Revival of Wills in the Light of Requisites of Wills Under the Code of Civil Procedure

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A. DISTINCTION BETWEEN "REPUBLICATION" AND "REVIVAL"

Republication is the re-establishment by the testator of a will he had once revoked. The second publication may be made either expressly or by construction. (Jarman on Wills, Sixth Edition, Vol. I, pp. 190-191). Republication is by the testator's own act, such as executing a codicil giving effect to a former will; revival is by operation of law. (Outlines of the Law on Wills, Descent, and Administration by Bocobo and Noble, Third Edition, p. 23). To "republish" means to publish again that which has been before published, so that, as used in 2 Rev. St. c.6 tit. 2, Sec. 53, providing that, if a testator execute a second will, the revocation of that will shall not revive the first, unless he republish it, it means to publish it in the same manner as it was originally published. (*In re Stickney's will*, 52 N. Y. Supp. 929, 931, 31 App. Div. 382). "Revival of a will" is where a second will, which has revoked the former one, is cancelled or destroyed, which operates to revive the first will. (*Boudinot v. Bradford*, 2 Dall. 266, 1 L. Ed. 375). In England, to "revive" a will is used as synonymous with "republish". (1 Williams on Executors 205; Act 1 Vict. c. 26, Sec. 22). In this our present study, we shall refer only to that revival by operation of law.

In our Code of Civil Procedure, there is no provision by which a will may be revived. It is left to the judicial interpretation. We have, therefore, to review the cases applicable touching on the revival of wills, and try to find out, if we can, a reasonable fixed criterion by which our courts may be guided in its judicial interpretation, viewed, of course, in the light of Secs. 618 and 623 of our Code of Civil Procedure, in accordance with which the due execution of wills in the Philippines are at present proved.

B. REVOCATION OF REVOCATORY WILL; ITS EFFECT

In 1837, the English Statute of Wills was passed (St. 7 Wm. IV. & Vict. c.26), section 22 of which provided that "no

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will or codicil, or any part thereof which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same." Some thirteen of the American states have adopted either the statute of Victoria or a similar statute upon this subject. But no such statute was ever passed or adopted in the Philippines. Hence, in the jurisdiction where no like provision is provided for in the statute books, great conflict of decisions are to be discovered. The Supreme Court of Illinois, in the case of *Stetson, et al. v. Stetson, et al.*, 200 Ill. 601, 66 N. E. 262; 61 L. R. A. 258, said: "Perhaps in no branch of the law is there more conflict among the decisions of the courts than in that which relates to the revocation of a former will by a subsequent will, and to the effect of the cancellation of a subsequent revoking will in reference to revival or non-revival thereby of the first will."

Sec. 623 of our Code of Civil Procedure provides: "No will shall be revoked, except by implication of law, otherwise than by some will, codicil, or other writing executed as provided in case of wills; or by burning, tearing, canceling, or obliterating the same with the intention of revoking it, by the testator himself, or by some other person in his presence, and by his express direction.

"If burned, torn, cancelled, or obliterated by some other person, without the express direction of the testator, the will may still be established by the court, and the estate distributed in accordance therewith, if its contents, and due execution, or obliteration is established by full evidence to the satisfaction of the court." (Vt. 2354).

A subsequent will revoking a former will, however, to be effective, must be executed with the formalities required for the making of wills. *Samson v. Naval*, 41 Phil. 838.

It being established, then, that a former will can only be revoked by a subsequent will, declaring the revocation of all former wills, and not by a subsequent instrument in writing not testamentary in character, which declares the revocation of the former will, can it be said that, in this jurisdiction, the destruction of a duly executed will containing an express revocation of a former will has the effect of reviving the former will, in the absence of a statute similar to the Victoria Statute above-quoted?

(a) THE COMMON-LAW RULE

The common-law rule answers the above question in the affirmative. Thus, in one line of decisions, it has invariably

been held that the destruction of the revocatory will revives the first will, if the first will is still in existence. By destroying the last will and carefully preserving the first, the testator, it is maintained, affords satisfactory evidence that he intended until the very last to die testate. "In the absence of an express provision to that effect, we cannot presume that the legislature intended that the mere execution of a will should in all cases revoke a prior will. Such a construction would in many cases defeat the manifest intention of the testator". *Peck's Appeal from Probate,* 50 Conn. 562, 47 Am. Rep. 685.

The general doctrine is that a will is ambulatory, and has no effect until the death of the testator. It follows that a testamentary paper, which the testator permits to survive him, must be his will. A will is inoperative and ineffectual, and has no legal existence, until it is consummated by death. *Taylor v. Taylor,* 2 Nott. & McC (S.C.) 483; *Scofield v. Olcott,* 120 Ill. 362, 11 N. E. 351; *Randal v. Beatty,* 31 N. J. Eq. 643 and cases cited.

In *Marsh v. Marsh,* 48 N. C. 78, 64 Am. Dec. 598, it is well said: "As wills are ambulatory, and have no operation until the death of the testator, it is difficult to see how the execution of a second will, which is afterwards destroyed by the testator, can in any wise affect the validity of the will previously executed. Both are inactive during the life of the testator, and the cancellation of the second, it would seem, must necessarily leave the first to go into operation at the testator's death." See also *Goodright ex dem. v. Glazier* (1770) 4 Burr. 2512 (Eng.); *Hardwood v. Goodright,* 1 Cowp. 91 (Eng.); *Lawson v. Morrison* (1792) 2 Dall. 286; 1 L. Ed. 384, 1 Am. Dec. 288.

In *Stetson et al. v. Stetson, et al.,* supra, the will which is said to have been executed by Jesse Stetson between September 1, 1898, and his death on April 27, 1899, is shown by the testimony of the appellants to have been taken possession of by him as soon as it was executed, and to have been carried away by him from the office of the attorney who is said to have drawn it; nor could it be found among his papers or elsewhere after his death. It is to be presumed, therefore, so holds the Illinois Court, that Jesse Stetson destroyed this will *animo revocandi.* If he destroyed it with the intention of canceling or revoking it, it was cancelled or revoked as an entirety. So long as Jesse Stetson was alive, this second will was merely ambulatory, and had no operation, and could have no operation until his death. While it was thus ambulatory, and before his death, the pre-

sumption is that he destroyed it, and, if he destroyed it, the clause contained in it, which revoked all former wills, was canceled and revoked, as well as the balance of the will. It necessarily results that the former will of December 3, 1897, was revived when the subsequent will, containing the revoking clause, was canceled or destroyed.

Redfield in his work on Wills (1 Redfield on the law of Wills, marg. p. 328) says: "It has been held in some of the American courts that a subsequent will containing a clause of revocation, executed with due solemnity for the purpose of revoking an existing will, operates, *proprio vigore*, and instantaneously, as a revocation, and, consequently, that the destruction of the second will did not revive the former one. This doctrine has an air of plausibility from the fact that an instrument of revocation alone would unquestionably have this effect so long as it was allowed to remain operative. But that would show a present purpose of becoming intestate, carried into effect as far as practicable before death. But the making of a will with a revocatory clause is very different. It is but substituting one will for another. And the revocatory clause is made dependent in some sense upon the subsequent will going into operation. And there is ordinarily no purpose of having the revocatory clause operate, except upon that condition. The whole instrument, is, therefore, ambulatory, and when destroyed it all ceases to have any operation. And the same is true of the destruction of a will merely revocatory of former wills. By such construction, the former will, if in existence, becomes revived." *Peck's Appeal from Probate, supra; Reid v. Borland*, 14 Mass. 208; *Limbery v. Mason*, Comyns Rep. 451 (Eng.); *Hyde v. Hyde*, 3 Rep. in Ch. 155; *Onions v. Tyrer*, 2 Vern. 742 (Eng.).

In the case of *Lively v. Harwell* (1859), 29 Ga. 509, Stephens, J., argues as follows: "It has been a long-mooted question whether the single fact of the revocation of a subsequent will revives a prior revoked one. The argument in favor of the revival is this: The first will would be good but for the last, which revokes it, and this last, being itself afterwards revoked, becomes a nullity—has no effect whatever—and, of course, leaves the prior will unaffected; and it is analogized to the case of a statute revived by the repeal of another, which had repealed the first. Such is the rule of the common law in the case of statutes; but the civil law is different, and so is the good reason of the thing different. Where a principle is sound, it

ought to be carried to all strictly analogous cases, unless stringent authority forbids; but if the principle be unsound, analogy ought not to be allowed to carry it to a single case beyond the imperative demands of authority,—the cases in which it has been already planted by decisions. Then, is it sound logical principle that a statute is revived by killing the statute which had previously killed the first? Is a dead man revived by killing his slayer? Is not the result rather this: Whereas you had at first one dead man now you have two? The argument is fallacious, because the premises are incorrect. The fallacy consists in assuming that the first will was revoked by the second".

The common-law rule, therefore, maintains that the revocation of a revocatory will revives the first will, because the revocatory will as well as the revoked one are both ambulatory in character during the life of the testator, and inasmuch as the second will revoking the first will is subsequently cancelled, such revocation naturally leaves the first will in effect, if in existence, the law presuming that the testator by the mere execution of the first will desires to die testate.

(b) THE CONTRARY VIEW TO THAT OF THE COMMON-LAW RULE

On the other hand, an equally strong line of judicial decisions can be found which holds the contrary opinion, that the revocation of the revocatory will does not, from the mere fact of revocation, revive the prior will. In Wisconsin, where a similar provision as provided for by Sec. 623 of our Code of Civil Procedure is found (Sec. 2290, Rev. St. 1898), the Supreme Court of that state in the case of *In re Noon's Will* (115 Wis. 299, 91 N. W. 670, 95 Am. St. Rep. 944), said: "Where a second will is drawn and executed with the formality required by the statute, and containing an unlimited revocatory clause, all former wills are wiped out, and held for naught. The operation of the revocatory clause is immediate and absolute. It is an act done solemnly and deliberately for present effect, and not one contemplating that future circumstances are to determine whether it shall have force".

It (the revocation) operates at once, and does not apply as a mere contingent caveat against the objects at which it was aimed. *Scott v. Fink,* 45 Mich. 241, 7 N. E. 799. The addition of the revocatory words in a mode of immediate cancellation of the former will, and renders it totally inoperative as a testamentary instrument. See *Cheever v. North,* 106 Mich.

390, 64 N. W. 455, 37 L. R. A. 561, 58 Am. St. Rep. 499; *Dudley v. Gates,* 124 Mich. 440, 83 N. W. 97, 86 N. W. 959; *In re Goods of Hodgkinson* (1893) Prob. Div. 339 (Eng.). By the great weight of authority in the United States, the destruction or revocation of the subsequent will containing the revocatory clause does not have the effect of reviving the former will. Cassoday, Wills, Sec. 386, and authorities cited.

The will must be executed in substantial conformity to the statutory requirements, to be valid. The first will having become legally dead by revocation, there is no way in which it would be revitalized except by some act which the law recognizes as being equivalent to execution under the statute. A codicil or subsequent writing adopting the former will, duly executed, or a re-execution of the old will with the required formalities, would undoubtedly revive it. See *Sinner v. Society,* 92 Wis. 209, 65 N. W. 1037; *Flood v. Kerwin,* 113 Wis. 673, 89 N. W. 845.

The great weight of authority is to the effect that the execution of a subsequent will, containing an express clause revoking the former will, operates as a revocation at once, and that the former will thus revoked cannot be subsequently revived, except by republication, and is not renewed by a destruction of the latter will. *James v. Marvin,* 3 Conn. 576; *Danley v. Jefferson,* 150 Mich. 590, 114 N. E. 470; *Simmons v. Simmons,* 26 Barb. 68 (N. Y.); *Pickens v. Davis,* 134 Mass. 252, 45 Am. Rep. 322; *In re Wear* 131 App. Div. 875, 116 N. Y. Supp. 304; *Scott v. Fink,* 45 Mich. 241, 7 N. E. 799, and cases cited.

A clause in a subsequent will, which in terms revokes a previous will, is not only an expression of the purpose to revoke the previous will, but an actual consummation of it, and the revocation is complete and conclusive, without regard to the testamentary provisions of the will containing it. *Colvin v. Warford,* 20 Md. 357, 391; *Harwell v. Lively,* 30 Ga. Ga. 315, 76 Am. Dec. 649; *Barksdale v. Hopkins,* 23 Ga. 332; *Bohanon v. Walcot, 1 How.* (Miss.) 336, 29 Am. Dec. 631; *Scott v. Fink, supra.*

In *Pickens v. Davis,* supra, the Supreme Court of Massachussetts, said: "It is more reasonable and natural to assume that such revocatory clause shows emphatically and conclusively 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 upon the subject. But when the new plan is in its turn

abandoned, and such abandonment is shown by a cancellation of the later will, it by no means follows that his mind reverts to the original scheme." See also *Major v. Williams,* 3 Curt. Ecc. 432 (Eng.); *Dickinson v. Swatman,* 30 L. J. (N. S.) P & M 84 (Eng.) *Rudisill v. Rodes,* 29 Crat. (Va.) 147. See also Schouler on Wills, Secs. 412-418.

The contrary view to that of the common-law rule holds, therefore, that the first will, having been revoked in accordance with law, becomes legally dead. This view seems to be more in accord with our law on wills, taking into account the fact that Sec. 623 of our Code of Civil Procedure is specific with regard to revocation of wills. Once a will has been revoked legally (Sec. 623, C. C. P.), the revoked will is "wiped out" of existence, and Sec. 618 of the same Code provides for the legal method by which a will shall be validly executed. See also *Diaz v. Leon,* 43 Phil. 413, which sustains the above view, stating that the original will having been revoked once *animo revocandi,* can no longer be declared the will and testament of the testator.

(c) THE OLD DOCTRINE OF THE ENGLISH ECCLESIASTICAL COURTS

It is seen that upon no subject relating to the law of wills are the authorities in such hopeless and irreconcilable conflict. The question, being an open one in this jurisdiction, the better rule seems to be, that the destruction of the second will does not have the effect of reviving the first, in the absence of evidence to show that such was the intention of the testator. This is the so-called doctrine of the English Ecclesiastical Court.

This doctrine was stated in 1824 in *Usticke v. Bawden,* 2 Add. Ecc. 116, 125 (Eng.): "The legal presumption is neither adverse to, nor in favor of, the revival of a former uncancelled, upon the cancellation of a later revocatory, will. Having furnished this principle, the law withdraws altogether; and leaves the question, as one of *intention* purely, and open to a decision, either way, solely according to facts and circumstances." See also *Moore v. Moore,* 1 Phillim. 406; *Wilson v. Wilson,* 3 Phillim. 543,554; *Hooton v. Head,* 3 Phillim. 266; *Kirksudbright v. Kirksudbright,* 1 Hagg. Ecc. 325; *Welsh v. Phillips,* 1 Moore P. C. 299 (English cases).

Such intention if proved to have existed at the time of concelling the second will, will give to the act of such cancellation the effect of reviving the former will; and that it would be open to prove such intention by parol evidence. The bare fact

that the first will had not been destroyed does not amount to such evidence. *Pickens v. Davis, supra.* Whether it has the one effect, or the other, depends upon what was in the mind of the testator. In many instances, it would be more satisfactory to have some decisive declaration made at the very time, and showing clearly the character of the act. *Pickens v. Davis, supra.*

Wherever a testator destroyed his later will by burning it, at the same time declaring orally that the former will should count, it was held that this re-established the former will. *Kerchner's Estate,* 41 Pa. Super. Ct. 112 (Pennsylvania).

The destruction of a will which expressly revoked a prior one, which had been retained in existence, will revive the prior one, if such was the intent of the testator found by the jury from all the circumstances of the case. Declarations of testator showing intent at the time of destroying the latter instrument are admissible in evidence. (*Blackett v. Zeigler,* 37 L. R. A. (N. S.) 291.

Prior to the passage of the Victoria Statute above quoted, the English law was also in great confusion upon the subject. The ecclesiastical courts were disposed to hold, in cases of testaments, that no presumption of revival arose, either for or against the validity of the first will, and that the question was to be settled by the intention of the testator as disclosed by the evidence. The common-law tribunals, in dealing with wills, as we have seen, were inclined to adopt the theory that the revocation of the second will raised a presumption that the testator thereby intended the first will to be in full force and effect. However, this was a *prima facie* presumption only, and might be rebutted by evidence of a contrary intention. Page, Wills, Secs. 271, 272. The two sets of tribunals thus seemed to agree that the testator might revive his first will by the revocation of his second, if such was his intention.

The two leading cases on this perplexing problem is *Pickens v. Davis, supra,* and *Williams v. Miles,* 68 Neb. 463, 62 L. R. A. 383, 110 Am. St. Rep. 431, 94 N. W. 705, 96 N. W. 151. The latter opinion carefully reviews all the decisions, both English and American, and finally adopts the rule of the ecclesiastical courts, making revivor of the former will a question of testator's intent, to be deduced from all the circumstances of the case.

It would not do to hold that the former will was absolutely revived by the destruction of the second, for that may have been entirely contrary to testator's intent. Having made the second

will, and laid aside and, perhaps, forgotten the first, it would be dangerous to hold that the destruction of the second *ipso facto* revived the first, no matter if testator did not so intend. On the other hand, it would in many cases frustrate testator's intent, were wo to hold that the former will could only be revived in such case by a re-execution of a republication thereof after the destruction of the second will. There is no danger then, in holding it to be a question of testator's intent, to be arrived at from all the circumstances in the case. Testimony to establish such intent could only come from disinterested witnesses, and we can perceive of no harm which would result in submitting such question as one of fact. *Blackett v. Zeigler, supra.*

In the construction of wills, testator's intent has always been regarded as controlling, and so with reference as to what should be regarded as his will. The wishes of the testator, have, whenever legally possible, been consistently protected by the courts. *Torres and Lopez de Bueno v. Lopez,* 48 Phil. 772.

Declarations of testator at the time of revoking a will have generally been admitted, when testified to by disinterested parties. *Boyle v. Boyle,* 158 Ill. 228, 42 N. E. 140; *Behrens v. Behrens,* 47 Ohio St. 323, 21 Am. St. Rep. 820, 25 N. E. 209; *Re Steinke,* 95 Wis. 121, 70 N. W. 61.

Even where a contrary rule prevails, admissions are admissible when forming part of the *res gestae. Caeman v. Van Harke,* 33 Kan. 333, 6 Pac 620, *Hayes v. West,* 37 Ind. 21; *Waterman v. Whitney,* 11 N. Y. 157, 62 Am. Dec. 71; *Townsend v. Howard,* 86 Me. 285, 29 Atl. 1077; *Pickens v. Davis, supra; Williams v. Williams,* 142 Mass. 515, 8 N. E. 424; *Barksdale v. Hopkins, supra; McClure v. McClure,* 86 Tenn. 174, 6 S. W. 44; *Carpenter v. Miller,* 3 W. Va. 174; 100 Am. Dec; 744; *Re Gould,* 72 Vt. 316, 47 Atl. 1082; *Rice County v. Scott,* 88 Minn. 386, 93 N. W. 109; *Colvin v. Warford, supra; Lane v. Hill,* 68 N. H. 275, 73 Am. St. Rep. 591, 44 Atl. 393.

There is no presumption one way or the other from the destruction of the instrument of revocation. The whole matter is one of fact, dependent upon the testimony which may be offered to show testator's intent. This is the rule announced by the later and better authorities, as shown in *Williams v. Miles, supra,* and the one best calculated to effectuate justice. It is the rule by statute in New York and Indiana. See *Forbes,* 24 N. Y. Supp. 841; *Kern v. Kern,* 154 Ind. 29, 55 N. E. 1004.

(d) CRITICISM OF THE THREE DOCTRINES IN THE LIGHT OF REQUISITES OF WILLS UNDER THE CODE OF CIVIL PROCERURE

The above three theories relating to revival of wills, particularly the old doctrine of the English Ecclesiastical Courts, are apparently sound both in law and logic, but in this jurisdiction, in view of the plain provisions of the statute with regard to validity of wills, it is still doubtful if our Supreme Court can safely adopt one rule or the other without encountering some degree of legal embarrassment.

Sec. 618 of our Code of Civil Procedure, as amended by Act No. 2645, specifically provides: "No will, except as provided in the preceding section (re Spanish wills), shall be valid to pass any estate, real or personal, nor charge or affect the same, unless it be written in the language or dialect known by the testator and signed by him, or by testator's name written by some other person in his presence, and by his express direction, and attested and subscribed by three or more credible witnesses in the presence of the testator and of each other. The testator or the person requested by him to write his name and the instrumental witnesses of the will, shall also sign, as aforesaid, each and every page thereof, on the left margin, and said pages shall be numbered correlatively in letters placed on the upper part of each sheet. The attestation shall state the number of sheets or pages used, upon which the will is written, and the fact that the testator signed the will and every page thereof, or caused some other person to write his name, under his express direction, in the presence of three witnesses, and the latter witnessed and signed the will and all pages thereof in the presence of the testator and of each other." In other words, no will *shall be valid* in the Philippine Islands unless it be in *writing* and executed according to the formalities required by law.

In the case of *Gumban vs. Goreche,* 50 Phil. 33, the Supreme Court of the Philippine Islands, speaking thru Justice Malcolm, said: "The right to dispose of property by will is governed entirely by statute. The law of the case is here found in Sec. 618 of the Code of Civil Procedure, as amended by Act 2645, and in Sec. 634 of the same Code, as unamended. It is in part provided in Sec. 618, as amended, that '*No will* ..... *shall be valid* ..... *unless* .....'. Codal Sec. 634 provides that 'The will *shall* be disallowed in either of the following cases: 1. If *not executed* and attested as in this Act provided'."

To Philippine Legislature, having seen fit to prescribe in definite terms the manner in which a will shall be executed to be valid, has indicated a policy which ought not to be frittered away by evasions or exceptions. The common-law rule cannot be permitted to override or annul plain, statutory requirements. To make a valid testamentary disposition of property, there must be substantial conformity to all statutory requirements. *Velasco v. Lopez* 1 Phil. 720; *Araujo v. Celis,* 16 Phil. 329; *Fule et al v. Fule et al,* 27 Off. Gaz. 1365.

To permit the revival of a will once legally revoked "by some will, codicil, or other writing executed as provided in case of wills; or by burning, tearing, canceling, or obliterating the same with the *intention of revoking* it," is tantamount to allowing the probate of a will not executed in accordance with the formalities of the law. It is equivalent to allowance of a non-existing will, a will not in writing. Burning a will "with the intention of revoking it" will not revive such will, even if the intention of the testator subsequently is to give effect to the burned will. The burned will is no longer in existence. It is not a valid will, according to Sec. 618 of the Code of Civil Procedure. It is clear that it can early be revived by republication or re-execution, and republished or re-executed according to the formalities for the validity of wills. To allow otherwise is to violate the plain provisions of law, to open the door to mistake and fraud, and to encourage fraudulent imposition in the establisment of spurious wills. *Ex Parte Santiago,* 4 Phil. 692; *Ex Parte Arcenes,* 4 Phil. 704. The same case is true with regard to "tearing", "canceling", or "obliterating" a will, or revoking it by some "will", "codicil", or "other writing executed as provided in case of wills". In each case, the revocation, if done in accordance with law, is complete, absolute, and immediate, making the first will legally dead. To revive it, it must be re-executed in accordance with the formalities laid down by the Code of Civil Procedure.

In *Newton v. Newton,* 12 Ir. Ch. 118 (1861), it was held that a will revoked absolutely by another will and thereafter destroyed by the testator could not be revived by a codicil, though the codicil, by seeking to revive it, evinced, in the opinion of the court, an intention that a subsequent will should not remain a will. The court said: "The will itself had been destroyed. It was as if it had never existed. It was no longer in *rerum natura,* and could not, therefore, be incorporated with the codicil".

In *Rogers v. Goodenough,* 2 SW. & Tr. 342, 350 (1862) (Eng.), the court said that the provision of the Wills Act that "no will shall be valid unless it be in writing and executed in the manner hereinafter mentioned" (see also the exact words in Sec. 618 of our Code of Civil Procedure), is decisive of that question, because "the expression 'no will shall be valid' applies equally to an original will and a revived will". See also *Hale v. Tokelove,* 2 Rob. Ecc. 318 (1850); *Re Goods of Steele,* L. R. 1 P & D. 575, 576, 577 (1868) (Eng.)

On the other hand, the doctrine opposite to that of the common-law rule, which claims that the revocation of the revocatory will does not revive the first will, in the absence of statutory provision supporting such a view, except by republication or re-execution, is, as we have seen, more in harmony with the plain provisions of our law on wills. But such a construction may, in many cases, work injustice, in the absence of legal justification, and defeat the manifest intention of the testator, which intention has, in many instances, been protected by our courts. This doctrine presumes altogether that the testator desires to die intestate, whereas, a will is ambulatory in nature and has no effect until the testator's death. *Riera v. Palmaroli,* 40 Phil. 105; *McDaniel v. Johns,* et al, 45 Miss. 641; 1 Jarman, Wills, Ch. 2, p. 18.

Besides, the second paragraph of Sec. 623 of the Code of Civil Procedure states: "If burned, torn, cancelled, or obliterated by some other person, without the express direction of the testator, the *will may still be established* by the court, and the estate distributed in accordance therewith, if its contents, and due execution, or obliteration is established by full evidence to the satisfaction of the court". In other words, a will *unduly* canceled, or revoked or wiped out of existence may still be proved, in spite of the plain provisions of Sec. 618 of the Code of Civil Procedure. This implies that republication or re-execution is not necessary. It may be argued that such a procedure is allowed only in cases where the revocation is unauthorized and illegal. But, the result is the same whether the allowance is one affecting a legal or an illegal act. The main fact remains that the court, without necessity of following the formalities of Sec. 618 of the Code of Civil Procedure, allows the probate of burned, canceled, or obliterated will.

The English Ecclesiastical Court rule, as we said, must not, however plausible, override the plain provisions of law. But, granting that this old doctrine of the ecclesiastical tribunals

may be safely applied by our courts, without overriding plain statutory provisions, what then should the rule be in cases where the manifest intention of the testator to revive the first will is *absent* and cannot be proved either by written or oral evidence? Of course, our Code of Civil Procedure contains provisions regarding intestacy, and it may be inferred that the common-law rule should then be followed. But, can it not be said that the mere execution of the first will is at least an indication, in the absence of proof to the contrary, that testator desires to die testate? What is in the mind of the testator, unearthed by direct or indirect rules of evidence, is a question which, even the best judge or lawyer cannot easily perceive. The old doctrine of the English Ecclesiastical Tribunals throws the door wide open to the admission of such evidence of intent, and suffers the intention of the testator to be determined by the "uncertainty of slippery testimony". *Bates v. Hacking,* 14 L. R. A. (N. S.) 941, 68 At. 622 (Rhode Is. Sup. Ct.) It is in such instances, aside from the purely legal aspect of the question, that the plausible doctrine of the English Ecclesiastical Courts, becomes not plausible in this jurisdiction.

CONCLUSION, WHAT THE LAW SHOULD BE ON REVIVAL OF WILLS IN THIS JURISDICTION

At first, the writer of this paper, in view of the legal quagmire in which he finds himself, is inclined to recommend the passage of a statute similar to the Victoria Statute of 1837 which runs as follows:

"No will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown". (1 Vict. c. 26).

But, at the same time, the author is conscious of the fact that such a rigid legislation will leave no room for interpretation, obliging the testator in all cases to republish a will in the event of the revocation of a revocatory will, regardless of the intent of the testator to give effect to the prior existing will.

The injustice of the situation may be seen by an illustration. Suppose, testator X executes a will with all the formalities required by law. Later he changes his mind and executes

another will revoking his first will. But thereafter, the same testator during his lifetime, realising the injustice of his latter act, destroys or revokes his revocatory will, manifesting at the same time his intention to give effect to his first will. Under these circumstances, shall not the first will be revived, if such was the intention of the testator, and the first will is still in existence?

The writer respectfully submits that the first will must be revived, without the necessity of republication.

The necessary requisites, however, in order that a will may be considered revived, are:

(1) Intent to revive the first will, i. e. to give effect to the prior will.

(2) Existence of the first will.

The intent must be express. The destruction of the revocatory will, without the testator's manifest intent to give effect to the prior will, will not revive such will. A decisive declaration made at the time of revocation and showing clearly the character of the act must be proved to the satisfaction of the court (*Pickens v. Davis, supra*)

The second requisite is that the first will must still be in existence, otherwise the requisites of the law on wills cannot be adequately complied with. But the bare fact that the first will is existing, that it had not been destroyed, does not amount to a conclusive proof that testator's intent was to give effect to the first will, in the absence of proof of such intent. The intent must be coupled with the existence of the first will, in order that revival of wills in this jurisdiction may be validly upheld. The two requisites, therefore, must both be present.

In all cases, however, the revocation of a revocatory will gives rise to a *prima facie* case that it was testator's intent to revive the first will. The whole matter must be reduced to one of fact, dependent upon the testimony which may be offered to show testator's intent. The reason for this is that the mere execution of the first will is an indication that testator desires to die testate (*In re Coulds Will,* 72 Vt. 316; *Blackett v. Ziegler,* 37 L. R. A. (N. S.) 291).

Revival of wills, therefore, should be favored, when (1) the testator's intent to give effect to the first will is present; (2) when the first will is still in existence; (3) and that in case of (1) testator's intent is always to be presumed, unless the contrary is shown.