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Wills - Revocation and Revival - No Revival of Prior Will by Revocation of Subsequent Revoking Will - Bailey v. Kennedy

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COMMENT

WILLS — REVOCATION AND REVIVAL — NO REVIVAL OF PRIOR WILL BY REVOCATION OF SUBSEQUENT REVOKING WILL — *Bailey v. Kennedy*, 162 Colo. 135, 425 P.2d 304 (1967).

INTRODUCTION

THE distinctive attribute of a will which renders it unique from other legal instruments which affect property is its ambulatory quality. As a dispositive document, a will is not and cannot become operative until the demise of its maker. Derivative from this notion is the additional characteristic of revocability.¹ To be a will, it is imperative that the instrument be revocable.²

Revocation, as applied to wills, is "the recalling, annulling, voiding, or invalidating of a testamentary instrument which, but for such revocation, would have been given effect as a last will and testament."³ Permissible modes of revocation are prescribed by statute in every state except Tennessee.⁴ Typically, a will can be revoked: (1) nonintentionally, by operation of law when an event occurs (such as marriage of the testator) to which the law attaches the automatic effect of revocation or (2) intentionally, when the testator performs an act to the document (such as burning or tearing it) or when the testator executes a succeeding document (a new will, codicil, or other writing).⁵ A subsequent written instrument can revoke an earlier one in two ways: expressly, by inclusion of a revocatory clause, or impliedly, by virtue of inconsistent provisions.⁶

Closely allied to the revocatory feature of wills is what might be termed its negative correlative, the phenomenon of revival. As wills may be executed and revoked, so too may

¹ "The essential element of revocability follows from the idea that the will is not meant to create any rights in others or to pass any interest in the property covered by the will prior to the maker's death." 1 BOWE-PARKER, PAGE ON WILLS § 1.2 (1960). "This revocable quality of the will is what is usually meant when it is said that the will is ambulatory." *Id.* § 5.17.

² The power of a testator to revoke is of equal stature and importance as the power to make a will in the first place, and one of the inherent characteristics of a will is its revocability At modern law, . . . if it can be shown that the instrument in question is irrevocable, it is not a will whatever else it may be.

² *Id.* § 21.1.

³ *Id.*

⁴ 1 P-H WILLS, ESTATES AND TRUSTS SERV. ¶ 1007 (1969).

⁵ McKinlay, *Revocation of Wills*, 29 ROCKY MT. L. REV. 492 (1957).

⁶ 2 BOWE-PARKER, *supra* note 1, § 21.33.

revoked wills be restored or revived, reassuming their temporarily interrupted legal efficacy. Revival is regulated by statute in only 31 states.⁷ Among them and also among the states which have dealt with the issue solely by case law, many different approaches to the revival question abound. The conflict of authority associated with revival is nowhere more apparent than with respect to the question of whether the destruction of a later revoking will can bring about the revival of a once-revoked but still undestroyed earlier will.

Through an analysis of Colorado's leading case in this area, *Bailey v. Kennedy*,⁸ this comment will examine this jurisdiction's position on revival by revocation of a revoking instrument and also explore the intimately related issue of revocation by subsequent will.⁹ The following questions, as they pertain to Colorado, will be considered. If a testator executes a first will, later a second, and then destroys the second, when he dies is he testate according to the earlier will or intestate? Must the second will contain an express clause revoking all prior wills in order to effect a revocation under the statute?

I. *Bailey v. Kennedy*

Morrison Bailey died testate, naming his wife beneficiary of a testamentary trust and giving her a power of appointment over the trust qualified by a provision that if she were to die intestate, then the trust property was to be distributed to his heirs. Mrs. Bailey executed a will and codicil. She later executed a second will which contained a clause expressly revoking all prior wills. Subsequently, she revoked the later will by tearing and destroying it. At her death, proponents offered the first will and codicil for probate. Contestants (Morrison Bailey's heirs) produced a copy of the second will, proving its execution though not disputing the fact that it had been revoked by destruction. The trial court found that the later will had been revoked with the intention of reviving the earlier will and codicil and admitted these instruments to probate. The Colorado Supreme Court reversed, holding that the first will was revoked at the time the second was executed and that, once revoked, a will can be revived only by republication. The court remanded the case and ordered that the trust assets

⁷ 1 P-H, *supra* note 4, ¶ 1008.

⁸ 162 Colo. 135, 425 P.2d 304 (1967).

⁹ The Colorado statute provides for revocation "by some other will or codicil in writing, or other writing declaring such revocation, executed, declared and attested as provided in section 153-5-2 [the statute defining the requisites of a will]" COLO. REV. STAT. ANN. § 153-5-3 (1963).

be distributed in keeping with Morrison Bailey's will and the remainder in accordance with the laws of intestacy.

II. REVIVAL IN PERSPECTIVE

Revival has proved itself a most perplexing problem for the courts and legislatures of the last two centuries. Antecedent to and still coexistent with the *Bailey* holding is a motley assortment of precedent and statutes on the subject. To appreciate the *Bailey* position, therefore, one must view it against the backdrop of the rather protean past of the revival question.

England furnished the United States a rich legacy on the issue by formulating no less than three distinct positions with respect to whether the revocation of a subsequent will revives an earlier one.¹⁰ At common law, revocation of a revoking will revives the latest undestroyed will automatically as a matter of law.¹¹ Resting upon the rule that a will is ambulatory, this theory asserts that a will which has been revoked prior to the testator's death can wield no power as a revoking instrument. The revocation of the second will constitutes a revocation of a revocation, leaving the earlier document unaffected.¹² A second case law rule, the ecclesiastical, considers revival a strictly factual question of the testator's intent at the time the second instrument was revoked.¹³ The revocation takes immediate effect upon execution of the later will. Revival of the first instrument—at the later will's subsequent revocation—depends upon the available evidence regarding the testator's intentions concerning the earlier will with no presumption for or against revival. A third position was promulgated by Parlia-

¹⁰ For interesting detailed accounts of the historical evolution of these various positions, see 2 BOWE-PARKER, *supra* note 1, §§ 21.49 through 21.56; Evans, *Testamentary Revocation by Subsequent Instrument*, 22 KY. L.J. 469 (1934); Roberts, *The Revival of a Prior by the Revocation of a Later Will*, 48 AM. LAW REG. 505 (1900); Zacharias & Maschinot, *Revocation and Revival of Wills*, 25 CH.-KENT L. REV. 185 (1947).

¹¹ Harwood v. Goodright, 1 Cowp. 87, 98 Eng. Rep. 981 (1774); Goodright v. Glazier, 4 Burr. 2512, 98 Eng. Rep. 317 (1770).

¹² A will has no operation, till the death of the testator. This second will never operated: it was only intentional. The testator changed his intention; and cancelled it. If by making the second, the testator intended to revoke the former, yet that revocation was itself revocable: and he has revoked it. Goodright v. Glazier, 4 Burr. 2512, 2514, 98 Eng. Rep. 317, 319 (1770). As several commentators have pointed out, the use of the term "revival" in this context is technically incorrect. The revocation of the later will actually prevents the revocation of the former, and that which has never been revoked is hardly a candidate for "revival." See, e.g., Roberts, *supra* note 10, at 517. One writer suggests that the word "restoration" would be more appropriate to the common law theory of revival. Evans, *Testamentary Revival*, 16 KY. L.J. 47 n.1 (1927). Another contends that "It would be more logical for these courts to refer to the prior will as *suspended* by the subsequent will and *reinstated* by cancellation of that [second] will." 46 COLUM. L. REV. 496, 497 n.6 (1946).

¹³ Usticke v. Bawden, 2 Add. 116, 162 Eng. Rep. 238 (1824).

ment via the Statute of Wills of 1837.¹⁴ This "anti-revival" rule abrogated both the common law and the ecclesiastical rules and directed that, once revoked, a will could be revived only by re-execution or republication in compliance with the statute on the execution of wills. Although silent as to when a revocation by subsequent will took effect in time, the statute was soon interpreted to mean that the revocation occurred at the time of execution of the later instrument.¹⁵ Under this "anti-revival" view, therefore, a will revoked by the execution of a later will can regain legal vitality only through re-execution or republication even when the second instrument itself meets rejection at the hands of the testator.

American jurisdictions, as a group, have historically favored no single English position on the revival question. Individual states have selected a preference from among the three rules, often adding variations.¹⁶ In fact, no fewer than five views of the issue have been exhibited in this country:

- (1) the earlier will is revived ipso facto (common law rule);
- (2) the earlier will is revived unless an intention to the contrary appears (common law rule modified by the ecclesiastical rule);
- (3) the earlier will is not revived unless reexecuted or republished (English view after adoption of the Statute of Victoria [the Statute of Wills of 1837]);
- (4) the earlier will is not revived unless intent to revive appears (post-Statute of Victoria view modified by the ecclesiastical rule);
- (5) revival is solely a question of intent (ecclesiastical rule).¹⁷

One writer suggests, however, that these five positions are now only of historical interest because, by case law and statute,

¹⁴ 7 Will. 4 & 1 Vict., c. 26, § 22 (1837).

¹⁵ *Major v. Williams*, 3 Curt. 432, 163 Eng. Rep. 781 (1843) (by implication). Prior to this case, it was arguable that the Statute of Victoria did not interfere with the common law rule because it pertained only to "revoked wills," and according to the common law view, the first will is never revoked following revocation of a subsequent will prior to the testator's death. Unrevoked wills merely continue in existence and need not be republished. However, in holding that the revocation took immediate effect upon execution of a subsequent will, the English courts effectively rejected that argument.

¹⁶ [T]he question of revival of an earlier will by the destruction or other revocation of a later will is involved in much contradiction and conflict. The courts of different jurisdictions seem to have taken every conceivable view of the matter
Roberts, *supra* note 10, at 506. Almost 50 years later, the situation had evolved no discernible improvement:

This survey of judicial decisions dealing with revocation and revival of wills, even when taken state by state, discloses an almost kaleidoscopic pattern of confusing factual situations and legal determinations from which one could draw a parallel case to fit almost every set of circumstances which human ingenuity or carelessness could produce or to bolster up an argument on either side of some particular problem.

Zacharias & Maschinot, *Revocation and Revival of Wills*, 26 CHI.-KENT L. REV. 107, 146 (1948).

¹⁷ 63 W. VA. L. REV. 86, 88 (1960) (citation omitted). See generally Annot., 28 A.L.R. 911 (1924); Annot., 162 A.L.R. 1072 (1946).

the jurisdictions adhering to the ecclesiastical rule or one of its variants (rules 2, 4, and 5) have settled upon a functionally similar view, denominated the "American Rule," which holds that a prior will is not revived unless it is clear that the testator intended revival.¹⁸ Given this consolidation, we find that in the United States today, 29 states follow the hybrid "American Rule";¹⁹ six have remained faithful to the English common law rule;²⁰ and 12 have adopted an "anti-revival" rule modelled after the English Statute of Wills.²¹ Prior to the *Bailey* case, Colorado was among the three states which espoused no view with respect to revival.²²

The English experience and the disparity of opinion relative to the revival question still evident among American jurisdictions reflect the thorny nature of the issue. In seeking a solution to the problem of how to treat a former will when a later one is destroyed, the courts and legislatures are faced with a dilemma. Two conflicting goals, both of which are fundamentally intrinsic to the law of wills, must be reconciled. The testator's evinced intent must be honored with the utmost fidelity, while at the same time, statutory safeguards associated with the execution and revocation of wills must be deferred to in the spirit of the Statute of Frauds²³ as expressed in American statutes. In other words, the strict exclusionary rules regulating the admissibility of parol evidence in determining a testator's intent must be heeded while simultaneously attempting to maximize opportunity to arrive at a true finding of that intent as manifested by him. How the various positions on revival deal with this tension will be considered following an examination of the court's reasoning in the instant case.

III. THE *Bailey* RATIONALE

Bailey was a case of first impression in Colorado. Having no revival statute upon which to base its decision, the Colorado Supreme Court was faced with the competing positions extant on the issue. In reaching its decision, the court alluded to the

¹⁸ Comment, *Revival of Revoked Wills*, 19 Wyo. L.J. 223, 228 (1965).

¹⁹ "American Rule:" 19 states by statute (Ala., Alas., Cal., Idaho, Ind., Kan., Mo., Mont., Nev., N.M., N.Y., N.D., Ohio, Okla., Ore., Pa., S.D., Utah & Wash.) and 10 states by case law (Iowa, Md., Mass., Minn., Neb., N.H., N.J., Tenn., Vt. & Wyo.). *Id.* at 229 nn.32-36.

²⁰ Common law rule: two states by statute (La. & Mich.) and four states by case law (Conn., Del., R.I. & S.C.). *Id.* at 229-30 nn.37-39.

²¹ "Anti-revival" rule: 10 states by statute (Ark., Fla., Ga., Hawaii, Ill., Ky., N.C., Tex., Va. & W. Va.) and two states by case law (Miss. & Wis.). *Id.* at 230 nn.40-43.

²² Arizona and Maine, in addition to Colorado, have no position on revival. *Id.* at 230.

²³ 29 Car. 2, c. 3, § 22 (1677).

"notable division of authority"²⁴ on the question of revival by revocation of revoking will but apparently felt that delineation of the relative merits of the several views was unwarranted. The court proceeded directly to its own choice, giving the impression that it believed that the statute on revocation compelled only one result.²⁵

The Colorado statute on revocation of wills provides for several modes to revoke a will:

A will shall be revoked by, and only by, the subsequent marriage of the testator, or by burning, tearing or obliterating the will by the testator himself, or in his presence and by his direction and consent, or by some other will or codicil in writing, or other writing, declaring such revocation, executed, declared and attested as provided in section 153-5-2 [the statute defining the requisites of a will]²⁶

By the plain words of the statute ("by, and only by") and by case law,²⁷ these are the mandatory and exclusive methods by which to effect a revocation. Relying on local precedent,²⁸ the *Bailey* court declared that all methods of revocation listed in the statute are of equal effectiveness when accomplished coincidental with the necessary intent to revoke. All methods being equal, any of the statutory modes of revocation must therefore become operant at precisely the same point in time. Obviously, when a will is revoked by an act to the document itself (burning, tearing, or obliterating), such revocation has immediate physical and legal effect: in whole or in part, the instrument is literally destroyed. To hold that revocation by subsequent will does not take effect until the instrument is admitted to probate, the court reasoned, would yield inequality among the modes by giving "undue prominence and unwarranted preference" to revocation by act to the document and thus favor the abusive revocatory forms over revocation by subsequent instrument.²⁹ Furthermore, since there is nothing on the face of the statute to indicate that the modes are to vary with respect to the time of their operative effect, the court concluded that the legislature intended each method of revocation

²⁴ *Bailey v. Kennedy*, 162 Colo. 135, 137, 425 P.2d 304, 305 (1967).

²⁵ Other courts in jurisdictions with a revocation statute like Colorado's have reached contrary results. See, e.g., *Timberlake v. State-Planters Bank of Commerce & Trusts*, 201 Va. 950, 115 S.E.2d 39 (1961), noted in 10 KAN. L. REV. 106 (1961); 18 WASH. & LEE L. REV. 166 (1961); 63 W. VA. L. REV. 86 (1960).

²⁶ COLO. REV. STAT. ANN. § 153-5-3 (1963).

²⁷ *Isenbart v. Johnson*, 124 Colo. 436, 238 P.2d 879 (1951).

²⁸ *Twilley v. Durkee*, 72 Colo. 444, 211 P. 668 (1923); *Frecman v. Hart*, 61 Colo. 455, 158 P. 305 (1916).

²⁹ 162 Colo. at 139, 425 P.2d at 306.

to be the equal of the others.³⁰ Revocation by any statutory method has present effect at the exact moment it is employed.

By its result, the court held that the execution of a subsequent will containing a revocatory clause constitutes a statutory mode of revocation. This holding was clearly within the meaning of the plain words of the statute. A will can be revoked by "some other will," and even if that will must "declare" such revocation (discussed *infra*), certainly a will having a clause revoking all previous wills can be said to "declare" a revocation. Since all modes of revocation are equivalent and therefore accomplish a revocation at the same instant, the execution of a second will with a revocatory clause, as a recognized mode of revocation, is tantamount to physical destruction of the earlier document.

The trial court had embraced the "American Rule" of revival in holding that Mrs. Bailey died testate by her earlier will and codicil because she had revoked the later will with the intention of reviving the first. The supreme court rejected this view and adopted the "anti-revival" rule, holding that once revoked, a will can be revived only by republication of the document in compliance with the statute which prescribes the requisites of a will. In reversing the lower court, the supreme court called attention to the danger which inheres in the "American Rule," and clearly intimated in dictum that a doctrine which allows a once-revoked will to regain legal sanction through parol evidence hazards the twin perils of fraud and perjury for the reason that, as here, oral evidence as to intent will frequently be provided by claimants who stand to gain or lose by the result.³¹ If a Colorado testator intends an earlier instrument to be revived upon the destruction of a later one having a revocatory clause, he must manifest that intent with nothing less than the statutory formalities required to create it in the first instance. Tolerating less stringent standards regarding manifestation of testamentary intent, the court seems to say, compromises the statutory safeguards developed to protect the testation process and invites their breach. In Colorado, only through republication can a revoked will be revived.

IV. REVIVAL IN COLORADO

The position on revival settled upon by the *Bailey* court derives from abundant authority, conforming with the doctrines of England and 12 other states in this country.³² Inasmuch as

³⁰ *Id.* at 138-39, 425 P.2d at 306.

³¹ *Id.* at 140, 425 P.2d at 306-07.

³² List of states note 21 *supra*.

two other views of the matter also have currency in the United States, a juxtaposition of *Bailey* with them affords a means to evaluate the implications of the Colorado decision. The degree to which each view maintains the competing objectives of faithfulness to the testator's intent and avoidance of the parol evidence dangers in the probate process is a proper benchmark by which to gauge their relative merits.³³

The common law rule, accepted in a distinct minority of states, has elicited much criticism. A classic and cogent repudiation of that rule was expressed in an early Georgia decision concerned with revival by revocation of a later inconsistent will:

The case is this: He had a scheme, and abandoned it for another, and thus [then?] abandoned the second. . . . [C]an you . . . say that when he abandons the last he returned to the first? If these two schemes comprehended *all the possible dispositions* of his property, then the conclusion would be a logical one But when the number of possible schemes in every case is legion, you cannot say that because he has departed from any one you know his mind has settled upon any other particular one out of that infinite number. The whole fallacy lies in assuming that the two papers *exhaust* the subject. It seems to me that the abandonment of any one scheme does not of itself afford the least *indication* in favor of any other particular one out of an infinite number.³⁴

As this case implies, the common law rule ignores the possibility that the testator intended to die intestate when he revoked the later instrument. With this in mind, one authority submits that the "anti-revival" rule conforms more closely to the effect most testators would expect a later revoking will to have on an earlier one: that a prior will is revoked finally and forever at the time a second is executed.³⁵ The prevention of automatic revival protects against probate of a previous will which had at one time been rejected by the testator but retained inadvertently or for records-keeping purposes with the belief that it was devoid of present or potential legal efficacy.

Another criticism of the common law rule is that it fails to distinguish between the dispositive and revocatory functions

³³ Professor Page has stated that a truly ideal rule in this area is unachievable: "No rule can be worked out which will avoid the dangers of oral evidence on the one hand and which will give effect to the actual intention of the testator in the particular case, on the other." 2 BOWE-PARKER, *supra* note 1, § 21.54. It follows that some compromise between the two objectives is inevitable. No rule is completely free from criticism; therefore, whichever a court chooses as the "best" rule is so in only a relative, not ideal, sense.

³⁴ Harwell v. Lively, 30 Ga. 315, 320-21, 76 Am. Dec. 649, 651 (1860) (emphasis added by the Georgia Supreme Court).

³⁵ 2 BOWE-PARKER, *supra* note 1, § 21.54.

of a will. Although it is undisputed that the dispositive provisions of a will must be considered ambulatory, this argument contends that revocatory provisions must be given immediate effect at the time a subsequent will is executed in that a revocatory clause is not essential to testamentary validity and should be considered a separate instrument of immediate effect.³⁶ The same reasoning has also been applied to inconsistency in the subsequent will on the ground that there is no difference in principle between revocation by express clause and by implication.³⁷

Although the ecclesiastical rule and its modern variant, the "American Rule," attempt to avoid distortion of the testator's intent risked by automatically probating a will about which only one thing is known for certain—that it was in some degree expressly or impliedly rejected by the testator—it indulges a greater hazard: the danger of abuse of the entire probate process by allowing oral testimony from interested parties.³⁸ This approach is contrary to the spirit of the Statute of Frauds in permitting a will once revoked to be restored to legal consequence on the basis of parol evidence alone.³⁹

The *Bailey* view on revival avoids the dangers of parol in determining the validity of a prior will and, in the opinion of this writer, runs a minimal risk of abusing the testator's intent.⁴⁰ When a testator executes a subsequent will it is reasonably safe to assume that in some respect the second instrument revokes the first. For what other reason would a person execute a second testamentary document if not to change one

³⁶ Note, *Destruction of a Subsequent Will as Effecting the Revival of a Prior Will*, 5 TEMPLE L.Q. 614, 622 (1931); 12 COLUM. L. REV. 353, 355 (1912).

³⁷ 46 COLUM. L. REV. 496, 498 n.9 (1946). See generally Note, *Revival by Revocation of a Later Instrument—Effect of a Revocatory Clause*, 28 KY. L.J. 227 (1940).

³⁸ The courts which have adopted the ecclesiastical law rule . . . attempt to do justice by giving effect to the actual intention of the testator; but they do it by throwing open the gates for oral evidence of testator's declarations, upon which the validity of the first will is to depend.

2 BOWE-PARKER, *supra* note 1, § 21.54. With respect to American statutes which direct that there is no revival unless it appears by the terms of the revocation, one authority states that the "prevailing" interpretation of such statutes is that the phrase, "unless it appears by the terms of the revocation," applies only to instances of written revocation and that oral assertions as to intent are not sufficient to revive under a statute of this type. To the extent that this is true, then no objection can be made that this position violates the Statute of Frauds. Ferrier, *Revival of a Revoked Will*, 28 CAL. L. REV. 265, 266 n.7 (1940).

³⁹ See the report of the committee on revision of New York statutes (dated 1827-28) as quoted in Ferrier, *supra* note 38, at 267; 12 COLUM. L. REV. 353, 355 (1912).

⁴⁰ But see Ferrier, *supra* note 38, at 272-75.

already in existence?⁴¹ Inconsistency or a revocatory clause in the second will manifests a disclaimer of the first. In tearing up the second, the rejection itself is rejected, but the conclusion that by such act the testator automatically intends testacy by revival of the first is only one of many possible intentions. Further, if the testator desires that the first will be reinstated, he can do so through republication and thus express his desires unequivocally and preclude the necessity of establishing his intent through parol evidence.

Intestacy, established by statute and representing the legislature's accumulated judgment on how the average deceased person would probably have wished his assets distributed had he made a will, requires no safeguards.⁴² Since the first English Statute of Wills,⁴³ the testation process has been closely regulated and guarded through comprehensive statutory controls.⁴⁴ Despite the possibility for denial of a testator's wishes inherent in the "anti-revival" rule, is it not better to risk distribution of a testator's property according to the laws of intestacy rather than to risk an even greater abuse of the estate by allowing oral evidence to determine distribution when a testator destroys a second will, leaving a once-revoked will in existence?⁴⁵ The *Bailey* view refuses to honor any manifestation of a testator's intent other than those required by statute to create a will in the first place. To make a will, certain formalities must be met. To "re-make" a will, the same should hold true.

V. REVOCATION BY SUBSEQUENT WILL IN COLORADO

Since the second will in the *Bailey* case contained an express clause revoking all prior wills, the court did not reach the question of what result would ensue if the later will had no revocatory clause.⁴⁶ This comment will conclude with a con-

⁴¹ It is possible, though extremely improbable, that the second will duplicates the first because, for example, the testator forgot that he had already executed a will previously or he believed that a change in circumstances (such as the birth of a child or a change of residence) required a new testamentary act. However, such possibilities are so remote that it is more reasonable to assume that the second instrument did alter the first in some respect. This assumption relates only to the desirability of the "anti-revival" rule as compared to the other two rules, and it is not suggested that it be accorded the status of a legal presumption.

⁴² "[T]he law views intestacy as normal and requires no safeguards, whereas experience has shown the necessity of safeguards around testamentary acts." 32 YALE L.J. 396, 398 (1923).

⁴³ 32 Hen. 8, c. 1 (1540).

⁴⁴ See generally Rees, *American Wills Statutes* (pts. 1-2), 46 VA. L. REV. 613, 856 (1960).

⁴⁵ Ferrier, *supra* note 38, at 267; 32 YALE L.J. 396 (1923).

⁴⁶ One would expect this issue to arise far less frequently than the question of how to treat the effect of the destruction of a second will with a revocatory clause because the great bulk of wills are drawn (at least

sideration of this issue and attempt to answer the question posed in the introduction: does the execution of a second will absent a revocatory cause constitute a statutory revocation?

Some American jurisdictions distinguish between the effects of subsequent wills which have and those which do not have a revocatory clause.⁴⁷ If the second will does contain a clause, then the revocatory effect is deemed immediate and final at the execution of the document. The theory underlying this doctrine is that an express clause of revocation should be regarded independent from the instrument and hence a statutory revocation at once.⁴⁸ On the other hand, if the second will is merely inconsistent, then the revoking effect is considered ambulatory and thus cannot operate unless admitted to probate. This distinction has received a mixed reaction from legal writers,⁴⁹ and the majority of jurisdictions advancing the "anti-revival" theory are said to make no distinction, holding that no revival of an earlier will can be brought about by the destruction of a later revoking will, regardless of the presence or absence of a revocatory clause.⁵⁰

The Colorado statute on revocation of wills provides for revocation "by some other will or codicil in writing, or other writing, *declaring such revocation*, executed, declared and attested as provided" by the statute on the execution of wills.⁵¹ A literal interpretation of the italicized phrase, "declaring such revocation," would dictate the use of an express revocatory clause. Does the phrase apply only to "other writing," and not to "some other will," thus allowing revocation by the mere execution of a second will without a revocation clause? Or does the qualification apply to all three listed instruments alike and thus seem to require that a second will must have an express clause of revocation in order to have revocatory effect? For at least two reasons, the phrase must be said to apply to all three. First, the phrase is set off by commas as a participial phrase in apposition, and as such, it modifies all three nouns preceding it. A second and more significant indicator may be

those drafted by lawyers) according to a fairly routinized pattern and include a revocatory clause in the preamble as a matter of course. 7 BOWE-PARKER, *supra* note 1, at 7; 5 TEMPLE L.Q. 614 (1931).

⁴⁷ See, e.g., Cheever v. North, 106 Mich. 390, 64 N.W. 455, 37 L.R.A. 561, 58 Am. St. R. 499 (1895); T. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 92 (2d ed. 1953); 2 BOWE-PARKER, *supra* note 1, § 21.54; 28 KY. L.J. 227 (1940).

⁴⁸ T. ATKINSON, *supra* note 47, § 92; 5 TEMPLE L.Q. 614 (1931).

⁴⁹ See, e.g., Roberts, *supra* note 10, at 520 (approving) and 15 HARV. L. REV. 142 (1901) (disapproving).

⁵⁰ T. ATKINSON, *supra* note 47, § 92.

⁵¹ COLO. REV. STAT. ANN. § 153-5-3 (1963) (emphasis added).

gleaned from legislative history. Prior to 1947, the statute read as follows: a will shall be revoked "by some other will or codicil in writing, declaring the same."⁵² In 1947, the state legislature amended the statute to include revocation by an "other writing," adding it followed by a comma.⁵³ In view of the fact that "declaring the same" (the precursor to the more explicit present phrase, "declaring such revocation") applied to "will" and "codicil" originally in the statute, it is reasonable to conclude that it still so applies today.

In light of the fact that the subsequent instrument, whether it be a will, a codicil, or an other writing, must "declare" a revocation in order to meet the requirement of the statute, a literal reading of the statute would seem to indicate that a subsequent will must have a revocatory clause to accomplish the nullification of a previous will. Whether a clause is actually necessary will depend upon the meaning the courts are willing to impute to the phrase "declaring such revocation."

The Colorado Court of Appeals, in *In re McKeown*,⁵⁴ recently construed this section of the statute, and the opinion suggests that Colorado courts will not favor a strict literal reading of it (that the phrase demands the use of an express clause of revocation). A testatrix executed a codicil modifying the first article of her will. Later, she executed a second codicil inconsistent with the first but which did not contain a revocatory clause, although it did acknowledge the earlier codicil by general reference to it. Both were admitted to probate, and counsel argued that the second codicil could not revoke the first because it was merely inconsistent with the first and did not expressly "declare" a revocation of it as directed by the statute. In rejecting this argument, the court held that to effect a revocation under the statute, the word "revoke" or any form of it is not obligatory. It was enough that the express wording of the second codicil was inconsistent with the earlier one. In effect, the court concluded that inconsistency is a sufficient "declaration" of revocation to fulfill the requisite of the statute.⁵⁵

An additional reason to suggest that Colorado courts may consider the execution of a second inconsistent will absent a

⁵² COLO. REV. STAT. ANN., C. 176, § 40 (1935).

⁵³ Ch. 341, § 1, [1947] Colo. Sess. Laws 935.

⁵⁴ 28 Colo. App. 49, 470 P.2d 611 (1970).

⁵⁵ *McKeown* is not precisely on point since it dealt with two codicils, both of which were in existence at the time of probate. However, in the appeals court's willingness to construe the phrase "declaring such revocation" more broadly than a strict literal reading would allow, the case suggests a direction which might lead to a holding that inconsistency is sufficient to "declare a revocation" within the meaning of the statute.

revocatory clause a revocation under the statute is implicit in the fact that Colorado, as do all American states,⁵⁶ accedes in the doctrine of revocation by implication.⁵⁷ Since the revocation statute is mandatory and sets forth the exclusive methods by which a will can be annulled, one must conclude that either the courts have acquiesced in allowing this doctrine to operate contrary to the dictates of the statute or else the statute is amenable to a construction which permits this type of revocation. In view of the superiority of constitutionally valid legislative fiat over the common law, the latter must be the case.

More compelling support of the idea that the statute can be construed to allow revocation by implication derives from Illinois precedent. This issue was faced squarely by the supreme court of that state on more than one occasion, and in view of the fact that the Colorado statutory enactments on wills were borrowed from that state,⁵⁸ the Illinois decisions are very persuasive on this point.⁵⁹ The Illinois statute on revocation provided for revocation "by some other will, testament or codicil in writing declaring the same"⁶⁰ This provision was interpreted by the court, in two cases,⁶¹ to mean that there could be no revocation by implication in Illinois because to revoke a previous will, a subsequent will must contain an express revocatory clause. In a third decision, *Lasier v. Wright*,⁶² the Illinois Supreme Court declared that it had erred in its interpretation of the statute expressed in the earlier cases and held that the statutory language could and did provide for revocation by implication, reasoning as follows:

When a testator makes a will absolutely inconsistent with all other wills and declares it his last will and testament, such acts of necessity amount to a declaration that all former wills are revoked. The word "declare," as defined by the lexicographers, means primarily to make known; to make manifest; to make clear; to present in such a manner as to exemplify; to disclose;

⁵⁶ 2 BOWE-PARKER, *supra* note 1, § 21.1. See generally Annot., 51 A.L.R. 652 (1927); Annot., 59 A.L.R.2d 11 (1958).

⁵⁷ Estate of Lehmer, 144 Colo. 477, 357 P.2d 89 (1960); *Whitney v. Harrington*, 36 Colo. 407, 85 P. 84 (1906).

⁵⁸ *Keeler v. Trueman*, 15 Colo. 143, 25 P. 311 (1890).

⁵⁹ Colorado is known to have adopted into its realm of statutory law provisions from the Illinois statutes, and consequently when the occasion arises, our court frequently gives prime consideration to Illinois precedent when necessary to interpret such a statutory provision.

Vanderme v. District Ct., 164 Colo. 117, 121, 433 P.2d 335, 337 (1967).

⁶⁰ Ch. 148, § 17, [1871-72] Ill. Laws 775.

⁶¹ *Limbach v. Limbach*, 290 Ill. 94, 124 N.E. 859 (1919); *Stetson v. Stetson*, 200 Ill. 601, 66 N.E. 262 (1903) (dictum).

⁶² 304 Ill. 130, 136 N.E. 545 (1922).

to reveal. The testator in this case, *within the meaning of the statute, has declared a revocation* of his former will by *impliedly* saying in every clause thereof that the will he was then executing was his will and his complete and only will. *It was not necessary to use express words in terms declaring such revocation.* The statute makes no such requirement.⁶³

Revocation by implication realized through inconsistent testamentary provisions is, therefore, a "declaration of revocation" within the meaning of the statute.

Intent is a purely subjective phenomenon of which the law can take cognizance only as it is objectively manifested through overt behavior. Certainly, a revocatory clause is an unambiguous expression of intent to revoke prior instruments. In recognizing revocation by implication, courts also treat inconsistency as a reliable objective manifestation of intent to revoke. Therefore, under the *Bailey* "anti-revival" rule, if it can be shown that a testator executed a later will inconsistent with an earlier one and then destroyed the second leaving the first, the testator will be deemed intestate to the extent the inconsistency can be established. There is, in fact, authority for precisely this result in England.⁶⁴

What might be the result when a will is being offered to probate and it is shown to the court that the testator had executed a subsequent will but no evidence as to the contents of the second instrument is available? In other words, is the mere execution of a second will, without more, a revocation under the statute? Probably not. Absent any evidence as to the contents of a lost or destroyed will, the courts will not presume that the provisions of it were inconsistent with the first.⁶⁵ Therefore, with neither a revocatory clause nor inconsistency shown, the later will cannot be said to have "declared a revocation" as required by the statute. Hence the mere execution of a later will, without more, is not a revocation, leaving prior

⁶³ *Id.* at 136, 136 N.E. at 552 (emphasis added).

⁶⁴ In the Goods of Hodgkinson, [1893] P. 339. Testator made a first will giving all his property to one person and appointing her sole executrix. He then executed a second will, without expressly revoking the first, devising his real property to another person and appointing that person sole executrix. Subsequently, he cancelled the later instrument. The court held that the first will had been partially revoked and granted probate only to such part of the testator's assets as was not comprised in the second will and declared intestacy as to the rest. "If the whole of the first will had been revoked by the second will, it would not have been revived by the cancellation of the second will; and the same principle applies to the revocation of part of the first will." *Id.* at 340.

⁶⁵ *In re Wolfe's Will*, 185 N.C. 563, 117 S.E. 804 (1923) (there is no presumption that a later will is inconsistent with an earlier one).

documents unaffected and still viable.⁶⁶ Thus the testator would be considered testate according to the terms of the latest undestroyed will.⁶⁷

CONCLUSION

The *Bailey* decision stands in lieu of a statutory revival statement in Colorado, obviating the need for one in holding that once a will is revoked by a means provided in the statute on revocation, it cannot be resurrected except through republication. This holding corresponds to the wisdom of the English Parliament in the Statute of Wills of 1837 (which continues to govern in that country today), and it also agrees with the position taken by at least 12 other jurisdictions in the United States. More importantly, it is harmonious with the probable intent of most testators and steadfastly avoids the dangers of parol evidence in the spirit of the Statute of Frauds.

Bailey also adds substance to the revocation statute in declaring that the execution of a later will with a revocatory clause constitutes an immediate and complete revocation of all prior wills. The revocatory effect of a second will lacking a clause still awaits resolution. However, the refusal of the Colorado Court of Appeals to impose a technical and literal meaning upon the words of the revocation statute,⁶⁸ coupled with the notion that the statute may be interpreted to permit revocation by implication (or, more specifically, inconsistency is a "declaration" of revocation), tend to indicate that a will without a revocatory clause might well be considered a statutory revocation of prior wills to the extent that inconsistency between them can be established.

Thomas L. Roberts

⁶⁶ *Eder v. Methodist Ass'n*, 94 Colo. 173, 29 P.2d 631 (1934) (a will not shown to have been revoked in accordance with the statute on revocation must be held to be in existence).

⁶⁷ See Annotations at note 56 *supra* listing American cases holding that the mere execution of a second will does not constitute a revocation.

⁶⁸ *In re McKeown*, 28 Colo. App. 49, 470 P.2d 611 (1970).

