criminal, of the courts in the country to which he is accredited but also that a foreign minister en route, either to or from his post in another country, is likewise entitled to immunity in the countries through which he passes. In setting down this principle, the court found it unnecessary to interpret the federal statute as the case did not fall within its terms. Instead, the court stated that the theory behind the rule of international law granting immunity to accredited diplomats at their posts of duty was equally applicable to situations as that presented by the facts of the case before it, for to hold otherwise might seriously hamper the travelling diplomat in the performance of his duty to fulfill his mission and might disrupt the friendly relations between his country and the country to which he had been assigned.

Cases squarely on point with the instant one are rare, relatively speaking, as compared to those which involve service of civil process upon a diplomat in the country to which he is accredited.³ One of the earliest on record, that of *Holbrook, Nelson & Company v. Henderson*,⁴ involved the person of the Minister of the Republic of Texas, duly accredited to France and England, who, while passing through New York en route to Texas with a treaty between the French government and his own, was arrested under civil process. His application to be discharged was granted by a court which cited freely from Vattel's treatise on international law and adopted the latter's theory that ambassadors passing through friendly

² 22 U. S. C. A. § 252 declares: "Whenever any writ or process is sued out or prosecuted by any person in any court of the United States, or of a State, or by any judge or justice, whereby the person of any ambassador or public minister of any foreign prince or State, authorized and received as such by the President, or any domestic or domestic servant of any such minister, is arrested or imprisoned, or his goods or chattels are distrained, seized, or attached, such writ or process shall be deemed void."

³ Cases of that character may be found in *Re Republic of Bolivia Exploration Syndicate, Ltd.*, [1914] 1 Ch. 139; *Musurus Bey v. Gadban*, 2 Q. B. 352 (1894); *Magdalena Steam Navigation Co. v. Martin*, 28 L. J. Q. B. 310 (1859); *In re Dillon*, Fed. Cas. No. 3914 (1854); *Ex parte Cabrera*, Fed. Cas. No. 2278 (1805); *State v. De La Foret*, 2 Nott. & McCord (S. C.) 217 (1820). See also 1 Op. U. S. Atty. Gen. 71 (1797) and 5 Op. U. S. Atty. Gen. 69 (1849).

⁴ 6 N. Y. S. 619 (1839).

territories on official business are not to be denied all the rights annexed to that position, the recognition of which all nations owe to each other.⁵

About one year later, in *Beyley v. Piedanna et Mauroy*,⁶ a French court reached a similar result in a case involving an American consul en route to his post at Genoa who was served with civil process but was released by the court because of a statute similar to the federal one. The French statute, however, purported to make no distinction as to the rank of the foreign officer involved whereas the present American one applies only to ambassadors or public ministers. For that reason, immunity has been denied here to lesser officials accredited to or assigned to serve in the United States such as consuls,⁷ "honorary" consulate officers,⁸ chancellors of consulates,⁹ *chargés des affaires*,¹⁰ and to the families of any of these lesser diplomatic officers.¹¹ They must look for protection of their personal and property rights to the law of the states in which they are temporarily resident.¹² Attachés to foreign embassies, however, are immune¹³ as are their families and the families of ambassadors and ministers,¹⁴ including the members of their official domestic suites.¹⁵

The second American case on the point is that of *Wilson v. Blanco*,¹⁶ decided in 1889. The defendant there, a duly accredited envoy extraordin-

⁵ The court said, in part, that: "It is clear that this principle is founded not on any municipal law of this country but on the law of nations . . . I do not suppose that it [a federal statute similar to 22 U. S. C. A. § 252] was intended to abrogate any part of the generally received and acknowledged principles of international law on that subject." See 6 N. Y. S. 619 at 627.

⁶ Trib. Civ. Seine Sirey 41, 2.148, cited in *Bergman v. De Sieyes*, 71 F. Supp. 334 at 339.

⁷ *Auer v. Costa*, 23 F. Supp. 22 (1938); *U. S. v. Tarcuanu*, 10 F. Supp. 445 (1935); *Gittings v. Crawford*, Fed. Cas. No. 5,465 (1838); *U. S. v. Ravara*, Fed. Cas. No. 16,222 (1793). See also 1 Op. U. S. Atty. Gen. 77 (1797); 1 Op. U. S. Atty. Gen. 406 (1820); and 2 Op. U. S. Atty. Gen. 725 (1835).

⁸ In *Jay-Thorpe, Inc. v. Brown*, 43 N. Y. S. (2d) 728 (1943), the defendant had been subpoenaed to appear as a witness. He moved to vacate the subpoena on the ground that he was the honorary Consulate-General of the Republic of Greece to New Orleans, although he was not a Greek national. His motion was denied.

⁹ *Moracchini v. Moracchini*, 126 Misc. 443, 213 N. Y. S. 168 (1925); *Tailored Woman, Inc. v. Bibily*, 126 Misc. 354, 212 N. Y. S. 704 (1925).

¹⁰ *DuPont v. Pichon*, 4 Dall. 321, 1 L. Ed. 851 (1805); *Hollander v. Paiz*, 41 F. 732 (1890).

¹¹ *Herman v. Apetz*, 130 Misc. 618, 221 N. Y. S. 389 (1927).

¹² 19 Op. U. S. Atty. Gen. 16 (1887).

¹³ In *re Anfrye*, 3 Weekly Notes Cas. 188 (1876); *U. S. v. Benner*, Fed. Cas. No. 14,568 (1830); *Girardon v. Angelone*, 234 App. Div. 351, 254 N. Y. S. 657 (1932). But see contra: *Carbone v. Carbone*, 123 Misc. 656, 206 N. Y. S. 40 (1924).

¹⁴ *Herman v. Apetz*, 130 Misc. 618, 224 N. Y. S. 389 (1927).

¹⁵ *Respublica v. De Longchamps*, 1 Dall. 111, 1 L. Ed. 59 (1784); *U. S. v. La Fontaine*, Fed. Cas. No. 15,550 (1831).

¹⁶ 4 N. Y. S. 714 (1889).

ary and minister plenipotentiary of Venezuela to France, was served with a civil process while in New York en route to France. His motion to vacate the service of summons upon him and also to vacate a judgment rendered on default was granted, the court citing the earlier American decision and stating that such a ruling was necessary to the free and unimpeded exercise of the defendant's diplomatic duties.

In only one case has a contrary ruling been reached and that was in the New York case of *Carbone v. Carbone*.¹⁷ In that case, the defendant was a diplomatic attaché of the Republic of Panama assigned to its legation in Italy and he was served with a summons in an action for absolute divorce. An order for his arrest on a writ of *ne exeat* was also issued. He gave bond to secure his release and then moved to vacate the order of arrest, to set aside the service, and to discharge the bond because of his diplomatic status. The court granted the motion to vacate the order of arrest and to discharge the bond but it denied the motion to set aside the service of summons. It considered that the case was governed by the provisions of the federal statute above referred to and that such statute did not warrant granting immunity as it applied only to diplomats accredited to the United States, which was not the situation of the defendant. The court likewise refused to recognize the broad principle of international law laid down by Twiss to the effect that "it is in the common interests of nations that the peace of the world should be maintained, and the personal inviolability of the Ambassador, whose mission is essentially that of peace, is as necessary for that end where he is passing through on his way to his destination as when he has reached his post."¹⁸ It also purported to find a distinction between the case before it and the earlier ones on the ground that the latter involved arrests while in the case at hand the question had been narrowed to one of service of civil summons. It granted the defendant his freedom because it was believed there was a duty, under the law of nations, not to prevent him from discharging his diplomatic functions by restraining his personal liberty. The fact that the defendant was only an attaché and not an ambassador or public minister was immaterial in view of the ruling that members of the staff of a diplomat are to be accorded the same privileges and immunities that are granted to the diplomat himself.¹⁹ The case seems weak, how-

¹⁷ 123 Misc. 656, 206 N. Y. S. 40 (1924).

¹⁸ Twiss, *The Law of Nations* (Longmans, Green & Co., London, 1884), 2d Ed., Vol. 1, § 222. Others expressing the same idea are Grotius, *De Jure et Belli Pacis* (John W. Parker, London, 1853), Lib. 2, Ch. 8, § 9; Oppenheim, *International Law* (Longmans, Green & Co., London, 1920), 3d Ed., Vol. 1, § 398; Hall, *International Law* (LaSalle Extension University, Chicago, 1924), 8th Ed., p. 364; and Wheaton, *Elements of International Law* (Stevens & Sons, London, 1929), 6th Ed., p. 469.

¹⁹ See cases cited in note 13, ante.

ever, for it fails to take into account the fact that the diplomat might be just as much restrained from the performance of his duties by the necessity of appearing and contesting a civil suit, attending the trial, testifying and the like, as if he were locked up in the local prison. It is, however, expressive of a minority view on the subject if there can be said to be either a majority or a minority view from so slender a stock of precedents.

Various theories designed to support the holding in the instant case have been expounded and debated over by the more eminent writers on international law. Although now outmoded and, logically, no longer applicable, it was once urged that an ambassador ought to be given extensive immunities and privileges because he travelled in an atmosphere of extra-territoriality so that, wherever he went, he theoretically remained in the territory of his sovereign. That explanation, based largely on a fiction, has almost completely disappeared as an explanation.²⁰ Another theory which has received some consideration has been designated as the "concession theory." It explains the juridical basis of diplomatic privileges and immunities by presuming that a state in receiving a diplomatic agent tacitly agrees that he shall be exempt from its jurisdiction.²¹ Although this theory has been adopted, extended and modified by statutes in most countries it does not furnish a satisfactory explanation as to why diplomats must be accorded privileges. The most logically sound, and therefore the most widely accepted theory, adopts the principle of *ne impediatur legatio* whereby the free and unhindered fulfillment of the purpose of the ambassador's mission is of utmost importance not only to the nations immediately concerned but also to the entire family of nations in their endeavor to maintain peaceful relations with one another. It is readily discernible that this theory, sometimes referred to as the theory of "interest of function," provides equal justification for extending diplomatic privileges and immunities to ambassadors en route to their duties as it does for those accredited to the nation where the attempted restraint by civil process is practiced.

This last-mentioned theory, borne out by the decision in the instant case, is likely to possess increasing importance by reason of the significant advances made in aerial navigation so that now no spot on the globe is more than sixty hours distant by air. Important aerial centers in the United States will be internationally important as they are made into regular ports of call for airliners carrying diplomatic as well as other personages to their destinations in other parts of the world. It would

²⁰ Preuss, "Theoretical Basis of Diplomatic Immunities." 10 N. Y. U. L. Q. 170 (1932).

²¹ Vattel, *The Law of Nations* (T. & J. W. Johnson & Co., Philadelphia, 1869), Ingraham's revision of Chitty's trans., pp. 466-7.

tend to create a serious breach of relations with other countries if their diplomatic personnel were subject to process even in civil actions while changing from one airliner to another. To expect them to answer on such service while they have more significant reasons for reaching their distant posts as soon as possible is obviously unwarranted.

With the advent of a United Nations, Congress has at least recognized the need for expanding the federal statutes in order to meet problems that will arise as to the immunities and privileges to be accorded to the personnel of the members of the United Nations. Its charter only loosely provides for those privileges and immunities that are necessary for the exercise of the functions of the organization.²² Congress has added to the subject by passing the Immunities Act of 1945 which gives foreign representatives to international organizations of which the United States is a member a limited immunity from the service of civil process.²³ That statute does not reach the point here involved, but the courts should recognize, in the congressional treatment of the problem as it relates to the newer international organizations, a spirit equally applicable to older institutions. The court concerned with the instant case at least did so and thereby achieved a sound result.

J. C. GREGORY

BILLS AND NOTES—RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER—WHETHER OR NOT TRANSFERREE OF NEGOTIABLE INSTALLMENT NOTE AFTER DEFAULT ON FIRST INSTALLMENT IS A HOLDER IN DUE COURSE AS TO BALANCE OF PRINCIPAL DUE THEREON—The recent decision by the Supreme Court of California in the case of *Bliss v. California Cooperative Producers*¹ should attract the concern of all who are interested in

²² United Nations Charter, Art. 105, states: "(1) The Organization shall enjoy in the territory of each of its members such privileges and immunities as are necessary for the fulfillment of its purposes; (2) Representatives of the members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization."

²³ 22 U. S. C. A. § 288D recites that: "Representatives of foreign governments in or to international organizations and officers and employees of such organizations shall be immune from suit and legal process relative to acts performed by them in their official capacity and falling within their functions as such representatives, officers, or employees except insofar as such immunity may be waived by the foreign government or international organization concerned." Executive Order No. 9698, of Feb. 19, 1946, 22 U. S. C. A. § 288, names not only the United Nations but also the Pan-American Union, the International Labor Organization, and the Food and Agriculture Organization as international bodies entitled to enjoy the privileges and immunities set forth in the statute referred to.

¹ — Cal. —, 172 P. (2d) 62 (1946). Traynor, J., wrote a dissenting opinion concurred in by Edmonds, J., and Spence, J. See also — Cal. —, 181 P. (2d) 369 (1947).

commercial transactions involving the use of installment notes. In that case, three installment notes payable in equal amounts over a ten-year period were given by the defendant to a newly formed cooperative society. The first installment matured on January 2, 1928, but was never paid. At that time the cooperative society had on hand sufficient property belonging to the defendant to cover the first installment yet it waited until August 31, 1928, before crediting the maker with the first installment on its books. In the meantime, the notes had been pledged to the plaintiff and, when the cooperative society went into bankruptcy, plaintiff took title to the security and thereafter sued the maker. To the defense of failure of consideration offered by the defendant, plaintiff asserted that he was a holder in due course and, as such, was a person against whom such a personal defense was of no avail. The lower court found that the plaintiff was not a bona fide purchaser as to the installment which was past due on the face of the notes at the time of the pledge but was a holder in due course as to the balance of the notes. Upon appeal, such decision was reversed, the California Supreme Court reasoning that, as one installment was in default on the date of the transfer, the plaintiff took the rest as an "overdue" instrument.² It was also of the opinion that it made no difference whether the past due installment was or was not eventually paid.

The only question involved being whether or not the plaintiff was a holder in due course, the absence or presence of the necessary elements requisite to determine this question are of chief concern but the problem may be examined in the light of analogous situations. The problem may be present in any one of three types of cases, to-wit: (1) where there is a transfer of a note payable in installments and one or more of these installments are overdue at the time of negotiation; (2) where a series of notes based upon the same consideration but of different maturity dates are transferred subsequently to the non-payment of one of the notes; and (3) where a note with interest installments is negotiated after a default in the payment of one of the interest installments. While the legal effect of these different factual situations is for the greater part identical some slight differences do exist and will be noted hereafter.

To constitute plaintiff as a holder in due course, the first element of concern requires that the taking be before maturity. The majority of the court in the instant case expressly stated that default in the payment of the first installment due upon the notes constituted the remainder "overdue." On the face of things, this statement is erroneous for only one installment had become due, in the absence of acceleration, and it

² Deering Cal. Civ. Code 1937, § 3133(2). That section is identical with Section 52(2) of the Uniform Negotiable Instruments Act.

could not logically be contended that the remainder had matured contrary to the very terms of the notes. It is true that there are decisions in which courts have unfortunately used the words "matured" and "overdue" when attacking similar problems,³ but in each of these decisions the main question was one of good faith or notice of dishonor and the terms were used loosely. In the instant case, on the other hand, the fact of maturity was the only ground upon which the court could have reached its decision.

An installment note, or series of notes, may mature in entirety upon default in one installment or in the payment of one note only in the event that the note or notes contain an acceleration clause. Even then, a distinction must be made between a clause which is optional in character and has not been exercised prior to negotiation and one which matures the note or notes automatically. In the case of the former, it is apparent that until the option is exercised the note has not matured,⁴ although instances may exist where the prior holder has taken advantage of the option before transferring the notes.⁵ On the other hand, where, upon default, the balance of the note or notes becomes due automatically, the transferee subsequent to default could never be regarded as a holder before maturity,⁶ unless in the rare instance where, because a note cannot mature before delivery, the purchaser takes after the note has matured because of some automatic acceleration clause while it still remained in the maker's possession.⁷ There was no acceleration clause in the notes involved in the instant case, so it is ridiculous to argue that the plaintiff was not a holder in due course because the remainder was overdue by virtue of the default in one installment.

The dissenting opinion therein strikes at the heart of the real issue, not one regarding maturity but rather whether or not the default in payment of the first installment constitutes a dishonor or, conversely, whether a taking under such circumstances shows a lack of good faith. Courts seem to be in almost complete agreement that a failure to pay a

³ *Huselby v. Allison*, 25 S. W. (2d) 1108 (Tex. Civ. App., 1930); *National State Bank v. Richetts*, 152 S. W. 646 (Tex. Civ. App., 1912); *Norwood v. Leeves*, 115 S. W. 53 (Tex. Civ. App., 1909); *Lybrand v. Fuller*, 30 Tex. Civ. App. 116, 69 S. W. 1005 (1902).

⁴ *Gillette v. Hodge*, 170 F. 313 (1909); *Lowenstein v. Phelan*, 17 Neb. 429, 22 N. W. 561 (1885); *Hobart M. Cable Co. v. Bruce*, 135 Okla. 170, 274 P. 665 (1929); *Holt v. Guaranty & Loan Co.*, 136 Ore. 272, 296 P. 852 (1931).

⁵ See, for example, *Christian Community of Universal Brotherhood v. Graf*, 137 Ore. 638, 1 P. (2d) 596 (1931).

⁶ *Stoy v. Bledsoe*, 31 Ind. App. 643, 68 N. E. 907 (1903); *Yeomans v. Nachman*, 198 Mo. App. 195, 198 S. W. 180 (1917); *Rowe v. Scott*, 28 S. D. 145, 132 N. W. 695 (1911); *Marion Nat. Bank v. Harden*, 83 W. Va. 119, 97 S. E. 600 (1918).

⁷ *Beach v. Bennett*, 16 Colo. App. 459, 66 P. 567 (1901).

principal installment on a note is notice of dishonor.⁸ These decisions are based on the fact that default in the payment of even an installment of principal raises a presumption that there is a valid reason for such failure or refusal to pay, thereby putting the transferee upon notice that a defense might exist. The majority hold that where the series of notes is based upon the same consideration, and one of them is in default at the time when the transfer takes place, the transferee is not to be regarded as a holder in due course but takes subject to all existing defenses,⁹ although there is a slender minority to the contrary.¹⁰

In the case of overdue interest installments, one line of cases, regarding the promise to pay interest as an integral part of the contract of equal importance as the promise to repay the principal, treats a default thereon as notice of dishonor just as if it had been a default on an installment of principal.¹¹ Other jurisdictions regard interest as a mere incident to the debt, so that default is not evidence of dishonor and notice of such fact does not show a lack of good faith in the purchase of such an instrument.¹² In between these views are other cases which treat the fact of default in interest as having some, but not necessarily conclusive evidentiary value, in determining whether or not the necessary element of good faith is present.¹³ This view would seem to be the more logical one for

⁸ *Hall v. E. W. Wells & Sons*, 24 Cal. App. 238, 141 P. 53 (1941); *Archibald Hardware Co. v. Gifford*, 44 Ga. App. 837, 163 S. E. 254 (1932); *General Motors Acceptance Corp. v. Talbott*, 39 Ida. 707, 230 P. 30 (1924); *Vinton v. King*, 86 Mass. (4 Allen) 562 (1862); *Sorenson v. Greysolon*, 170 Minn. 259, 212 N. W. 457 (1927); *National State Bank v. Richetts*, 152 S. W. 646 (Tex. Civ. App., 1912); *Norwood v. Leaves*, 115 S. W. 53 (Tex. Civ. App., 1909).

⁹ *Railway Postal Clerks Inv. Ass'n v. Wells*, 147 Ga. 377, 94 S. E. 228 (1917); *Beasley Hardware Co. v. Stevens*, 42 Ga. App. 114, 155 S. E. 67 (1930); *Harrington v. Clafin*, 91 Tex. 294, 42 S. W. 1055 (1897); *Ferguson v. Wiede*, 46 S. W. 392 (Tex. Civ. App., 1898); *Huselby v. Allison*, 25 S. W. (2d) 1108 (Tex. Civ. App., 1930); *Iowa City State Bank v. Friar*, 167 S. W. 261 (Tex. Civ. App., 1914); *Lybrand v. Fuller*, 30 Tex. Civ. App. 1166, 69 S. W. 1005 (1902); *Masterson v. Turnley*, 220 S. W. 428 (Tex. Civ. App., 1920).

¹⁰ *Hobart M. Cable Co. v. Bruce*, 135 Okla. 170, 274 P. 665 (1929); *Morgan v. Farmington Coal & Coke Co.*, 97 W. Va. 83, 124 S. E. 591 (1924).

¹¹ *Mills v. Charlson*, 201 Minn. 167, 275 N. W. 609 (1937); *First Nat. Bank v. Forsyth*, 67 Minn. 257, 69 N. W. 909 (1897); *Citizens Savings Bank v. Couse*, 68 Misc. 153, 124 N. Y. S. 79 (1910); *Hart v. Stickney*, 41 Wis. 630, 22 Am. Rep. 728 (1877).

¹² *Winter v. Nobs*, 19 Ida. 18, 112 P. 525 (1910); *Cooper v. Hocking Val. Nat. Bank*, 21 Ind. App. 358, 50 N. E. 775 (1898); *Higby v. Bahrenfuss*, 180 Iowa 316, 163 N. W. 247 (1917); *Kreitz v. Savings Deposit Bank & Trust Co.*, 21 Ohio App. 354, 153 N. E. 236 (1926); *Taylor v. Buckner*, 100 Ore. 75, 196 P. 839 (1921); *United States Nat. Bank v. Floss*, 38 Ore. 68, 62 P. 751 (1900); *Merchants Nat. Bank v. Smith*, 110 S. C. 458, 96 S. E. 690 (1918); *Barbour v. Finke*, 41 S. D. 644, 201 N. W. 711 (1924); *Tuke v. Feagin*, 181 S. W. 805 (Tex. Civ. App., 1915).

¹³ *City of New Port Richey v. Fidelity & Deposit Co.*, 105 F. (2d) 348 (1939); *Lumpkin v. Lutgens*, 143 Minn. 139, 172 N. W. 893 (1919); *Batson v. Peters*, 89 S. W. (2d) 46 (Mo., 1935); *Fidelity Trust Co. v. Whitehead*, 165 N. C. 74, 80 S. E. 1065 (1914); *McPherrin v. Tittle*, 36 Okla. 510, 129 P. 721 (1913); *Shultz v. Crewdson*, 95 Wash. 266, 163 P. 266 (1918).

the presence of an overdue interest payment should put the purchaser on guard but should not be conclusive of bad faith.

It must be remembered, however, that a party must have notice of dishonor before he can be bound thereby.¹⁴ There was no finding in the instant case that the plaintiff had been told that there had been a prior default when he took the notes. All he knew was that he obtained the notes after one of the installments became due. The mere fact that there was no endorsement of credit or payment on the notes created no presumption that the installment had not been paid,¹⁵ and as he took all but the first installment before maturity the only effect that the prior default might have had was to create a notice of dishonor. Absent such notice, the upper court should have affirmed rather than reversed the holding of the trial court.

I. D. FASMAN

DEATH—ACTIONS FOR CAUSING DEATH—WHETHER PLACE WHERE FATAL INJURIES WERE INFLICTED OR PLACE WHERE DEATH OCCURS CONTROLS RIGHT TO BRING WRONGFUL DEATH ACTION IN ILLINOIS—At first glance, the term "death" would appear to be capable of only one definition, but the courts of Illinois have found it necessary to expand the ordinary connotation of the word when construing Section 2 of the Injuries Act. An example of another such definition is found in the recent case of *Carroll v. Rogers*¹ where the deceased, a minor and resident of Illinois, was fatally injured in Missouri by defendant's negligent act. He died thirteen months later in Illinois and suit was instituted in this state based on the Missouri wrongful death statute. The action was dismissed in the trial court on motion predicated on the ground that the court lacked jurisdiction since the act causing death occurred outside of Illinois.² That court, following an interpretation of the word "death" which had been laid down in several earlier decisions, concluded that it was confined to mean the wrongful act which caused the demise rather than the fact of expiration of life. The Appellate Court for the Second District, however, reversed that holding, thereby indicating that the word included its ordinary meaning and was not

¹⁴ *U. S. v. Capen*, 55 F. Supp. 81 (1944); *Archibald Hardware Co. v. Gifford*, 44 Ga. App. 837, 163 S. E. 254 (1932); *Spencer v. Alki Point Transp. Co.*, 53 Wash. 77, 101 P. 509 (1909).

¹⁵ *McCorkle v. Miller*, 64 Mo. App. 153 (1895).

¹ 330 Ill. 114, 70 N. E. (2d) 218 (1946).

² Ill. Rev. Stat. 1945, Ch. 70, § 2, provides, among other things, that ". . . no action shall be brought or prosecuted in this state to recover damages for a death occurring outside of the state. . . ."

limited in the fashion supposed. As the death did occur in Illinois, the courts of this state had jurisdiction of the case.

Prior to 1903, there was no limitation upon the jurisdiction of the Illinois courts with respect to wrongful death actions for, even if the case arose outside of the state, the remedy was treated as being transitory in nature and the local courts were free to apply the statutes of other states so long as they were not contrary to any public policy of Illinois.³ In that year, the legislature added a proviso limiting the jurisdiction of the courts in such cases by forbidding suit in this state for a "death occurring outside of this state."⁴

In the first few controversies arising under the section as so amended, it was contended that the change merely served to prevent the court from applying the Illinois statute when the action accrued outside of the state but did not serve to bar the court from taking jurisdiction. That contention was uniformly answered with the statement that, since a state statute never has extra-territorial application, there would have been no need for the new provision so any such interpretation would render it utterly useless.⁵ It was also argued that the amended section was unconstitutional for it would operate to prevent the Illinois courts from recognizing and giving full faith and credit to the statutes of the other states. Here again, the Illinois Supreme Court answered in the negative, pointing out that the legislature, when determining the public policy of the state, was fully empowered to limit the jurisdiction of its courts.⁶

At this point, the meaning of the term "death" became important. Did it mean the actual process of dying, or could it denote the wrongful act causing death? It is quite apparent that where both the act and the death occurred outside the state there was no necessity for making any distinctions so the courts had no difficulty.⁷ The same thing was true

³ C. & E. I. R. R. Co. v. Rouse, 178 Ill. 132, 52 N. E. 951 (1899); Hannah v. C. T. Ry. Co, 41 Ill. App. 116 (1891); Shedd v. Moran, 10 Ill. App. 618 (1882).

⁴ Laws 1903, p. 217. In Brennan v. Electrical Installation Co., 120 Ill. App. 461 (1905), however, it was held that the amendment had no effect upon an action instituted before its enactment even though the same had not yet been decided.

⁵ Wall v. Chesapeake & Ohio Ry. Co., 290 Ill. 227, 125 N. E. 20 (1919); Dougherty v. American McKenna Co., 255 Ill. 369, 99 N. E. 619 (1912); Stephen v. I. C. R. R. Co., 128 Ill. App. 99 (1906).

⁶ Dougherty v. American McKenna Co., 255 Ill. 369, 99 N. E. 619 (1912). The United States Supreme Court, however, in Kenney v. Loyal Order of Moose, 252 U. S. 411, 40 S. Ct. 71, 64 L. Ed. 638 (1920), reversing 285 Ill. 188, 120 N. E. 631 (1918), held that Illinois had to give full faith and credit to an Alabama judgment based on a claim for wrongful death, despite the fact that the action accrued outside of Illinois, forbidding the state court from going behind the judgment to ascertain its basis.

⁷ See cases cited in note 5, ante.

where both events happened within the state. Where, however, one occurred outside the state and the other within, problems such as the instant one or the converse thereof would arise.

In *Crane v. Chicago & Western Railroad Company*,⁸ for example, a negligent act in Illinois resulted in the death of the deceased in Indiana. The action was instituted in Illinois. It was urged that the court did not have jurisdiction as the death had occurred outside of the state. The court, however, emphasized the fact that the underlying basis for every wrongful death action is the wrongful act itself rather than the fact of death, thereby holding that the term "death" as used in the amended statute could be read as if it was stated that no action should be brought in this state where "the wrongful act causing the death" occurred outside of the state.⁹ If the act occurred in Illinois, the place of the resultant death was unimportant.

Just the opposite situation was presented in *Fitzgerald v. Cleveland, Cincinnati, Chicago & St. Louis Railway Company*,¹⁰ for there the wrongful act took place in Indiana and the death followed in Illinois. Again the Illinois court took jurisdiction, despite the claim that the Crane case prevented the maintenance of the suit, on the obviously correct conclusion that the Crane case had merely defined the term "death" as being broad enough to include the wrongful act but that the court there had had no occasion to determine that the term did not also embrace its ordinary connotation. As the decedent in fact died in Illinois, it could not be said that the "death" occurred outside of the state. The instant case has exactly the same standing, so it may be said that until a court declines to take jurisdiction where either the act or death, taken alone, occurs in Illinois it must be recognized that the word "death" as used in the statute has a double meaning.

The court in the instant case used language tending to minimize the effect of the Crane case, indicating that the interpretation promulgated there was a strained one, not likely to be reached again, due to the fact that Indiana would not allow a recovery and the court was anxious to see that justice was done. There is nothing in that decision which would justify any such conclusion and it is reasonable to suppose that, as the plaintiff was a resident of Illinois, he had never attempted to bring suit in the other state. The decision in the Crane case should not

⁸ 233 Ill. 259, 89 N. E. 222 (1908).

⁹ The decision became something of a leading case, being cited and followed in *Campe v. Chicago City Ry. Co.*, 148 Ill. App. 224 (1909), and *Fortner v. Wabash R. Co.*, 162 Ill. App. 1 (1911).

¹⁰ 151 Ill. App. 32 (1909). See also the more recent case of *Rost v. Noble & Co.*, 316 Ill. 357, 147 N. E. 258 (1925).

be passed over lightly for its basis is founded in logic and good public policy. The accident occurred in Illinois. The court was sitting in the state whose law would govern the plaintiff's right, even had the controversy been taken into another jurisdiction.¹¹ It would have been absurd for the court to deny redress to a party, especially a resident, by refusing to apply its own laws which it could be considered far more capable of administering than any other court. As the apparent purpose of the prohibition was to prevent the courts of this state from being cluttered with litigation lacking any connection whatsoever with Illinois, not even that purpose would have been served by a contrary holding. Since it is the situs of the injury which determines the existence of the cause of action, it is no more than reasonable to contend that there is a stronger link where the injury occurs within the state than where the death does. It may be unfortunate that the statutory language was not broad enough, without interpretation, to cover both situations but the holding of the Crane case should not be lightly cast aside.

Legislative revision of the statute in question, occurring in 1935, did not change the phraseology interpreted in the cases mentioned but purported to put certain limitations on the operation of that proviso. While actions to recover damages for deaths occurring outside of the state are still generally prohibited, they may be maintained "where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit" cannot be had upon the defendant in such place.¹² The present case, decided after these additions were made, properly draws no support therefrom for the death clearly took place in Illinois. It may, however, be of value to determine the effect of this amendment on the jurisdictional question. In its present form, the statute limits the operation of the prohibition against suit here to cases where (1) the place of death does not provide the plaintiff with a right of action, and (2) the defendant is not amenable to service of process in that jurisdiction. Read literally, if either (1) or (2) is lacking, the Illinois courts are to take jurisdiction, even though the death occurred outside of this state, if the parties can be found here. Given such literal interpretation, an Illinois court might be persuaded to take jurisdiction, especially on behalf of one of its citizens, even though this state had no factual connection whatsoever with the controversy, if the courts of the place of death, whether measured by the infliction of harm or fatal result, were not open to entertain such an action. Whether or not this section will be given so broad an interpretation with respect to the first element remains for

¹¹ For list of authorities, see 25 C. J. S., Death, § 28.

¹² Laws 1935, p. 916; Ill. Rev. Stat. 1945, Ch. 70, § 2.

the future to determine. Lacking a common law remedy and absent any statute creating one, it would seem that principles of the conflict of laws concerning the *lex loci delicti* would dictate that no remedy should be provided.¹³

It is more likely that the amendment was prompted by and was intended to cure certain defects noted by a federal court sitting in this jurisdiction.¹⁴ That court pointed out that if both the act and the death occurred outside of Illinois but were the product of the fault of an Illinois resident, all the latter would have to do would be to remain within the state, and he would be safe from litigation therein in the state courts.¹⁵ Any policy granting such an asylum to a resident ought to be severely condemned. Now, under the new provision, and particularly by reason of the second element, if the defendant cannot be served in the place where death occurs, then, presumably a suit may be maintained in Illinois. This state might not have any real connection with the suit but so long as the defendant was not amenable to service of process at the situs of the death our courts could take jurisdiction. There is no decision on that point at present but in the light of the evident public policy, no other result could be expected.

W. A. HEINDL

¹³ In general, see Goodrich, *Handbook of the Conflict of Laws* (West Pub. Co., St. Paul, Minn., 1938), 2d Ed., pp. 250-6. As to workmen's compensation, compare *Friedman Mfg. Co. v. Industrial Commission*, 284 Ill. 554, 120 N. E. 460 (1918), with *Biddy v. Blue Bird Air Service*, 374 Ill. 506, 30 N. E. (2d) 14 (1940).

¹⁴ See *Swett v. Givner*, 5 F. Supp. 739 (1934). The federal courts sitting in Illinois have always treated this provision as procedural in nature and have, therefore, repeatedly refused to be bound by it: *Missouri Pac. Ry. Co. v. Larussi*, 161 F. 66 (1908); *Martineau v. Eastern Air Lines*, 64 F. Supp. 235 (1946).

¹⁵ This is under the supposition that the defendant removed himself from the state where the action accrued before he was served with process and was not amenable under a statute such as Ill. Rev. Stat. 1945, Ch. 95½, § 23, providing for substituted service where the defendant is a non-resident and the cause of action against him arose out of his use of the highways of the state. Even then, the problem would be a real one if the local statute, as applied to a principal sought to be held for the acts of his agent, were given the interpretation placed on the Illinois statute in *Jones v. Pebler*, 296 Ill. App. 460, 16 N. E. (2d) 438 (1938), noted in 17 CHICAGO-KENT LAW REVIEW 69, reversed in 371 Ill. 309, 20 N. E. (2d) 592 (1939). Another angle is revealed by the decision in *Smalley v. Hutcheson*, 296 N. Y. 68, 70 N. E. (2d) 161 (1946). The plaintiffs there were injured as a result of a collision in Illinois between their automobile and the car driven by the defendant's intestate, who was killed in the accident. The deceased was a resident of New York and administration of the estate occurred there. Suit in apt time was instituted in Illinois, service being had under the statute aforesaid. That suit was dismissed on defendant's special appearance, the Illinois court holding that the statute did not authorize substituted service upon the personal representative of the non-resident driver. A subsequent suit brought in New York was held barred by the statute of limitations and the pendency of the Illinois action was regarded as insufficient to prevent the running of the statute.

INJUNCTION—SUBJECTS OF PROTECTION AND RELIEF—WHETHER OR NOT SELF-EMPLOYER MAY ENJOIN PICKETING BY LABOR UNION WHERE SUCH CONDUCT IS NOT JUSTIFIED BECAUSE OF ABSENCE OF LABOR DISPUTE OR GRIEVANCE—The case of *Dinoffria v. International Brotherhood of Teamsters and Chauffeurs Local Union No. 179*¹ presents a problem in labor law which, while not novel in Illinois, is of interest because the result reached appears to be contradictory to that attained in two other Appellate Court decisions to be found in this state.² The plaintiffs, self-employed operators of retail gasoline service stations, instituted an action against the defendant labor union requesting relief in the form of an injunction and money damages. The union was in the process of picketing and boycotting the plaintiffs' businesses because of plaintiffs' refusal to join the union. Such conduct resulted in substantial injuries to the plaintiffs as they were not able to obtain the necessary supplies for the carrying on of their trade. The trial court refused both injunctive relief and the claim for damages, but, on appeal, the Appellate Court reversed and remanded. It agreed with the operators' contention that since they employed no one but themselves they were in no way jeopardizing the union or its members and, therefore, interference by it was wholly unjustified.

The approach utilized by the court in solving the instant problem is a simple one. It merely found that the union had no legitimate objective in seeking the plaintiffs' membership. The basis of this conclusion rests upon two grounds: (1) there were no employees whose working conditions and the like could be improved, and (2) there were no allegations that the plaintiffs were employing methods injurious to the union or its members. The defendant rested its case upon the constitutional guaranty of free speech. The court, in passing over this argument, said: "Such conduct cannot be deemed lawful and protected by the constitutional guaranty of free speech."³ This language is vastly different from that used in the two previously mentioned Illinois decisions where the court, in both cases, stressed the right of free speech as permitting the union to picket the self-employer.

This conflict in the application of legal principles and reasoning seems to run throughout the cases. Condemnation of the conduct of a union in picketing a one-man business has been justified on the ground

¹ 331 Ill. App. 129, 72 N. E. (2d) 635 (1947). Writ of error has been granted.

² *Baker v. Retail Clerks' I. Protective Ass'n*, 313 Ill. App. 432, 40 N. E. (2d) 571 (1942); *Naprawa v. Chicago Flat Janitors' Union Local No. 1*, 315 Ill. App. 328, 43 N. E. (2d) 198 (1942), leave to appeal denied 382 Ill. 124, 46 N. E. (2d) 27 (1943).

³ 331 Ill. App. 129 at 137, 72 N. E. (2d) 635 at 638.

that it is unlawful,⁴ an invasion of rights guaranteed by the Fourteenth Amendment,⁵ or that no labor dispute, as defined by anti-injunction statutes, can exist between the union and this type of business.⁶ The opposite view has been upheld on the contention that there can be a labor dispute between a one-man business and a union,⁷ or that freedom of speech guarantees the right to picket,⁸ and, therefore, makes it unnecessary to determine whether or not there is a dispute present.⁹ One court, in commenting upon this, has stated: "The more recent cases justify conduct, such as that charged against the defendant, on the broader grounds of their constitutional guaranty of the right to free speech."¹⁰

It is apparent by now that if the stated reasoning of the courts is accepted at face value it throws the whole picture into utter confusion. The difficulty results from the fact that the courts have recognized the existence of two separate rights as guaranteed by the Constitution which are in opposition to one another in any labor conflict. The union has a right to picket under the constitutional guarantee of free speech, and a businessman has the right to engage in his business without interference

⁴ *Lyle v. Local No. 452 Amalgamated Meat Cutters, etc.*, 174 Tenn. 222, 124 S. W. (2d) 701 (1939).

⁵ *Roraback v. Motion Picture Machine Operators' Union*, 140 Minn. 481, 168 N. W. 766 (1918), rehearing denied 141 Minn. 140, 169 N. W. 529 (1918). See also the concurring opinion of North, J., in *Harper v. Brennan*, 311 Mich. 489 at 501, 18 N. W. (2d) 905 at 909.

⁶ *Luft v. Flove*, 270 N. Y. 640, 1 N. E. (2d) 369 (1936), affirming 246 App. Div. 523, 283 N. Y. S. 441 (1935); *Feinberg v. Pappas*, 30 N. Y. S. (2d) 5 (1941); *Fertel v. Rosenzweig*, 28 N. Y. S. (2d) 6 (1941); *Comen v. Osman*, 27 N. Y. S. (2d) 353 (1941); *Rubin v. Choina*, 26 N. Y. S. (2d) 10 (1941); *Anastasiou v. Supran*, 21 N. Y. S. (2d) 541 (1940); *Lyons v. Meyerson*, 18 N. Y. S. (2d) 363 (1940), affirmed in 260 App. Div. 911, 23 N. Y. S. (2d) 557 (1940); *Kershnar v. Heller*, 14 N. Y. S. (2d) 595 (1939), modified in 258 App. Div. 751, 15 N. Y. S. (2d) 451 (1939); *Gips v. Osman*, 170 Misc. 53, 9 N. Y. S. (2d) 828 (1939); *Botnick v. Winokur*, 7 N. Y. S. (2d) 6 (1938). The foregoing New York cases take it for granted without discussion that unless there is a labor dispute within the terms of the Anti-injunction Act, there can be no union interference. Those opinions which do go into the question reach the same conclusion: *Zueidon v. Goldberg*, 20 N. Y. S. (2d) 272 (1940); *Leach v. Himmelfarb*, 18 N. Y. S. (2d) 642 (1940); *Pitter v. Kaminsky*, 7 N. Y. S. (2d) 10 (1938). But see contra: *Bierber v. Bininbaum*, 168 Misc. 943, 6 N. Y. S. (2d) 63 (1938).

⁷ *Reiner v. Sullivan*, 33 N. Y. S. (2d) 77 (1942); *Schwartz v. Fish Workers' Union etc.*, 170 Misc. 566, 11 N. Y. S. (2d) 283 (1939); *Abeles v. Friedman*, 171 Misc. 1042, 14 N. Y. S. (2d) 252 (1939); *Rohde v. Dighton*, 27 F. Supp. 149 (1939).

⁸ *Glover v. Retail Clerk's Union*, 10 Alaska 274 (1942); *Naprawa v. Chicago Flat Janitors' Union Local No. 1*, 315 Ill. App. 328, 43 N. E. (2d) 198 (1942), leave to appeal denied 382 Ill. 124, 46 N. E. (2d) 27 (1943); *Baker v. Retail Clerks' I. Protective Ass'n*, 313 Ill. App. 432, 40 N. E. (2d) 571 (1942).

⁹ *Bakery & Pastry Drivers, etc. v. Wohl*, 315 U. S. 769, 62 S. Ct. 816, 86 L. Ed. 1178 (1942); *Cafeteria Employees Union v. Anjelos*, 320 U. S. 293, 64 S. Ct. 95, 88 L. Ed. 58 (1943).

¹⁰ *Glover v. Retail Clerk's Union*, 10 Alaska 274 at 284.

under the Fourteenth Amendment. The dilemma the courts find themselves in can only be resolved by balancing these two rights, one against the other, although it is seldom that a court takes the time to mention this.¹¹

From a careful analysis of the decisions, it may be gathered that the test used to determine whether picketing should be allowed is whether or not in the opinion of the court the union is attempting to attain a legitimate labor objective. Will the conduct of the union help improve the economic and working conditions of labor, or will it cause the business man to desist from some practice which is detrimental to the laboring man? If so, the picketing will be allowed. Of course, if there is no apparent legitimate objective and the union is merely trying to obtain more power or to increase its income, then such interference should not and will not be tolerated. Naturally, the courts do not expressly state these considerations. Thus, in *Bakery & Pastry Drivers and Helpers Local 802 v. Wohl*,¹² a United States Supreme Court decision which has been cited many times to the effect that a union has a right to picket under the guaranty of free speech, the court said: “. . . one need not be in a ‘labor dispute’ as defined by state law to have a right under the 14th Amendment to express a grievance in a labor matter by publication unattended by violence, coercion, or conduct otherwise unlawful or oppressive.”¹³ The court stated that a labor dispute need not be involved but it did use the word “grievance” and, when deciding the case, it went into great detail in pointing out the harmful effect of the plaintiff’s conduct upon the union and its members. It was necessary to determine that the union was seeking a lawful objective by its picketing before it was possible to consider the other issues. This same thread of reasoning can be found in some of the New York decisions, for while it has repeatedly and dogmatically been held in that state that a one-man business can never be involved in a labor dispute as there are no “employees,”¹⁴ still where the court has expressly found that the union had legitimate cause to protest it has been willing to decide against

¹¹ See the concurring opinion of North, J., in *Harper v. Brennan*, 311 Mich. 489 at 501, 18 N. W. (2d) 905 at 909.

¹² 315 U. S. 769, 662 S. Ct. 816, 86 L. Ed. 1178 (1942).

¹³ 315 U. S. 769 at 774, 62 St. Ct. 816, 86 L. Ed. 1178 at 1183.

¹⁴ *Luft v. Flove*, 270 N. Y. 640, 1 N. E. (2d) 369 (1936), affirming 283 N. Y. S. 441, 246 App. Div. 523 (1935); *Feinberg v. Pappas*, 30 N. Y. S. (2d) 5 (1941); *Fertel v. Rosenzweig*, 28 N. Y. S. (2d) 6 (1941); *Comen v. Osman*, 27 N. Y. S. (2d) 353 (1940); *Rubin v. Choina*, 26 N. Y. S. (2d) 10 (1941); *Lyons v. Meyerson*, 18 N. Y. S. (2d) 363 (1940), affirmed in 260 App. Div. 911, 23 N. Y. S. (2d) 557 (1940); *Kershner v. Heller*, 14 N. Y. S. (2d) 595 (1939), modified in 258 App. Div. 751, 15 N. Y. S. (2d) 451 (1939); *Gips v. Osman*, 170 Misc. 53, 9 N. Y. S. (2d) 828 (1939); *Botnick v. Winokur*, 7 N. Y. S. (2d) 6 (1938).

the majority view.¹⁵ This type of solution for the problem can be found in other opinions, if they are carefully analyzed; but unfortunately sufficient facts to permit such close analysis are not always given.¹⁶ It is reasonable to conclude, therefore, that in spite of the apparent conflict in legal reasoning, the only difference that exists among the courts lies in their determination of what constitutes a legitimate labor objective. It is impossible to draft a strict definition thereof as this concept has changed and, no doubt, will change again with the social and economic outlook.

The query then is what legitimate labor objectives can be attained by the picketing of a one-man business? As was aptly pointed out in the instant case, the union cannot justify its conduct on the usual basis of trying to improve the working conditions of labor employed by the party picketing.¹⁷ Is it not possible, however, that a union, by picketing this type of businessman, can improve the working conditions of those employed by someone else? In that respect, interference has been condoned where the one-man business handled non-union goods manufactured by a producer whose workmen the union was trying to organize for the court reasoned that the only way to bring the union's grievance before the public and to obtain action was to picket the ultimate distributor.¹⁸

Not only have courts upheld the union's right to picket for the improvement of labor conditions but they have also refused to enjoin where the union is attempting to protect gains already made. Thus, picketing has been allowed where the union objected to the number of hours a self-employed party kept his place of business open.¹⁹ It was argued by the union that such conduct jeopardized the position of the union worker as the tendency was for these individuals to draw off the business from the union shops. The court agreed and recognized the fact that a

¹⁵ See, for example, *Reiner v. Sullivan*, 33 N. Y. S. (2d) 77 (1942); *Abeles v. Friedman*, 171 Misc. 1042, 14 N. Y. S. (2d) 252 (1939).

¹⁶ The objective in some cases is readily discernible: *Glover v. Retail Clerk's Union*, 10 Alaska 274 (1942); *Baker v. Retail Clerks' I. Protective Ass'n*, 313 Ill. App. 432, 40 N. E. (2d) 571 (1942); *Evans v. Retail Clerks' Union*, 66 Ohio App. 158, 32 N. E. (2d) 51 (1940). In others, the facts are not adequate enough to make any determination as to whether or not the basis of the court's decision was a finding of a legitimate labor objective: *Ex parte Lyons*, 27 Cal. App. (2d) 293, 81 P. (2d) 190 (1938); *O'Neil v. Building Service Employees I. Union No. 6*, 9 Wash. (2d) 507, 115 P. (2d) 662 (1941).

¹⁷ See also *Yablonowitz v. Korn*, 205 App. Div. 440, 199 N. Y. S. 769 (1923).

¹⁸ *Goldfinger v. Feintuch*, 276 N. Y. 281, 11 N. E. (2d) 910 (1937). See also *Jacobs v. Eison*, 188 Misc. 577, 68 N. Y. S. (2d) 921 (1947).

¹⁹ *Glover v. Retail Clerk's Union*, 10 Alaska 274 (1942); *Baker v. Retail Clerks' I. Protective Ass'n*, 313 Ill. App. 432, 40 N. E. (2d) 571 (1942); *Evans v. Retail Clerks' Union*, 66 Ohio App. 158, 32 N. E. (2d) 51 (1940).

union might have a vital interest in the number of hours and days a one-man shop remained open. It is of interest to note, however, that in all of these cases the union merely wanted the individual proprietor to conform to union hours but did not insist that he join the union.

Along the same line, other aspects of one-man businesses have been held inimical to unions and their members so as to justify picketing. For instance, in two cases,²⁰ independent jobbers were engaged in purchasing from wholesalers and selling to retailers. They refused to join the union or to conform to union rules and regulations. As these individuals did not have to contend with such obligations as social security taxes or unemployment insurance payments, could work as many hours as they wished and did not have to draw the union scale wage, they could operate on a small margin of profit. It was, therefore, advantageous to the wholesalers to sell to these jobbers instead of maintaining their own delivery system. A trend was started whereby regularly employed union drivers would be replaced or forced to become independent jobbers, resulting in keen competition and disastrous effects upon working conditions which had originally been fought by the union. Picketing was, therefore, regarded as a proper device.

Because a man is self-employed and hires no one else, it does not always mean that he thereby rid himself of worker responsibility and, with it, union pressure. Certain New York garment manufacturers, for example, who had always employed workers to do the cutting and finishing of clothing, revised their methods of operating by doing the cutting themselves and farmed out the finishing work to other less responsible individuals who, in turn, hired the labor. The court held that these self-employed parties, by contracting for the finishing of garments with whomsoever they wished, just as effectively controlled labor as if they actually employed the workers so were subject to picketing.²¹

While the courts have gone a long way to protect the legitimate interests of labor, they have been prone to oppose picketing where the result of compliance with the union demand would, almost of necessity, force the individual out of business. Such an illustration is provided by the cases where the self-employed party offers to join the union when approached but is not allowed to do so because of a union rule against the employer doing the work. The union might or might not have a legitimate grievance, but as the result of compliance with union demands would force the self-employer out of business, since he would

²⁰ *Bakery & Pastry Drivers, etc. v. Wohl*, 315 U. S. 769, 62 S. Ct. 816, 86 L. Ed. 1178 (1942); *Reiner v. Sullivan*, 33 N. Y. S. (2d) 77 (1942).

²¹ *Abeles v. Friedman*, 171 Misc. 1042, 14 N. Y. S. (2d) 252 (1939).

have to hire a union worker to do the work he had himself performed, picketing was restrained.²² In one of the more recent cases of this type, that of *Bautista v. Jones*,²³ the court said: "Thus the question before us does not relate to the right of the union to take measures reasonably necessary to protect its members from unequal and unfair competition but, instead, to the asserted right to make the possible evils of a system the basis for complete deprivation of the opportunity of particular individuals to work."²⁴ But even this situation must be contrasted with cases where others are employed,²⁵ for then the apparent difference between the two lines of cases seems to lie in the fact that in the latter the tendency of the union rule is not to drive the individual out of business because he has shown himself able to employ others.

The preceding discussion merely illustrates what some courts have deemed to be justifiable circumstances permitting union interference with businesses conducted by self-employed parties. The cases must, of necessity, be read with one eye on the period when they were rendered, for the trend of the times is of the utmost importance. The earliest cases held that such interference should not be tolerated without discussion of other consequences. Cases permitting such picketing fall within a period when public sympathy was concerned with the problems of the laboring man and his union. At the present, the field of labor relations is in a state of upheaval with accent on placing curbs on labor and unions. It is, therefore, at least for the present, likely that courts will scrutinize closely the conduct of unions in their relation to business and might again return to earlier trends, at least with respect to self-employed individuals. The Taft-Hartley Act may have made its contribution in this direction for it designates as unlawful the "forcing or requiring [of] any employer or self-employed person to join any labor or employer organization . . ."²⁶ But whether the policy reflected thereby is temporary or permanent is, to say the least, problematical.

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²² *Bautista v. Jones*, 25 Cal. (2d) 746, 155 P. (2d) 343 (1945), affirming 55 Cal. App. (2d) 694, 131 P. (2d) 579 (1943); *Roraback v. Motion Picture Machine Operator's Union*, 140 Minn. 481, 168 N. W. 766 (1918), rehearing denied 141 Minn. 140, 169 N. W. 529 (1918). See also *Campbell v. Motion Picture Mach. Operators' Union*, 151 Minn. 220, 186 N. W. 781 (1922); *Jensen v. St. Paul Moving Picture M. O. L. Union*, 194 Minn. 58, 259 N. W. 811 (1935).

²³ 25 Cal. (2d) 746, 155 P. (2d) 343 (1945), affirming 55 Cal. App. (2d) 694, 131 P. (2d) 579 (1943).

²⁴ 25 Cal. (2d) 746 at 751, 155 P. (2d) 343 at 346.

²⁵ *Senn v. Tile Layers Protective Union*, 301 U. S. 468, 57 S. Ct. 857, 81 L. Ed. 1227 (1939); *Glover v. Minneapolis Building Trades Council*, 215 Minn. 533, 10 N. W. (2d) 481 (1943); *Zaat v. Building Trades Council*, 172 Wash. 445, 20 P. (2d) 589 (1933).

²⁶ Labor-Management Relations Act, 1947, § 303(a) (1).

LIMITATION OF ACTIONS—COMPUTATION OF PERIOD OF LIMITATION—WHETHER OR NOT ABSENCE FROM JURISDICTION AFTER ACCRUAL OF CAUSE OF ACTION TOLLS RUNNING OF STATUTE OF LIMITATIONS WHERE PLAINTIFF HAS OTHER MEANS OF SECURING JURISDICTION OVER DEFENDANT—In the recent Ohio case of *Commonwealth Loan Company v. Firestine*,¹ the plaintiff received from the defendants a note dated in 1926. Default was made in payment of the note in 1930 when the maker left a balance still due and owing. In 1945, the plaintiff exercised the power conferred by a cognovit clause contained in the note and had judgment entered against the defendants. The defendants then filed a motion to vacate that judgment on the ground that the fifteen-year statute of limitations had run against the claim. The trial court found that, between 1930 and the date of the judgment, the defendants had resided in Illinois for a period of approximately four years. Plaintiff therefore contended that, as required by the local statute, this period of absence should be excluded in computing the period of limitation. If it was, the action was clearly not barred. Defendants nevertheless argued that the statutory exception was only applicable where the plaintiff's relief depended upon the personal presence of the defendant within the state whereas under this particular note, because of the warrant of attorney, the plaintiff might have obtained judgment at any time. The trial court refused to vacate the judgment and its decision was affirmed in the intermediate appellate court.² The Supreme Court of Ohio also agreed with that result, stating that the statute involved was clear and explicit and, as the defendants came within the letter of the exception, the presence of a warrant of attorney in the note made no difference.

The court pointed out the dearth of direct authority on this precise question, citing only one case, an Illinois Supreme Court decision in the case of *Hibernian Banking Association v. Commercial National Bank*,³ from which they quoted with approval. Research has turned up another Illinois case which is in harmony.⁴ The reasoning of both these Illinois cases is founded on the same basis as that used in the instant decision; namely, that the statute does not provide for a different conclusion if there happens to be a cognovit clause. In fact, it was suggested that to hold that the presence of such a clause would change matters would be, in effect, to repeal the statute. The absence of authority is easily explained. A creditor holding a note with a confession clause has a

¹ — Ohio —, 73 N. E. (2d) 501 (1947).

² — Ohio App. —, 72 N. E. (2d) 912 (1946).

³ 157 Ill. 524, 41 N. E. 919 (1895).

⁴ Mitchell v. Comstock, 305 Ill. App. 360, 27 N. E. (2d) 620 (1940).

convenient and inexpensive method of obtaining judgment against the makers. He is, therefore, not likely to wait very long after default has occurred before proceeding to a remedy.

The problem in the present case is, of course, narrow. It is, however, part and parcel of a larger one, to-wit: should the statute of limitations be tolled by the absence or non-residence of the defendant where, in spite of such circumstance, the plaintiff by diligent effort could have obtained relief before the local tribunals? In this discussion, interest in the application of this problem is confined to actions *in personam*, but it is also of importance to *in rem* proceedings.⁵

Under the former category fall two types of situations other than the one involved in the instant case. In each of these the defendant, although absent from the state, is amenable to process either by some form of substituted service which may be authorized by statute⁶ or by service upon some person, such as the Secretary of State, acting as the non-resident defendant's duly appointed agent.⁷ The courts are in disagreement as to whether or not either of these circumstances should affect the operation of the exception. The main crux of the argument is whether the courts should look into the spirit of the statute or whether they should be confined to its express language. If the former, then as long as the plaintiff can obtain relief, the statute is not tolled. If the latter, then the statute will only be tolled where the facts fall into the exact language, and, therefore, the presence of any other method of obtaining relief is of no consequence.

Where substituted service is possible, the present problem must be further analyzed in the light of the language of the appropriate limitation statute. Some statutes, like the one in Illinois, require that in order for the exception to operate the defendant must "reside out of" the state,⁸ hence mere absence alone is not sufficient.⁹ In the majority

⁵ See annotation in 119 A. L. R. 331 to the case of *Herthel v. Barth*, 148 Kas. 308, 81 P. (2d) 19 (1938).

⁶ See, for example, Ill. Rev. Stat. 1945, Ch. 110, § 137.

⁷ *Ibid.*, Ch. 95½, § 23.

⁸ *Ibid.*, Ch. 83, § 19, for example, specifies that the limitation period is tolled ". . . if, after the cause of action accrues, he departs from *and resides out of the state. . .*" Italics added.

⁹ *Gray v. Fifield*, 59 N. H. 131 (1879); *Ward v. Cole*, 32 N. H. 452 (1855); *Gilman v. Cutts*, 27 N. H. 348 (1853); *Malakoff v. Frye*, 158 Misc. 171, 234 N. Y. S. 22 (1935), construing a Washington statute; *State v. Furlong*, 60 Miss. 839 (1883); *Dent v. Jones*, 50 Miss. 265 (1874); *Miller v. Tyler*, 61 Mo. 401 (1875); *Venuci v. Cademartory*, 59 Mo. 352 (1875); *Garth v. Robards*, 20 Mo. 523, 64 Am. Dec. 203 (1855); *State v. Allen*, 132 Mo. App. 98, 111 S. W. 622 (1908); *Bensley v. Haerberle*, 20 Mo. App. 648 (1886); *Rhodes v. Parish*, 16 Mo. App. 430 (1885); *Rutland Marble Co. v. Bliss*, 57 Vt. 23 (1885); *Hall v. Nasmith*, 28 Vt. 791 (1856); *Crowder v. Murphy*, 61 Wash. 626, 112 P. 742 (1911).

of cases, that result is just and equitable to all parties involved for where an individual is merely temporarily absent from the state and has not taken up residence elsewhere he will have a residence within the state where substituted service may be had. The plaintiff thus having a remedy, there is no need for the tolling of the statute. One can, of course, envision a situation where the defendant abandons his residence intending to establish a new one when he returns from a temporary sojourn outside the state. Such a problem, apparently, would not be covered by the express language of statutes in this category, but might be settled by recourse to the idea that a residence is not abandoned merely by an intention so to do but continues until a new one is established.

The prime conflict, however, arises where the statute involved merely mentions "absence" as the controlling factor in determining whether or not the statute of limitations is tolled. Some courts have said that language of that type is so clear that any absence would serve even though substituted service might be had.¹⁰ As one court put it, whether the "full or partial remedies of the law are or are not suspended by a resident of the state being temporarily out of the state, cannot be considered in giving effect to the plain and unambiguous language."¹¹ Another court preferred to base its decision upon the fact that the exception to the statute of limitations was in existence long before any statutory provision with regard to substituted service had been enacted.¹² It logically pointed out that it could not have been within the contemplation of the legislature, at the time of enacting the earlier of the two statutes, that the exception should not operate where substituted service could be had. Courts which take the opposite view under the same set of circumstances look rather to the spirit of the statute and disregard the precise language.¹³ They point out that the exception was enacted to prevent injustice and that where such injustice can be forestalled by the plaintiff's own action he needs no special protection.

The same conflict is present where the non-resident defendant is amenable to process by the service thereof on his duly appointed agent.

¹⁰ *Bauserman v. Blunt*, 147 U. S. 647, 13 St. Ct. 466, 37 L. Ed. 316 (1890); *Connor v. Timothy*, 42 Ariz. 517, 33 P. (2d) 293 (1934); *Roth v. Holman*, 105 Kas. 175, 182 P. 416 (1919); *Conlon v. Lanphear*, 37 Kas. 431, 15 P. 600 (1887); *Fisher v. Phelps, Dodge & Co.*, 21 Tex. 551 (1858); *Keith-O'Brien Co. v. Snyder*, 51 Utah 227, 169 P. 954 (1917), followed in *Buell v. Duchesne Mercantile Co.*, 64 Utah 391, 231 P. 123 (1924).

¹¹ *Parker v. Kelly*, 61 Wis. 552 at 557, 21 N. W. 539 at 540 (1884).

¹² *Anthes v. Anthes*, 21 Ida. 305, 121 P. 553 (1912).

¹³ *Dorus v. Lyon*, 92 Conn. 55, 101 A. 490 (1917); *Sage v. Hawley*, 16 Conn. 106, 41 Am. Dec. 128 (1844); *Penley v. Waterhouse*, 1 Iowa 498 (1855); *Mune v. Taylor*, 91 Ky. 461, 16 S. W. 128 (1891); *Blodgett v. Utley*, 4 Neb. 25 (1875).

Typical provisions of that character exist to cover situations where the non-resident automobile operator uses the highways of the state and thereby appoints some public official as his agent for service of process. One line of authority holds, in such cases, that as the plaintiff has a method of obtaining relief the mere fact that the defendant remains out of the state does not toll the statute.¹⁴ It has been said, in that regard, that the "absence or non-residence of the defendants in no way obstructed or prevented suit against them or service upon them,"¹⁵ and a pertinent Illinois decision, that in the case of *Nelson v. Richardson*,¹⁶ follows much the same line of reasoning. The basis of the decision there was that, even though the facts did not fall within the express language of the exception, it must have been the intention of the legislature to take this particular situation out of the exception. As the very purpose for a non-resident driver provision is to give the plaintiff a speedy method of obtaining relief not otherwise available, granting recognition to the operation of this exception would be inconsistent therewith and unnecessary.¹⁷ Other jurisdiction, however, still feel bound by the express language of the limitation statute and allow it to be tolled even though the Secretary of State could be served as the agent of the non-resident defendant.¹⁸ Decisions of that character seem to rest upon the fact that it is the duty of the debtor to seek out his creditor and to pay him at his residence so that it is not unreasonable to say that one violating his duty by staying outside of the state should not have the benefit of a statute of repose.

Courts which look to the spirit of the statute rather than to its precise language would seem to have more reason back of their decisions. If the original object of the statute of limitations and the purpose of

¹⁴ *Coombs v. Darling*, 116 Conn. 643, 166 A. 70 (1933); *Nelson v. Richardson*, 295 Ill. App. 504, 15 N. E. (2d) 17 (1938); *Arrowood v. McMinn County*, 173 Tenn. 562, 121 S. W. (2d) 566 (1938). The same result is reached where an agent is expressly appointed: *Green v. Sunder*, 114 Tenn. 100, 84 S. W. 808 (1904). For a discussion as to foreign corporations doing business within the state see annotation in 59 A. L. R. 1336 to the case of *Clawson v. Boston Acme Mines Develop. Co.*, 72 Utah 137, 269 P. 147 (1928).

¹⁵ *Arrowood v. McMinn County*, 173 Tenn. 562 at 565, 121 S. W. (2d) 566 at 567.

¹⁶ 295 Ill. App. 504, 15 N. E. (2d) 17 (1938).

¹⁷ Any difference between the decision in *Nelson v. Richardson*, 295 Ill. App. 504, 15 N. E. (2d) 17 (1938), and the two Illinois cases referred to in notes 3 and 4, ante, would seem to depend on the existence of such a statute. In the earlier decisions, cases which concerned the effect of a warrant of attorney, nothing tangible could be shown which would indicate a legislative intent to take the case out of the statutory exception. The converse was the case when the matter involved a non-resident automobile driver.

¹⁸ *Maguire v. Yellow Taxi Corporation*, 253 App. Div. 249, 1 N. Y. S. (2d) 749 (1938), affirmed in 278 N. Y. 576, 16 N. E. (2d) 110 (1938); *Bode v. Flynn*, 213 Wis. 509, 252 N. W. 284 (1934). The Ohio Court of Appeals has recently decided to the contrary: see *Canaday v. Hayden*, — Ohio App. —, 74 N. E. (2d) 635 (1947).

the exception is kept in mind, it hardly seems possible that a legislature would intend to have the statute suspended where that was unnecessary as is the case where the rights of the parties can be protected by the exercise of diligence.

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WILLS—PROBATE, ESTABLISHMENT, AND ANNULMENT—EFFECT OF ADMISSION OF FOREIGN WILL TO PROBATE ON RIGHT TO CONTEST WILL BY DIRECT ATTACK—The case of *Sternberg v. St. Louis Union Trust Company*¹ provides the first Illinois Supreme Court interpretation of the provisions of Section 90 of the Illinois Probate Act² so far as they affect the right to contest a foreign will which has been admitted to probate in this state. The testator's will there concerned was made in Missouri in 1937. He married in 1943 and died in that state in 1944 leaving no issue. Under the Missouri statutes,³ his will was not revoked by his subsequent marriage since he left no issue of that marriage surviving him, hence the will was admitted to probate in that state. An authenticated copy of the will was subsequently admitted to probate⁴ in Illinois where testator had owned and left considerable real estate. The widow thereafter renounced the will but the other heirs filed suit to contest the same on the ground that the validity of the will, insofar as it affected real estate located in Illinois, was determinable by Illinois law and that the marriage of the testator subsequent to the execution of the will had worked a revocation of it.⁵ The executor, on the other hand, contended that the present Illinois Probate Act had modified the common-law rule to the point where a foreign will, valid where the testator was domiciled, was likewise valid in Illinois and, when admitted to probate in this state, was sufficient to pass title to real estate located there, any local provision to the contrary notwithstanding. The circuit court held that the will was valid insofar as it affected personal property located in Illinois but was invalid to devise the real estate. On appeal, the Illinois Supreme Court affirmed, holding that the common-law rule had been modified by the Probate Act only to the extent that a foreign will might be admitted to probate when executed in accordance with the law of the testator's domicile, or in accordance with the law of the place where executed, or where it had been admitted to probate in a foreign state, but that

¹ 394 Ill. 452, 68 N. E. (2d) 892 (1946).

² Ill. Rev. Stat. 1945, Ch. 3, § 242.

³ Mo. Rev. Stat. 1929, Ch. 1, §§ 521-2.

⁴ Ill. Rev. Stat. 1945, Ch. 3, § 237 et seq.

⁵ *Ibid.*, § 197.

its operation and effect, after admission to probate, was to be determined by local law.

While the problem settled by the court in the instant case is a new one under the present Probate Act,⁶ it has arisen many times before in the history of the probating of foreign wills. That which has caused difficulty from time to time has been the erroneous belief that statutory provisions, making a foreign will which was valid where executed admissible to probate or good and available in law on recordation in a stated manner, were to be treated as having the effect of making such foreign will valid for all purposes, freeing it from attack either directly or collaterally. This has, however, not been the case even under the earliest provisions for the probate of foreign wills in the states whose laws ultimately were adopted and became the law of Illinois.

Under English law, wills might be proved either in common form or in solemn form. Under the first method, the will was brought before the judge of the proper court and proved by its witnesses without notice to interested parties. At any time within thirty years thereafter, however, any interested person, by petition, could force the executor of the will to again prove the will in solemn form, at which time notice was given to all interested parties and all issues with reference to the validity of the will were tried *de novo*. Probate established the validity for purpose of transfer of personalty only; as to lands, probate had no significance. Each time a devisee found it necessary to prove his claim to land, he was obliged to prove the will anew, so the validity of the will could be contested on every such occasion.

The early statutes of this country extended the validity of a probated will to realty as well as to personalty by providing for a will contest proceeding which was comparable to the reprobating of a will in England in solemn form. The validity of a will might also be questioned in chancery by direct attack.⁷ In 1789, at a time when Illinois was but a county of Virginia, a law was passed in that state providing for the proof of foreign wills, there having been no prior statute covering the subject matter.⁸ It declared that such wills could be "contested and controverted in the same manner as the original might have been." This statute is the earliest direct antecedent of the present Illinois provisions, and indicated an intent that the right to contest a foreign will should be as broad as that concerned when a domestic will was

⁶ *Ibid.*, § 151 et seq.

⁷ *Dibble v. Winter*, 247 Ill. 243, 93 N. E. 145 (1910); *Luther v. Luther*, 122 Ill. 558, 13 N. E. 166 (1887); *Rigg v. Wilton*, 13 Ill. 15, 5 Am. Dec. 419 (1851). See also *Horner, Probate Practice*, 2d Ed., Ch. IV, § 58.

⁸ *Abridgment Pub. Laws Va. (1796)*, p. 335, § 14. See also 4 *Littel's Laws of Ky.*, Append. 2, p. 447, § 7.

involved. It was followed by an enactment of the Governor and Judges of the Northwest Territory, dated 1795, making allowance for the proving of wills as well as the recording of foreign wills, which provided for the contesting of wills "whereof copies or probates shall be as aforesaid produced and given in evidence."⁹ Again there was evident intention that some method should exist by which every will could be contested. That statute was re-enacted for the Territory of Indiana, in 1807, when the land now comprising the state of Illinois was a part thereof.¹⁰ Subsequently, upon the organization of the Territory of Illinois in 1809, these sections were re-enacted into Illinois law in 1812.¹¹

After the admission of Illinois as a state, provision was made for the probate of both domestic and foreign will by language which seems to have been borrowed substantially from the then Ohio statute.¹² Shortly thereafter, a probate court was established under a statute wherein it was also provided that ". . . any person or persons interested may contest any wills . . ." ¹³ When the Illinois statutes were revised in 1829, the provisions of the then Kentucky statute concerning the contest of wills,¹⁴ which in turn had been based upon the earlier Virginia statute, were included in the revision¹⁵ and the other provisions already noted were re-enacted.¹⁶ At that time, therefore, foreign wills could be contested in precisely the same way as domestic wills not only in Kentucky,¹⁷ Ohio,¹⁸ and Virginia¹⁹ but apparently also in Illinois. In 1855, the Illinois legislature adopted the Pennsylvania proof of foreign will statute²⁰ at a time when it had been held in that state that foreign wills were contestible.²¹ All these provisions remained intact, with the exception of some inconsequential omissions or renumbering of the sections,²² down to the passage of the present Probate Act.

⁹ See Maxwell, *Laws of Northwest Territory*, p. 148.

¹⁰ *Terr. Laws Indiana*, Aug. 1807 to Nov. 1811, pp. 84-8.

¹¹ *Pope's Laws of Illinois Territory*, pp. 215-6.

¹² *Laws 1819*, p. 231, §§ 22-3.

¹³ *Laws 1821*, p. 119, § 5.

¹⁴ *Ky. Laws 1797*, § 11 and § 15. See also *Rigg v. Wilton*, 13 Ill. 15, 5 Am. Dec. 419 (1851).

¹⁵ *Rev. Laws 1828-29*, p. 193, § 5.

¹⁶ *Ibid.*, p. 192, § 2 and § 7.

¹⁷ See 2 *Morehead and Brown, Ky. Dig. 1834*, p. 1544, § 13, and p. 1548, § 1.

¹⁸ *Ohio Stats. 1824*, p. 121, § 12.

¹⁹ 1 *Rev. Code Va. 1819*, p. 379.

²⁰ *Laws 1855*, p. 44.

²¹ See *Opp v. Chess*, 204 Pa. 401, 54 A. 354 (1903).

²² Section 22 of the Act of 1819 became Section 2 of the Act of 1829, and remained such; Section 23 of the Act of 1819 became Section 7 of the Act of 1829, but was afterwards changed to Section 9 of the Wills Act; Section 5 of the Act of 1821 remained Section 5 in the Act of 1829 but later became Section 7 of the Wills Act. All these provisions were repealed but became incorporated into the present Probate Act.

One technical question did arise over the legislative intention because the provision for the admission of foreign wills²³ appeared in sequence after the provision for will contests²⁴ while that concerning the admission of domestic wills²⁵ preceded it. That question was resolved in the case of *Dibble v. Winter*,²⁶ wherein it was said that it would be unreasonable to read a radical departure into the Illinois act and give foreign wills greater force than domestic ones, for the court there held that foreign wills were contestible in Illinois in like manner as domestic wills. It can thus be seen that, from the earliest day until the passage of the present Probate Act, foreign wills were open to contest here.

The language of the present Probate Act is clear on the question for it states that "within nine months after the admission to probate of a domestic or foreign will in the probate court of any county of this state, any interested person may file a complaint in the circuit court of the county in which the will was admitted to probate to contest the validity of the will."²⁷ One of the framers thereof has stated that the application of this section, both to foreign wills as well as to domestic ones, is nothing more than a restatement and codification of the rule of *Dibble v. Winter* and that while a successful contest here will have no effect on the original probate it will serve to prevent the will from operating on real estate located in this state.²⁸ It has, therefore, been held that the grounds upon which a will may be contested are not in any way restricted,²⁹ so that if, for example, the writing offered as the will of the decedent has been revoked, such fact will serve as a proper ground for contest.³⁰

It now having been established, contrary to the contentions of the executor in the instant case, that foreign wills admitted to probate in Illinois are subject to contest, it still remains to be determined what effect the marriage of the non-resident testator, subsequent to the execution of the will offered in probate, has upon the will for purpose of transferring title to the testator's lands located in this state. An established principle of law, recognized everywhere and arising from the necessities of the case, declares that the disposition of immovable property, whether by deed, descent, or otherwise, is exclusively subject to the laws of the

²³ Laws 1829, p. 193, § 7; Ill. Rev. Stats. 1937, Ch. 148, § 9.

²⁴ Laws 1829, p. 193, § 5; Ill. Rev. Stats. 1937, Ch. 148, § 7.

²⁵ Laws 1829, p. 192, § 2; Ill. Rev. Stats. 1947, Ch. 148, § 2.

²⁶ 247 Ill. 243, 93 N. E. 145 (1910).

²⁷ Ill. Rev. Stats. 1945, Ch. 3, § 242.

²⁸ See Ill. Probate Act Ann., 1940, p. 95, § 90.

²⁹ *Shelby Loan & Trust Co. v. Milligan*, 372 Ill. 397, 24 N. E. (2d) 157 (1939).

³⁰ *Dowling v. Gilliland*, 275 Ill. 76, 113 N. E. 989 (1916).

government within whose jurisdiction such property is situated.³¹ This principle extends to wills and governs not only the form and mode of execution but also the power of the testator to make the devise or other disposition of property.³² It applies to descent and heirship, so that none can take except those who are recognized as legitimate heirs by the *lex rei sitae*, and they take in the proportions and order which those laws prescribe.³³ In accordance with these principles, the validity of the will offered for probate in the instant case was governed by the laws of Illinois as to the real estate located there and, by that law, the marriage of the testator produced a revocation of any will made by him prior to the date of that marriage.³⁴ The only recognized exception to such rule, established by statute, permits the will to survive if a contrary intention is expressed by the testator therein,³⁵ but such was not the fact in the instant case. The decision, therefore, both on historic principles and on clear legislative intent, is well founded.

R. C. MONTGOMERY

WILLS—RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES—WHETHER OR NOT WIDOW MAY CLAIM STATUTORY SHARE IN CORPUS OF REVOCABLE TRUST CREATED BY DECEASED HUSBAND—A remarkable doctrine on the subject of trusts was announced by the Supreme Court of Ohio in the recent case of *Harris v. Harris*,¹ a suit brought by a widow to have certain instruments executed by her deceased husband declared not to be trusts or, if otherwise valid as trusts, to have the instruments set aside to the extent necessary to permit her to receive her statutory share in his estate. The settlor died testate without issue. Prior to his death, he had purported to create a trust *inter vivos* over certain shares of stock in a corporation of which he was president under which he received the income for life and provided for an eventual disposition of the trust res to the children of his brother. The widow was not named

³¹ *United States v. Fox*, 94 U. S. 315, 24 L. Ed. 192 (1877); *Furhop v. Austin*, 385 Ill. 149, 52 N. E. (2d) 267 (1943); *Hall v. Gabbert*, 213 Ill. 208, 72 N. E. 806 (1904).

³² *Harrison v. Weatherby*, 180 Ill. 418, 54 N. E. 237 (1899); *Dibble v. Winter*, 247 Ill. 243, 93 N. E. 145 (1910).

³³ *Stoltz v. Doering*, 112 Ill. 234 (1885). See also Story, *Conflict of Laws*, Ch. XII, p. 823, § 483.

³⁴ Ill. Rev. Stats. 1945, Ch. 3, § 197.

³⁵ See *Kuhn v. Bartels*, 374 Ill. 231, 29 N. E. (2d) 284 (1940); *Lawman v. Murphy*, 321 Ill. 421, 152 N. E. 220 (1926); *Wood v. Corbin*, 296 Ill. 129, 129 N. E. 553 (1920); *Hudnall v. Ham*, 183 Ill. 486, 56 N. E. 172 (1900); *McAnnulty v. McAnnulty*, 120 Ill. 26, 11 N. E. 397 (1887).

¹ 147 Ohio St. 437, 72 N. E. (2d) 378 (1947). Mathias, Hart and Zimmerman, JJ., dissented. Mathias, J., and Zimmerman, J., each wrote dissenting opinions.

as a beneficiary. Under the terms of the trust instrument, the settlor expressly reserved the unrestricted right to modify and revoke, but such rights were never exercised. In addition, he reserved the right to deliver additional securities or to take delivery of trust property which might be the subject of revocation. The trustee was denied the power to sell, had no right to invest or re-invest the trust assets, and was particularly refused the right to vote the stock in question. The trial court held the trust to be valid in all respects and denied plaintiff's petition. The Ohio Court of Appeals held that the trust was valid except that, because the settlor had retained dominion and control over the corpus, the trust was ineffective to deprive the widow of her interest in the assets thereof as the surviving spouse. The Supreme Court of Ohio, by a divided court, affirmed the decision for the plaintiff.

In support of its holding, the majority of the court stressed the fact that, in spite of the trust agreement, the settlor had continued to serve as president and director of the corporation in question and, until his death, had made the same use of his property as he had done prior to the execution of the trust agreement. It also pointed out that the trustee had not attended meetings of the stockholders or board of directors and at no time had he examined the books of the company. In short, the majority felt that the trustee performed only a minor function. While admitting that a husband could dispose of his personal property during his lifetime without the consent of his wife and while recognizing that the transfer of property to a trustee under an agreement whereby the settlor reserves to himself the income during his life with the right to amend or revoke is a perfectly proper and valid transaction, the majority nevertheless concluded that if, by such an agreement, the settlor does not part absolutely with dominion over the property, his widow may elect to take a statutory share therein as if the same constituted a part of the settlor's estate.

It is difficult to reconcile the opinion of the majority with existing decisions. If a valid trust *inter vivos* had been created, title passed immediately to the trustee and nothing remained in the settlor except the right to revoke, alter, and amend the trust agreement. Thereafter, in the event of the settlor's death, since title to the trust property was already in the trustee, it would appear that no part of such trust res would pass to the settlor's executor or administrator if the right of revocation had not been exercised. On the other hand, if the transfer was illusory only, then the purported trust would be invalid as to the wife and others and the corpus thereof would be administered as part of the settlor's estate for title had not passed. It is significant that no fraud as to the wife was alleged or proven. The court merely based its

decision on the fact that the settlor had not parted with absolute dominion over the trust res.

In this connection, the court purportedly followed the decision in the Ohio case of *Bolles v. Toledo Trust Company*,² but as the trusts involved in that case were testamentary in character that decision would not have material application. It is significant, too, that the court reached its decision despite an Ohio statute, mentioned in the opinion, which reads: “. . . the creator of a trust may reserve to himself any use of power, beneficial or in trust, which he might lawfully grant to another, including the power to alter, amend, or revoke such trust and such trust shall be valid as to all persons, except . . . creditors of such creator.”³ It should be pointed out, however, that the Ohio bar should have been amply prepared for the present decision for a review of the Ohio cases had already indicated that the upper court of that state has consistently followed a vacillating and erratic course on the subject of trusts and one which is generally opposed to the weight of authority.⁴

The generally accepted rule in cases of this character was once stated by a Pennsylvania court, in the case of *Windolph v. Girard Trust Company*,⁵ where the court said: “It is the settled law in this state, as was the common law, that during his life a man may dispose of his personal estate by voluntary gift or otherwise, as he pleases, and it is not a fraud upon the rights of his widow and children. . . . The power arises from the fact that he is the absolute owner and hence may make a gift, declare a trust, or otherwise dispose of his personal property at his pleasure. During his life, his wife and children have no vested interest in his personal estate and hence they cannot complain of any disposition he sees fit to make of it. Their right to his property attaches only at his death.”⁶ And this is true even though the gift was made with the intention and purpose of depriving the wife of her distributive share of the husband’s personalty at his death.⁷ It has, therefore, been held that the reservation of a life interest to the husband and some

² 144 Ohio St. 195, 58 N. E. (2d) 381 (1944).

³ Page Ohio Gen. Code Ann., Vol. 6, Ch. 4, § 8617.

⁴ See Goldman and DeCamp, “When is a Trust not a Trust?”, 16 U. of Cin. L. Rev. 191 (1942).

⁵ 245 Pa. 349, 91 A. 634 (1914).

⁶ 245 Pa. 349 at 363, 91 A. 634 at 638.

⁷ *Sturges v. Citizens' Nat. Bank*, 152 Md. 654, 137 A. 378 (1927); *Kerwin v. Donaghy*, 317 Mass. 559, 59 N. E. (2d) 299 (1945); *Brashears v. State ex rel. Oklahoma Pub. Welfare Comm'n.* 194 Okla. 663, 154 P. (2d) 101 (1944); *Potter Title & Trust Co. v. Braum*, 294 Pa. 482, 144 A. 401 (1928).

degree of control over the property would not defeat the transfer in trust if it was otherwise absolute in nature,⁸ and a federal court has held that where the husband created an irrevocable trust reserving the income to himself for life his widow would have no interest in the trust estate.⁹

But the general rule is otherwise when it appears that the gift is merely a colorable device by means of which the husband makes an apparent gift of his property but in reality continues to use and enjoy the trust property during his lifetime and at the same time attempts to deprive his wife of her property rights after his death. Such a transfer is deemed to be a legal fraud on the rights of the wife and hence is voidable at her election.¹⁰ Illinois adopted this view in the case of *Smith v. Northern Trust Company*,¹¹ but that case is readily distinguishable from the instant one for there fraud as to the wife was alleged. In addition, the Ohio court acknowledged the trust to be valid, while the Illinois court declared it invalid because of the fraud on the wife. It should be mentioned, however, that there is a minority group of cases which achieve a result directly opposed to this general rule and uphold trusts even when created in fraud of the wife's rights.¹²

The concept that retention by the settlor of control over the trust and the trust res may have an adverse effect on the purported transfer was developed by the United States Supreme Court in the income tax case of *Helvering v. Clifford*.¹³ In that case, the taxpayer had declared himself trustee over certain securities owned by him, retaining for himself wide powers of control over the corpus. The court held that the trust was invalid for federal income tax purposes and stated: "In this case we cannot conclude as a matter of law that respondent ceased to be the owner of the corpus after the trust was created. . . . So far as his dominion and control were concerned, it seems clear that the trust did not effect any substantial change. In substance his control over the

⁸ *Jones v. Somerville*, 78 Miss. 269, 28 So. 940, 84 Am. St. Rep. 627 (1900); *Gentry v. Bailey*, 6 Gratt. (Va.) 594 (1850).

⁹ *West v. Miller*, 78 F. (2d) 479 (1935).

¹⁰ *Burton v. Burton*, 100 Colo. 567, 69 P. (2d) 307 (1937); *Trader v. Trader*, 48 Ida. 722, 285 P. 678 (1930); *Kratli v. Booth*, 99 Ind. App. 178, 191 N. E. 180 (1934); *Martin v. Martin*, 282 Ky. 411, 138 S. W. (2d) 509 (1940); *Merz v. Tower Grove Bank & T. Co.*, 344 Mo. 1150, 130 S. W. (2d) 611 (1939); *In re Side's Estate*, 119 Neb. 314, 228 N. W. 619 (1930); *Newman v. Dore*, 275 N. Y. 371, 9 N. E. (2d) 966 (1937). See also 26 Am. Jur., Husband and Wife, § 198; 41 C. J. S., Husband and Wife, p. 417.

¹¹ 322 Ill. App. 168, 54 N. E. (2d) 75 (1944), noted in 23 CHICAGO-KENT LAW REVIEW 87.

¹² *Brown v. Fidelity Trust Co.*, 126 Md. 175, 94 A. 523 (1915); *Rose v. Union Guardian Trust Co.*, 300 Mich. 73, 1 N. W. (2d) 458 (1942); *Beirne v. Continental Equitable Title & Trust Co.*, 307 Pa. 570, 161 A. 721 (1932).

¹³ 309 U. S. 331, 60 S. Ct. 554, 84 L. Ed. 788 (1939).

corpus was in all essential respects the same after the trust was created as before. The wide powers which he retained included for all practical purposes most of the control which he as an individual would have."¹⁴ Its views, however, did not purport to establish that the trust was invalid for other purposes under state law,¹⁵ and it has often happened that wide divergencies exist between taxation principles and those which control in other legal problems based on the same facts. While the Ohio court in the instant case made no reference to the Clifford decision, one is led to wonder if the court might not have been unconsciously influenced thereby as the reasoning parallels that underlying the income tax decision. If so, and if the views there promulgated should spread to other jurisdictions, income tax law may change state law instead of vice versa.

It might well be that in the instant case the Ohio court has achieved a commendable result from the standpoint of public policy in that it protects the surviving wife from becoming a possible charge upon the state; but the rationale of the court permits the conclusion that the court does not have a complete grasp of the fundamental legal principles involved in a trust. Other courts, when setting trusts aside, have declared them to be invalid. The Ohio court held the subject trust to be valid, thereby indicating that title had passed and yet, at the same time, held that the trust res should be administered as part of the settlor's estate, thereby indicating that title had not passed. To say the least, the decision introduces novel features into the law of trusts.

E. B. STROH

¹⁴ 309 U. S. 331 at 335, 60 S. Ct. 554, 84 L. Ed. 788 at 791.

¹⁵ In that regard, see Barlett, "The Impact of State Law on Federal Income Taxation," 25 CHICAGO-KENT LAW REVIEW 103 (1947), particularly p. 115.

BOOK REVIEWS

PRINCIPLES OF THE LAW OF CONTRACTS. Grover C. Grismore. Indianapolis, Indiana: The Bobbs-Merrill Company, 1947. Pp. lxiii, 538.

When a new law book is published, the question at once arises as to who is to be the reader-target: for whom, and why? Professor Grismore states, in the preface to this book, that his purpose was to present the fundamental principles of the law of Contracts as clearly and concisely as possible, and yet with sufficient illustration and explanation to enable the novice not only to comprehend their scope and application, but also to acquire some understanding of the basic assumptions which underlie them.

Now, if the "novice" referred to is the beginning law student in a good law school, much as I might recommend to him the perusal of books like *Selected Readings on the Law of Contracts* or monographs of similar stature on particular topics, I would not suggest the use of other texts. To encourage a beginning law student to resort to text materials when he should be reading and analyzing cases, thereby training and disciplining his mind, would be as destructive as recommending a small saddle horse for a pleasant ride through Virgil's *Aeneid*. If, on the contrary, the text is a clear and concise handbook or spring board for the beginning practitioner, who might also be termed a "novice," then there is justification for the use of small but comprehensive and relatively inexpensive texts. As would be the case of an index or digest, he may thereby be led to cases where the facts and the law applied might be analogous to the problems pressing upon his mind so that, through them, he might find the answers.

The question then becomes one as to whether there are not sufficient directories or encyclopedias of the law of Contracts already in print. Here it may be truthfully said that contract concepts have been broadened and extended, if in fact new species have not actually been created, so that a volume just recently written will more likely include current material, both from cases and from legal periodicals, than is available in older publications. Therein lies the merit of Professor Grismore's modest volume. His propositions and comments are concise and carefully worded. There are abundant citations to cases, to legal periodicals, and to more outstanding publications in the field. The utility of the book might have been enhanced by a table of articles from legal periodicals indexed alphabetically by subjects. But aside from this, it is an acceptable book although one of limited application.

D. CAMPBELL

A DISQUISITION ON GOVERNMENT. John C. Calhoun. New York: D. Appleton & Company, 1854. Reprinted, with an introduction by Naphtaly Levy, by Poli. Sci. Classics, New York, 1947. Paper, pp. xii, 107.

The historic events which ultimately led to the rejection of "state's rights" and "strict construction" in favor of a "nationalist" point of view have long since operated to place the political ideas of prominent Southern statesmen of that earlier period under a cloud of disapprobation. Military defeat of those who upheld such ideas has, too often, been treated as evidence that the principles they espoused were all necessarily false, hence should be discarded. But no product of the thoughtful mind is ever utterly wrong. Ideas that are inappropriate or invalid when offered in one era or for one purpose may find stronger support when reawakened at a different time or to further other ends.

Here, then, lies the significance of this modern reprinting of Calhoun's *Disquisition on Government*, a work which has been called one of the two first-rate contributions made by the United States to the literature of political theory. Its message is as fresh as if it were written yesterday; its thoughtful analysis of the problem of protecting the governed from those who rule is as pertinent now as when first written; its proposed solution as applicable to a system of united nations as it once was to a collection of united states. Stripped of its inaccuracies bred by an acceptance of slavery as a desirable state for those he regarded as unfit for liberty, Calhoun's argument that liberty and equality are not absolute co-requisites in civilized society, although they may be balanced by the adequate weighting of each against the other, still points to a way by which nations, just as individuals, may live together with due allowance to the rights of each, i.e. in true freedom.

The wider dissemination of works like this one, of special importance to lawyers who serve to shape not only the thinking but also the institutions of their fellow men, is particularly desirable especially as they may be rare from age or long neglect. They should not be kept moldering in the dust of the library shelf but ought to be brought forth periodically to invigorate the minds and liven the arguments of all thinking persons.

W. F. ZACHARIAS

AVIATION ACCIDENT LAW. Charles S. Rhyne. Washington, D. C.: Columbia Law Book Company, 1947. Pp. x, 315.

Man's efforts to accelerate his natural pace have long been marked by tragic accidents. The tremendous growth in the field of aviation has had its shocking consequences too. Judges and attorneys have been obliged, and will be called upon in the future, to deal with various aspects of aviation accident cases. This book is designed to serve as a guide to those who seek a quick, yet thorough, understanding of the problems thereby precipitated and the solutions attained thus far through statutory provisions and court decisions. It not only deals extensively with tort liability but also covers such divers matters as workmen's compensation and related insurance problems. Its value is enhanced by complete tables of law review and other articles and of all American cases in the field. It provides not only an extensive case-by-case analysis of these decisions but supplements the same with references to statutes and international conventions.

The author is no newcomer to the subject. Besides being Chairman of the American Bar Association's Committee on Aeronautical Law, and a member of the Board of Directors of the National Aeronautic Association, he is the author of two earlier books on aviation entitled *Civil Aeronautics Act Annotated* and *Airports and the Courts*. He is, therefore, eminently qualified by knowledge and experience to write authoritatively. His book should prove to be an invaluable tool, both to practitioners and others, for it is an important contribution to a growing collection of publications in the realm of accident law.

One remarkable fact developed by this book is the complete lack of uniformity evidenced by the courts when dealing with various types of aircraft accidents. The Uniform State Law for Aeronautics of 1922 contains no provision on the liability of aircraft operators to passengers and has been adopted, with modifications, in only a minority of states. The author rightly deplors this sad failure and points to the weakness in any plan depending upon state action. It is hard to understand, therefore, how Senator McCarran, who wrote a foreword, could reach the conclusion that state legislation seems to be more appropriate on the subject than would be federal treatment. There could be relatively fewer branches of the law where uniform, hence federal, legislation is more nearly required by the very nature of the subject matter. Airplanes move speedily through space without regard to state lines and are used almost exclusively in interstate commerce. Obviously, divergent state laws are utterly out of place.

F. HERZOG