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Revocation of a Revoking Codicil: The Renaissance of Revival in California

By GAIL BOREMAN BIRD*

The actions of testators are often bewildering to those left behind, but perhaps no situation has produced the variety of interpretations, now entombed as legal doctrines, as the case of a testator who makes a will, then makes another will that expressly or impliedly revokes the first, and then destroys this second will. If the testator intended to die intestate, it is puzzling that he or she left the first will. On the other hand, the testator may have intended the first will to control the devolution of his or her property. If this is the situation, it is equally puzzling that the first will has been revoked. This latter incongruity may be explained, however, by assuming that the act of revoking the second instrument was intended to "revive" the first instrument.

The issue of revival *vel non* has stymied courts and legislatures for centuries, producing a variety of conflicting rules and engendering widespread confusion.¹ As early as 1850, California, following the lead of England² and some American jurisdictions,³ enacted an anti-revival statute,⁴ adopting the rule that the revocation of a revoking instrument

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1. Roberts, *The Revival of a Prior by the Revocation of a Later Will*, 48 AM. L. REG. 505, 506, 521 (1900) [hereinafter cited as Roberts]; Zacharias & Maschinot, *Revocation and Revival of Wills*, 25 CHI.-KENT L. REV. 185, 186 (1947) [hereinafter cited as Zacharias & Maschinot].

2. Wills Act of 1837, 7 Will. 4 & 1 Vict., ch. 26, § 22. See notes 12-15 & accompanying text *infra*.

3. New York enacted anti-revival legislation in 1829. 1829 N.Y. Rev. Stats. pt. 2, ch. 6, tit. 1, art. 3, § 53 (1829). Although its statute was worded differently from the English Wills Act, the two statutes generally have been given the same effect. 2 W. BOWE & D. PARKER, PAGE ON WILLS § 21.55, at 444 (3d ed. 1960) [hereinafter cited as BOWE & PARKER]; Ferrier, *Revival of a Revoked Will*, 28 CALIF. L. REV. 265, 270-71 (1940) [hereinafter cited as Ferrier]; Roberts, *supra* note 1, at 511-12. Some American jurisdictions followed the English model, while others, including California, adopted the New York version. See 2 BOWE & PARKER, *supra*, § 21.55 at 443-44; Rees, *American Wills Statutes: II*, 46 VA. L. REV. 856, 891-92 (1960).

4. 1850 Cal. Stats. ch. 72, § 11.

would not revive the earlier testamentary instrument. While the rule has been criticized,⁵ an emerging body of case law suggests that the question of revival is not resolved in California, particularly in cases of partial revocation.

This Article first examines the history of the law of revocation and revival, focusing on the development of these doctrines in California. The Article next addresses the problems of partial revocation and examines the evolution of the California rule in light of the New York cases that have influenced it. The Article then analyzes the inconsistencies judicially grafted onto the California statutes, concluding that the California statute should be replaced by the solution offered by the Uniform Probate Code.

Revival in Historical Perspective

The historical confusion surrounding the question of revival undoubtedly stems from the division of jurisdiction between the common law courts, which controlled devises of real property, and the ecclesiastical courts, which governed succession to personalty.⁶ The Statute of Frauds did not address the effect of the revocation of a revoking instrument,⁷ leaving the common law and ecclesiastical courts free to develop their own resolutions of this problem.

The common law courts adopted a rule of "automatic revival,"⁸ based on the ambulatory nature of a will: "If the testator lets it stand till he dies, it is his will: if he does not suffer it to do so, it is not his

5. Evans, *Comments on the Probate Code of California*, 19 CALIF. L. REV. 602, 611-12 (1931); Ferrier, *supra* note 2, at 271-76.

6. For a more detailed comparison of the common law and ecclesiastical rules, see 2 BOWE & PARKER, *supra* note 3, §§ 21.50-.52, at 435-37; Zacharias & Maschinot, *supra* note 1, at 188-92. See generally 7 R. POWELL, THE LAW OF REAL PROPERTY ¶ 993, at 640-43 (rev. ed. 1979).

7. The Statute of Frauds did require that revocation be accomplished by some act of physical destruction on the part of the testator or by some written will or codicil, or other writing, executed with all testamentary formalities. Statute of Frauds, 29 Car. 2, ch. 3, § 6 (1676). The statute neither provided any method for the revocation of a revocation nor specified when a revoking instrument was to take effect. Roberts, *supra* note 1, at 506; Zacharias & Maschinot, *supra* note 1, at 188.

8. See, e.g., Note, *Revival by Revocation of a Later Instrument-Effect of a Revocatory Clause*, 28 KY. L.J. 227 (1940). The term is something of a misnomer because, according to the common law view, the first will continues to have potential legal effect despite the execution of revocatory instruments during the testator's lifetime. If the later instruments are destroyed or otherwise revoked, the former will remains unrevoked, and "revival" is unnecessary. See Zacharias & Maschinot, *supra* note 1, at 191; see text accompanying notes 9-11 *infra*.

will."⁹ Therefore, when a testator executed a will devising real property to *A*, then executed a later will devising the same real property to *B*, and subsequently revoked the second will, the first will would remain intact and unrevoked. The second will was deemed never to have had an effect, even for purposes of revocation.¹⁰

Thus, under the common law rule, "a will has no operation, till the death of the testator. This second will never operated: it was only intentional. . . . If by making the second, the testator intended to revoke the former, yet that revocation was itself revocable: and he has revoked it."¹¹ Under this view, the later will would revoke the first only upon the testator's death. Until that time, the first will would remain unrevoked, but subject to revocation by a later will.

By contrast, the ecclesiastical courts treated the revoking instrument as effective, for revocation purposes, from the date of its execution. The fact that the earlier will remained in physical existence was of no significance; it no longer had legal existence.¹² Revival of the earlier testament, however, was possible. If the testator subsequently destroyed the later instrument, evidence of intent, including oral declarations, was admissible to establish whether the testator wished the prior testament to stand.¹³ There was no presumption for or against revival in such a situation.¹⁴

These distinct lines of authority ended in England with the pas-

9. *Goodright v. Glazier*, 98 Eng. Rep. 317, 319 (1770).

10. *Id.* Whether the second will in *Goodright v. Glazier* contained an express revocatory clause may be doubtful. Roberts, *supra* note 1, at 507-09; Zacharias & Maschinot, *supra* note 1, at 190-91.

11. *Goodright v. Glazier*, 98 Eng. Rep. 317, 319 (1770). See generally 2 BOWE & PARKER, *supra* note 3, § 25.51, at 436.

12. See, e.g., *Ex parte Hellier*, 26 Eng. Rep. 1256 (1754), in which the court stated that the execution of the second will is a revocation of the first.

13. Revival of the earlier will therefore was possible if sufficient evidence was introduced showing that the testator intended the earlier will to stand. In *Usticke v. Bawden*, 162 Eng. Rep. 238 (1824), oral statements made by the testator shortly before death were deemed sufficient to establish an intent to survive. See generally 2 BOWE & PARKER, *supra* note 3, § 21.50, at 435-36.

14. See, e.g., *Usticke v. Bawden*, 162 Eng. Rep. 238 (1824); *Welch v. Phillips*, 12 Eng. Rep. 828 (1836). It has been suggested that the difference between the common law and the ecclesiastical rules resulted from the fact that the common law courts had jurisdiction over real property and were necessarily concerned with the security of titles. In contrast, the ecclesiastical courts had jurisdiction only over chattels, where security of titles was of lesser importance. In addition, chattels were administered by a personal representative who could transmit good title to a purchaser, despite the possible invalidity of the will. Land, however, devolved on the heir or devisee immediately and a purchaser from a devisee was not protected if the will was later deemed invalid. M. RHEINSTEIN & M.A. GLENDON, *THE LAW OF DECEDENTS' ESTATES* 266 (1971).

sage of the Wills Act of 1837,¹⁵ which established a unified scheme for the execution and revocation of wills and testaments. The statute expressly addressed the revival problem, directing that "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 the manner herein-before required [that is, with all testamentary formalities], and showing an Intention to revive the same"¹⁶ In applying this statute, the English courts generally have followed the ecclesiastical courts' rule that a revocation operates from the time of its execution.¹⁷ Hence, the revocation of a revoking instrument will not operate to revive a prior will unless there has been a re-execution or a republication by a later codicil.¹⁸ Under the English statute, the revocation of a revoking will results in intestacy; oral declarations of the testator are inadmissible to establish an intention to revive the revoked will.¹⁹

The response of American courts to the problems posed by the revocation of a revoking instrument has been inconsistent and conflicting, and there seems to be no doctrine that "carries with it the decided weight of authority."²⁰ Moreover, the statutory solutions are not uniform.²¹ The common law and ecclesiastical views, and most conceivable variations, are represented.²² It is not surprising, therefore, that

15. 7 Will. 4 & 1 Vict., ch. 26 (1837).

16. *Id.* § 22.

17. 2 BOWE & PARKER, *supra* note 3, § 21.53, at 437.

18. This principle has been applied in both express and implied revocation situations. The decision in *Goods of Hodgkinson*, 1893 P. 339, illustrates an implied revocation. In *Hodgkinson*, the testator had executed an initial will leaving all his property to a friend. A few months later, he made a second will leaving the real property he had recently received under his mother's will to his sister. The second will contained no express clause of revocation. The second will was subsequently revoked. The reviewing court held that the first will had been revoked in part and had not been revived. The second will was, of course, inoperative, and the testator died intestate as to the real property. A similar result obtained in *Major v. Williams*, 163 Eng. Rep. 781 (1843) (involving express revocation). See generally Zacharias & Maschinot, *supra* note 1, at 192-93; W. ROLLISON, *THE LAW OF WILLS* § 161, at 300 (1939).

19. 2 BOWE & PARKER, *supra* note 3, § 21.53, at 437-38; Zacharias & Maschinot, *supra* note 1, at 192-99.

20. Roberts, *supra* note 1, at 506.

21. See note 3 *supra*. For a discussion of the variety of American statutes on the subject of revival, see Rees, *American Wills Statutes: II*, 46 VA. L. REV. 856, 890-92 (1960); Zacharias & Maschinot, *supra* note 1, at 208-15. The Uniform Probate Code, now in force in at least twelve jurisdictions, allows revival under certain circumstances. UNIFORM PROBATE CODE § 2-509. See text accompanying notes 126-33 *infra*.

22. See Zacharias & Maschinot, *supra* note 1, at 208-15. See generally, 2 BOWE & PARKER, *supra* note 3, §§ 21.54-56, at 438-46.

the courts of one jurisdiction, working with a single statutory scheme, have had difficulty producing a coherent jurisprudence of revival.

Revocation and Revival in California

A California testator may revoke a will by a variety of statutory methods.²³ He or she may perform some physical act on the document itself, such as tearing it or burning it.²⁴ Alternatively, the testator may execute a subsequent instrument with due testamentary formalities.²⁵ If the later document contains an express clause of revocation, or contains "provisions wholly inconsistent with the terms of the prior will," the earlier will is effectively revoked.²⁶ Because a will destroyed *animo revocandi*, by physical act, is not susceptible of revival,²⁷ the following discussion primarily addresses revocation by subsequent instrument.

California Probate Code section 75 provides:

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.²⁸

Essentially unchanged from its first enactment in 1850,²⁹ the statute apparently was borrowed from the New York anti-revival statute, adopted in 1829.³⁰ The purpose of the legislation was to resolve the effect of the revocation of a revoking will and thus alleviate the confusion resulting from distinctions between the ecclesiastical and common law lines of authority.³¹ The result differs from both the common law and ecclesiastical rules.³² Like the ecclesiastical rule, the statute apparently gives a revocation immediate effect.³³ Unlike the ecclesiastical

23. See CAL. PROB. CODE §§ 70-76 (West 1956).

24. *Id.* § 74(2) (West 1956).

25. *Id.* § 74(1).

26. Estate of Iburg, 196 Cal. 333, 238 P. 74 (1925); see CAL. PROB. CODE § 72 (West 1956).

27. T. ATKINSON, LAW OF WILLS § 92 at 474 (2d ed. 1953) [hereinafter cited as ATKINSON].

28. CAL. PROB. CODE § 75 (West 1956).

29. See 1850 Cal. Stats. ch. 72, § 11.

30. Estate of Hering, 108 Cal. App. 3d 88, 92, 166 Cal. Rptr. 298, 300 (1980); Ferrier, *supra* note 3, at 266-67.

31. Estate of Thompson, 185 Cal. 763, 779-80, 198 P. 795, 801-02 (1921).

32. Ferrier, *supra* note 3, at 267.

33. The California statute, like the New York legislation, does not expressly state that the former will is revoked instantly upon the execution of the subsequent will, but logically the later will should be given this effect; otherwise there would be no reason to prescribe the means to be followed to revive the earlier will. See *In re Lones*, 108 Cal. 688, 690, 41 P. 771,

rule, the statute embodies a presumption against revival and apparently prohibits the use of parol evidence to establish the testator's intent.³⁴ The former will can be revived, according to the statute, only by republication.³⁵

California's anti-revival statute does not distinguish between express and implied revocation;³⁶ both types of revocation operate immediately from the time that the subsequent instrument is executed.³⁷ In *Estate of Bassett*,³⁸ the testator first executed a formal attested will that left her entire estate to a friend. This will was found intact at her death. It was alleged, however, that the testator had executed a holographic will after the formal will, leaving all her property to her sister, and that this holographic will had been destroyed by the testator with the intention of revoking it. The trial court permitted proof of the former existence and contents of the holographic will by the evidence of a single witness³⁹ and ruled, presumably on the basis of the anti-revival statute, that the testator had died intestate.

772 (1895); Zacharias & Maschinot, *supra* note 1, at 210. For discussion of the California cases dealing with this problem, see text accompanying notes 36-44 *infra*.

34. California Probate Code § 75 states in part that the "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" CAL. PROB. CODE § 75 (West 1956). The phrase, "terms of such revocation," was early interpreted by California courts to apply only to a written revocation. *See, e.g., In re Lones*, 108 Cal. 688, 41 P. 771 (1895); *see also In re Stickney's Will*, 161 N.Y. 42, 55 N.E. 396 (1899). Oral declarations made by a testator at the time of revoking a second will to the effect that he or she intends the first will to stand are not effective to revive the first will. *In re Lones*, 108 Cal. 688, 41 P. 771 (1895).

35. CAL. PROB. CODE § 75 (West 1956). Republication is not defined in the code, but, in this context, it generally means re-execution of the original will with all of the prescribed testamentary formalities, or the due execution of a codicil to the will. *See generally* ATKINSON, *supra* note 27, §§ 89-90, at 464-68. *Cf. In re Stickney*, 161 N.Y. 42, 55 N.E. 396 (1899) (court suggested that an earlier will could be duly republished for revival purposes if testator declared to the same persons who were witnesses to its original execution that testator now intends it to be his or her will).

36. Revocation by inconsistent provisions sometimes is referred to as "implied revocation." ATKINSON, *supra* note 27, § 87, at 450. In fact, the statute does not mention revocation of the prior will, stating merely that "[i]f, after making a will, the testator makes a second will, the . . . revocation of the second will does not revive the first" CAL. PROB. CODE § 75 (West 1956).

37. *Estate of Bassett*, 196 Cal. 576, 583, 238 P. 666, 669 (1925); *Estate of Johnston*, 188 Cal. 336, 341, 344, 206 P. 628, 629-30, 631 (1922); *see also In re Lones*, 108 Cal. 688, 690, 41 P. 771, 772 (1895).

38. 196 Cal. 576, 238 P. 666 (1925).

39. Although two witnesses would be required to establish the contents of a lost or destroyed will before it might be admitted to probate, the trial court ruled that the contents of the will could be established by the testimony of a single witness to work a revocation of the earlier will on the basis of inconsistent provisions. *Id.* at 577, 238 P. at 667. *See* notes 45-47 & accompanying text *infra*.

The decision was affirmed on appeal. The reviewing court noted that, in the absence of statute, a distinction may be drawn between a subsequent will that contains an express clause of revocation and a later will that impliedly revokes a prior will by virtue of inconsistent provisions.⁴⁰ In jurisdictions recognizing this distinction, the express revocation clause is given effect from the time of its execution, thereby revoking the prior will immediately. Revocation by a later, inconsistent will does not take effect until the testator dies with the later will intact and unrevoked. Under this view, if the revocation of the prior will was express, a subsequent revocation of the second will cannot revive the first, because there is nothing to revive; if the second will was merely inconsistent with the prior will, however, its subsequent destruction would revive the earlier will.⁴¹

The court in *Bassett* refused to make this distinction because, under the California statutes, a will is equally revoked by a subsequent will containing provisions wholly inconsistent with an earlier will as by a subsequent will containing an express revocation clause.⁴² The anti-revival statute provides "in effect, that if the later will revokes the earlier will by either method prescribed [by statute], then the destruction of said later will does not thereby revive the earlier one; either method of revocation . . . may be said, therefore, to take effect *eo instanti* without regard to the time of the testator's death."⁴³ Both methods of revocation, express and implied, have the same effect on revival: a subsequent destruction of the revoking instrument cannot revive the earlier will. Thus, when the testator in *Bassett* executed her holographic will, she caused the immediate revocation of her earlier at-tested will because the two wills were wholly inconsistent. In addition, the anti-revival statute prohibited the later revocation of the holographic will from serving to revive the earlier will.⁴⁴

In *Bassett*, the holographic will itself had been destroyed, and only one witness who knew of its execution and contents was available.

40. Estate of Bassett, 196 Cal. 576, 583-84, 238 P. 666, 670 (1925) (quoting Estate of Thompson, 185 Cal. 763, 198 P. 795 (1921)).

41. *Id.* In essence, courts drawing this distinction are applying the ecclesiastical rule when the revocation is express, and the common law rule when the revocation is implied. The result of this distinction, that the express revocatory clause "becomes operative at once though the remainder of the instrument becomes operative only at death," is anomalous. Evans, *Testamentary Revival*, 16 KY. L.J. 47, 48-49 (1927); see also Note, *Revival by Revocation of a Later Instrument—Effect of a Revocatory Clause*, 28 KY. L.J. 227 (1940). See generally 2 BOWE & PARKER, *supra* note 3, § 21.54, at 442.

42. Estate of Bassett, 196 Cal. 576, 582-83, 238 P. 666, 669 (1925).

43. *Id.* at 583, 238 P. at 669.

44. *Id.*

Prior case law had established the controversial rule that, when a will containing an express clause revoking a prior will is destroyed by the testator, its due execution may be proved by one witness for the limited purpose of establishing the revocation clause.⁴⁵ The *Bassett* court approved the application of this principle when the inconsistent provisions of a second, holographic will had been subsequently destroyed by the testator by physical act, *animo revocandi*.⁴⁶ Therefore, according to the court in *Bassett*, the trial court had properly allowed the execution and contents of the holographic will to be established by the testimony of one witness to show the inconsistencies with the earlier will and had properly concluded that the decedent had died intestate.⁴⁷

Problems of Partial Revocation

After establishing the principle that the execution of a subsequent will whose dispositive provisions are wholly inconsistent with those of a former will immediately revokes the former will for all purposes, including operation of the anti-revival statute, the California courts confronted several problems of partial inconsistency. It was unclear whether, and to what extent, a second will would revoke a prior will if its provisions were partially inconsistent with the first. It also was unclear whether the anti-revival statute would apply to an earlier instrument if the later instrument were itself revoked.

Revocation by Partial Inconsistency

The effect of partially inconsistent testamentary instruments was first examined in California in *Clarke v. Ransom*.⁴⁸ The testator first executed a formal will, making several small bequests and leaving one-half of the residue of her estate to her brother and the balance in trust for the benefit of her daughter. A few months later her daughter died, and the testator executed a codicil bequeathing her entire estate, aside from the original small bequests, to her brother. Included among the bequests was a gift of one thousand dollars to a friend. Thereafter, the testator wrote a brief note to the friend, stating that she wished to give the friend her "watch, two shawls, and also five thousand dollars." The

45. Estate of Johnston, 188 Cal. 336, 206 P. 628 (1922); see also Estate of Thompson, 185 Cal. 763, 198 P. 795 (1921). For a critical analysis of this rule and a criticism of California's proof of lost wills statute, see Note, *Wills: Proof of Lost or Destroyed Will as Revocation of Earlier Will*, 15 CALIF. L. REV. 164 (1927).

46. Estate of Bassett, 196 Cal. 576, 582, 238 P. 666, 669 (1925).

47. *Id.* at 584, 238 P. at 670.

48. 50 Cal. 595 (1875).

note was offered for probate along with the will and codicil and was determined to be a valid holographic instrument.⁴⁹ Contrary to the argument of the proponents of the formal will and codicil, the California Supreme Court held that the absence of express revocatory language did not preclude the holograph from partially revoking or altering the earlier instruments. To the extent that its terms were inconsistent with those of the will and codicil, the holograph constituted a *pro tanto* revocation or alteration of the earlier instruments.⁵⁰ Therefore, all three documents were properly admitted to probate to be read together, and the provisions of the earlier instruments remained in force to the extent that they were not superseded by those in the later instrument. *Clarke v. Ransom* thus established the principle that partial inconsistency effects only a partial revocation.⁵¹

In *Estate of Iburg*⁵² and *Estate of Danford*,⁵³ both decided by the California Supreme Court in 1925, the court considered the point at which partial inconsistency gives way to total inconsistency, and hence effects total rather than *pro tanto* revocation. In *Iburg*, the testator left two wills. The first instrument left his entire estate to a friend and named that friend as executor. The second instrument, which was holographic, did not expressly revoke the first, but left the entire estate to the testator's sister. It made no provision for the appointment of an executor. The trial court admitted both instruments to probate and appointed the friend as executor in accordance with the terms of the first will.⁵⁴ The sole issue before the supreme court was whether the later will completely revoked the first, precluding the appointment of the executor, or whether the two wills were only partially inconsistent and hence should be read together under the principle enunciated in *Clarke v. Ransom*.⁵⁵

The court noted that under the revocation statute only total inconsistency gives rise to total revocation and that in doubtful cases "the courts incline to preserve the contents of the prior will, wholly or in part, rather than declare a total revocation by inference."⁵⁶ Neverthe-

49. *Id.* at 599-601.

50. *Id.* at 601-02.

51. Zacharias & Maschinot, *Revocation and Revival of Wills Part II*, 25 CHI.-KENT L. REV. 271, 275 (1947). This principle comports with the general rule followed in the majority of jurisdictions. See 2 BOWE & PARKER, *supra* note 2, § 21.43, at 411-13. See generally ATKINSON, *supra* note 27, § 87, at 450-53.

52. 196 Cal. 333, 238 P. 74 (1925).

53. 196 Cal. 339, 238 P. 76 (1925).

54. *Estate of Iburg*, 196 Cal. 333, 333-34, 238 P. 74, 74 (1925).

55. 50 Cal. 595 (1875). See text accompanying notes 48-51 *supra*.

56. *Estate of Iburg*, 196 Cal. 333, 334, 238 P. 74, 74 (1925).

less, the *Iburg* court found that the second will totally revoked the first will, relying on the principle that a later will that constitutes a complete disposition of the testator's property must necessarily revoke an earlier will in its entirety, including any nondispositive provisions of the earlier instrument.⁵⁷ Therefore, although the second will did not mention an executor, it effectively revoked the appointment of the executor in the earlier will by virtue of its complete and wholly different disposition of the testator's estate.⁵⁸ Thus, under *Iburg*, the critical factor is the dispositive provisions of the wills; if these provisions are wholly inconsistent, the earlier will is totally revoked.

In *Estate of Danford*,⁵⁹ the dispositive provisions of the wills were not necessarily wholly inconsistent, but the court found a total revocation. As in *Iburg*, the testator in *Danford* left two wills. Both were holographic. The first will made small cash bequests to the testator's son, daughter-in-law, and grandchildren, left one quarter of the estate to his sister, and one half of the estate to one Caroline Mason. No disposition was made of the residue. The second will, executed two years later, left \$2000 to Mrs. Gross, \$5000 to his sister, and the residue of the estate to Caroline Mason. The court determined that

[t]he governing principle is, therefore, the intention of the testator. It does not necessarily follow from the fact of the new will that full and entire revocation was intended. The purpose may have been to make supplemental provisions, consistent with the former will in whole or in part, to dispose of other property, or to amend and alter the prior dispositions only. Hence a complete revocation by implication will not follow unless the general tenor of the latter will shows clearly that the testator so intended, or the two instruments are so plainly inconsistent as to be incapable of standing together.⁶⁰

The court noted that the later instrument did not profess to be a codicil and that its provisions were adequate to dispose of the entire estate. The court concluded that, because there was nothing in the context of the two wills to require their construction as one instrument, the testator probably intended the later instrument to supplant the earlier will, and that therefore the decision of the lower court to admit only the second will to probate was not, as a matter of law, incorrect.⁶¹

57. *Id.* at 335-38, 238 P. at 75-76.

58. *Id.* at 338, 238 P. at 76. The decision in *Iburg* was overturned in 1931 by an amendment to California Probate Code § 72. 1931 Cal. Stats. ch. 281, § 72. Under the amendment, the former will's designation of an executor will be given effect if the court should decide that the testator so intended. See *Estate of Salmonski*, 38 Cal. 2d 199, 238 P.2d 966 (1951).

59. 196 Cal. 339, 238 P. 76 (1925).

60. *Id.* at 342, 238 P. at 77.

61. *Id.* at 343, 238 P. at 78.

Under California law, therefore, if two wills contain wholly inconsistent dispositive provisions, or if there is some other indication that the testator intended the later will to supplant the earlier, then the earlier will shall be deemed to be revoked as of the date of execution of the later instrument.⁶² When the wills are only partially inconsistent, however, the two instruments will be read together, giving effect to the terms of the prior will so far as they are consistent with the provisions of the later will. Only those provisions of the prior will that are inconsistent with the terms of the later will shall be revoked.⁶³

Revival of a Partially Revoked Will

The subsequent revocation of a later wholly inconsistent instrument will not serve to revive the earlier will in the absence of republication or re-execution.⁶⁴ The effect given the revocation of a later instrument that is only partially inconsistent with an earlier will, however, must be determined. If the earlier will is deemed to have been partially revoked at the time of the execution of the later will, and by virtue of Probate Code section 72, a subsequent revocation of the later instrument does not revive those revoked portions of the earlier will, the result is partial intestacy. This view has been adopted by the courts of New York.⁶⁵ California courts, however, seeking to prevent intestacy and generally attempting to effect testators' intentions, have devised a different approach using principles found in earlier New York cases.⁶⁶

The New York Precedents

Until its revision in 1966, the New York anti-revival statute⁶⁷ was

62. Estate of Bassett, 196 Cal. 576, 238 P. 666 (1925); Estate of Danford, 196 Cal. 339, 238 P. 76 (1925); Estate of Iburg, 196 Cal. 333, 238 P. 74 (1925).

63. Clarke v. Ransom, 50 Cal. 595 (1875).

64. Estate of Bassett, 196 Cal. 576, 238 P. 666 (1925).

65. See notes 67-85 & accompanying text *infra*.

66. See notes 86-110 & accompanying text *infra*.

67. Section 41 of the New York Decedent Estate Law was a verbatim restatement of New York's original anti-revival statute, enacted in 1829. It read as follows: "If, after the making of any will, the testator shall duly make and execute a second will, the destruction, canceling or revocation of such *second* will, shall not revive the first will, unless it appear by the terms of such revocation, that it was his intention to revive and give effect to his first will; or unless after such destruction, canceling or revocation, he shall duly republish his first will." 1829 N.Y. Rev. Stats. pt. 2, ch. 6, tit. 1, art. 3, § 53.

The present New York anti-revival statute provides: "(a) If after executing a will the testator executes a later will which revokes or alters the prior one, a revocation of the later will does not, of itself, revive the prior will or any provision thereof. (b) A revival of a prior will or of one or more of its provisions may be effected by: (1) The execution of a codicil

similar to California Probate Code section 75;⁶⁸ on most questions of construction and application of the statute, California and New York courts were in accord.⁶⁹ The question of the revival of a partially revoked will, however, has produced differing responses.

The leading New York case addressing this question is *Osburn v. Rochester Trust & Safe Deposit Company*,⁷⁰ decided in 1913. The testator had duly executed a will and subsequently had executed a separate codicil that modified the original will "by making an additional bequest of one thousand dollars before creating and providing for a residuary estate."⁷¹ She later intentionally destroyed the codicil, but the original will was found intact at her death. The court recognized that the revocation of the codicil would not revoke the underlying will,⁷² but concluded that the revocation also could not revive those portions of the will that had been revoked by the execution of the codicil:

When the codicil modified the will by providing for an additional legacy before creation of the residuary estate it modified and revoked the will to that extent. This revocation was consummated at the moment when the codicil was executed and published and thereafter the will was to that extent annulled. After this revocation had thus been consummated by the execution of the codicil the will could not be restored to its original form and tenor simply by the revocation of the codicil. A revocation of the revocation could not thus be accomplished.⁷³

Thus, the testator died intestate as to one thousand dollars.⁷⁴

which in terms incorporates by reference such prior will or one or more of its provisions. (2) A writing declaring the revival of such prior will or of one or more of its provisions, which is executed and attested in accordance with the formalities prescribed by this article for the execution and attestation of a will. (3) A republication of such prior will, whether to the original witnesses or to new witnesses, which shall require a re-execution and re-attestation of the prior will in accordance with the formalities prescribed by 3-2.1." N.Y. EST., POWERS & TRUSTS LAW § 3-4.6 (McKinney 1981).

68. See text accompanying note 28 *supra*.

69. Both courts have indicated that: (1) an effective revocatory instrument operates immediately on execution, regardless of whether the revocation was express or implied, *Estate of Bassett*, 196 Cal. 576, 238 P. 666 (1925); *In re Ford's Will*, 135 Misc. 630, 239 N.Y. Supp. 252 (1930); (2) once revoked by a subsequent instrument, a will cannot be revived by oral declarations of the testator at the time of the later revocation, *In re Lones*, 108 Cal. 688, 41 P. 771 (1895); *In re Stickney's Will*, 161 N.Y. 42, 55 N.E. 396 (1899); and (3) the establishment of the contents of a subsequent will for the purpose of showing the revocation of an earlier instrument may be shown by the testimony of one witness, *Estate of Johnston*, 188 Cal. 336, 206 P. 628 (1922); *In re Wear's Will*, 131 App. Div. 875, 116 N.Y. Supp. 304 (1909). See also *Zacharias & Maschinot*, *supra* note 1, at 108-10.

70. 209 N.Y. 54, 102 N.E. 571 (1913).

71. *Id.* at 56, 102 N.E. at 572.

72. *Id.* at 56-58, 102 N.E. at 572-73.

73. *Id.* at 58, 102 N.E. at 573.

74. *Id.*

The rule established in *Osburn* became firmly entrenched in subsequent New York decisions,⁷⁵ and is codified in the current version of New York's anti-revival statute.⁷⁶ The court in *Osburn*, however, neither expressly mentioned the anti-revival statute nor referred to two earlier New York decisions that suggested a different approach.

In *In re Simpson*,⁷⁷ decided in 1878, the testator had duly executed a will and subsequently had executed a codicil, which substantially modified the testamentary plan. He later revoked the codicil.⁷⁸ It was conceded that the execution of the codicil revoked the will by implication because the provisions of the codicil were inconsistent with those of the will, and it was argued that the revocation of the codicil could not operate to revive the provisions of the will that had been revoked by it.⁷⁹

However, the New York anti-revival statute then in effect, like the anti-revival statute in California, spoke only of wills⁸⁰ and did not expressly refer to the subsequent execution of a codicil. Although the issue was rendered moot by the ultimate decision in the case,⁸¹ the court refused to give an unqualified assent to the argument that the anti-revival statute applied to the revocation of a codicil. The court recognized that the statutory definition of the term "will" expressly encompassed codicils, but nonetheless declared that the anti-revival statute did not require that the phrase "second will" be construed to include a codicil to the first will in every case.⁸² On this basis, the court

75. See, e.g., *In re Moffat's Estate*, 5 Misc. 2d 991, 158 N.Y.S.2d 975 (1956); *In re Hill's Estate*, 176 Misc. 774, 29 N.Y.S.2d 185 (1941); *In re De Coster's Will*, 150 Misc. 807, 270 N.Y.S. 244 (1934); *In re Kathan's Will*, 141 N.Y.S. 705 (1913); see also *Application of Shinn*, 7 Misc. 2d 623, 158 N.Y.S. 2d 921 (1956).

76. See note 67 *supra*.

77. 56 How. Pr. 125 (N.Y. 1878).

78. The first will left the testator's entire estate to his wife. Thereafter, the wife became seriously ill and was not expected to survive. At this point, the testator executed the codicil, leaving half of his estate to collateral relatives and charities. Later, his wife recovered and the testator destroyed the codicil. *Id.* at 126-27.

79. *Id.* at 128.

80. "If after the making of any will, the testator shall duly make and execute a second will, the . . . revocation of such second will shall not revive the first will . . ." 1829 N.Y. Rev. Stats. pt. 2, ch. 6, tit. 1, art. 3, § 53.

81. The court ultimately concluded that the original will had been effectively republished after the destruction of the codicil. *In re Simpson*, 56 How. Pr. 125, 142-43 (N.Y. 1878).

82. The court observed that the statute "evidently refers to a testamentary instrument which assumes to dispose of the testator's entire estate, and not to an instrument which is merely an addition or supplement to a former will; and which has no legal entity independent of the existence of the latter. . . . If this is so then the rule of the common law is still in force in this state, which holds that the destruction of a codicil which only by implication

concluded that the revocation of the codicil by the testator would have left the original will "in full force and effect to the same extent as if the codicil had never been executed."⁸³

Similarly, in *In re Johnston's Will*,⁸⁴ the court concluded that the anti-revival statute should not apply to an instrument that was at most a codicil, and admitted the testator's original will to probate in its entirety.⁸⁵ Although the authority of *Simpson* and *Johnston* has been effectively overruled by *Osburn* and the revision of the New York anti-revival statute, these cases have had a profound effect on the California courts' attitude towards the problem of revival in partial revocation cases.

Partial Revocation in California

The interplay between California's anti-revival statute and the principle of partial implied revocation was first treated by the California Supreme Court in *Estate of Schnoor*.⁸⁶ In *Schnoor*, the testator had initially executed a holographic will leaving her entire estate, both real and personal, to Mrs. Vinson. Two years later, she executed a second holographic will that made several bequests of personal property, and left the residue of the estate to Mrs. Vinson. The second will did not expressly revoke the earlier instrument. Shortly after making the second will, the testator destroyed it.⁸⁷

The testator's heirs contended that both wills had been effectively revoked and that the decedent therefore had died intestate. The court suggested that, if the second will constituted a revocation of the first, revival of the first will would be precluded by Probate Code section 75. As framed by the court, therefore, the issue was whether the execution of the second will constituted a revocation of the first.⁸⁸ The court first noted that the dispositive provisions of the two instruments were not "wholly inconsistent" and hence the earlier will had not been revoked

revoked a former will in part by inconsistent provisions, does, *ipso facto* revive the revoked portions of the will." *Id.* at 131-32.

83. *Id.* at 132.

84. 76 N.Y. Sup. Ct. 157, 23 N.Y.S. 355 (1893).

85. *Id.* at 160-61, 23 N.Y.S. at 357-58. In *Johnston*, the testator duly executed a will, which left his property to various relatives, including a niece. Later, he executed a new will, which he stated was to be an "alteration of his will." This document did not expressly revoke the first, but left all his property to his niece. Subsequently the testator destroyed the second instrument. The court held that the second instrument was at most a codicil and that, on its revocation, the first instrument was revived.

86. 4 Cal. 2d 590, 51 P.2d 424 (1935).

87. *Id.* at 590-91, 51 P.2d at 425.

88. *Id.* at 591, 51 P.2d at 425.

in its entirety.⁸⁹ The court then applied the principle of construction that “[s]everal testamentary instruments executed by the same testator are to be taken and construed together as one instrument,”⁹⁰ and construed the second holographic instrument as a codicil to the first. “[T]he second will gave to Mrs. Vinson exactly what she would have received if the new provisions had been drafted as a codicil.”⁹¹ Having made this determination, the court simply concluded that the second instrument was a codicil; its execution, therefore, did not revoke the first will.⁹²

The court failed to consider the possibility that the earlier will had been partially revoked by the second instrument, whether the second instrument were denominated a will or a codicil, and hence did not address the application of California Probate Code section 75 to a case of partial revocation. Implicit in the court’s holding, however, is the suggestion that a codicil should be treated differently from a will for purposes of revival, a treatment suggested in the early New York case, *In re Simpson*.⁹³

A similar result obtained in *Estate of Shute*.⁹⁴ By her first holographic will, Mrs. Shute left twenty-five dollars a month to her brother-in-law “while he needs it,” and the rest of her estate to her brother and three sisters. By a later will, she again left twenty-five dollars a month to her brother-in-law, but changed the phrase “while he needs it” to “during his life.” Also added to this second will were various specific and pecuniary bequests to certain friends and relatives. A final change was a provision giving her brother twenty-five dollars a month for life in lieu of a share in the residue, which was left to the testator’s three sisters. The second will was not in existence at the testa-

89. Thus, *Estate of Iburg*, 196 Cal. 333, 238 P. 74 (1925), was easily distinguishable, because in that case the dispositive provisions of the two instruments were completely different from one another. *Estate of Danford*, 196 Cal. 339, 238 P. 76 (1925), presented a more difficult problem because the court in *Danford* had viewed the fact that the second will made a complete disposition of the estate as indicative of a complete revocation of the first. See text accompanying notes 60-61 *supra*. The *Schnoor* court concluded that in *Danford* nothing in the context of the two wills required them to be considered as one instrument, and implied that such compelling considerations were present in the instant case. The court, however, failed to specify what those considerations or factors were. *Estate of Schnoor*, 4 Cal. 2d 590, 592-93, 51 P.2d 424, 426 (1935).

90. *Estate of Schnoor*, 4 Cal. 2d 590, 592, 51 P.2d 424, 425 (1935) (quoting CAL. PROB. CODE § 101 (West 1956)); see also *Clarke v. Ransom*, 50 Cal. 595 (1875); see text accompanying notes 50-51 *supra*.

91. *Estate of Schnoor*, 4 Cal. 2d 590, 592, 51 P.2d 424, 425 (1935).

92. *Id.* at 592, 51 P.2d at 425-26.

93. 56 How. Pr. 125 (N.Y. 1878).

94. 55 Cal. App. 2d 573, 131 P.2d 54 (1942).

tor's death.⁹⁵ The trial court found that the second will had completely revoked the first, that the second will had itself been revoked by the testator, and that, because of the anti-revival doctrine, the testator had died intestate.⁹⁶ The appellate court disagreed.

As in *Schnoor*, the appellate court framed the issue in terms of total inconsistency and hence total revocation.⁹⁷ The court indicated that the mere fact that the second will makes a complete disposition of the property does not necessarily control.⁹⁸ What was controlling, according to the court, was whether the execution of the second will had the effect of revoking the first will, that is, whether the two wills were wholly inconsistent within the meaning of Probate Code section 72.⁹⁹ After reviewing the provisions of the two wills, the court concluded that, "[g]enerally speaking, the provisions of the second will were not inconsistent with those of the first insofar as nearly three-fourths of the estate is concerned,"¹⁰⁰ and that, as in *Schnoor*, the second instrument was in effect a codicil, whose execution did not revoke the first will.¹⁰¹

The court did not address the problem of partial revocation because it treated the earlier will as valid in its entirety, including those portions that were inconsistent with the later instrument. The court's holding suggests, however, that a codicil, at least for the purposes of implied revocation, should be treated as wholly ambulatory, and that the partial revocation that arises because of inconsistencies between the codicil and the earlier will does not take effect until the testator dies

95. If a will was last known to be in the testator's possession and is not found at his death, a presumption arises that the testator destroyed it with the intention to revoke. ATKINSON, *supra* note 27, § 97, at 509. That presumption was evidently not rebutted in the *Shute* case.

96. Estate of *Shute*, 55 Cal. App. 2d 573, 574, 131 P.2d 54, 55 (1942).

97. "The specific question is whether the second will contains provisions which are wholly inconsistent with the terms of the prior will." *Id.* at 575, 131 P.2d at 55.

98. "[I]n many cases where both wills are offered for probate the controlling factor is not whether a revocation results from the inconsistent provisions in the second will, but it is the fact that the second will is the last will of the decedent." *Id.* at 576, 131 P.2d at 56. This statement accords with Professor Atkinson's suggestion that, if the testator executes two inconsistent wills and the second disposes of all of the testator's property, it necessarily nullifies the effect of the first. "If the wills are entirely inconsistent, only the latter can stand. This result can be accounted for upon a mechanical basis, and it is not necessary to place the cases of total inconsistency upon the ground that the testator has demonstrated his intention to revoke the first will because of the provisions of the second." ATKINSON, *supra* note 27, § 87, at 450. Atkinson's theory, however, is not consistent with the California statute, which indicates that an actual revocation occurs by virtue of inconsistent provisions. CAL. PROB. CODE § 72 (West 1956).

99. Estate of *Shute*, 55 Cal. App. 2d 573, 577, 131 P.2d 54, 57 (1942).

100. *Id.* at 578, 131 P.2d at 57.

101. *Id.*

with the codicil intact and unrevoked.¹⁰²

Following the decisions in *Schnoor* and *Shute*, the issue of partial revocation and revival remained dormant in California for almost forty years. Recently, the California Court of Appeal undertook to clarify California law on this question in *Estate of Hering*.¹⁰³ By his first will, Hering left the bulk of his estate in trust, naming Elaine Bockin as the life income beneficiary and giving the trustee a power to invade the principal for her benefit. The remainder interest in the trust was to be distributed to the Braille Institute of America. A few months later, the testator executed a "First Codicil" to this will. The codicil referred to the various provisions of the will containing Bockin's name and amended those provisions by deleting Bockin and inserting the name of Evelyn Salib. The testator subsequently revoked the codicil.¹⁰⁴

The trial court determined that the provisions relating to Elaine Bockin in the original will had been revoked by the execution of the codicil and that, because of Probate Code section 75, the subsequent revocation of the codicil did not revive or reinstate those provisions. The trust provisions were therefore inoperative, and the property intended to be in trust should thus pass immediately to the Braille Institute.¹⁰⁵

The appellate court reversed, holding that the anti-revival statute should not apply in the case of a revoked codicil that does not revoke an entire will. Relying primarily on the New York decision, *In re Simpson*,¹⁰⁶ the court noted that Probate Code section 75 is phrased in terms of the revocation of a subsequent "will" and determined that the statute was not intended to apply in the case of a revocation of a codicil. Although Civil Code section 14 states that "[t]he word 'will' in-

102. At the end of the opinion, the court stated: "The decedent having intentionally revoked an instrument which was in practical effect a codicil, no inconsistency remains which nullifies any part of the first will and the same should be accepted as the last will of the decedent." *Id.* at 579, 131 P.2d at 57. It should be noted that, when the anti-revival statute is not at issue, California courts generally hold that a second will disposing of all of the testator's property will revoke a former will by inconsistency. Thus, the *Schnoor* and *Shute* cases have been deemed aberrational. See French & Fletcher, *A Comparison of the Uniform Probate Code and California Law with respect to the Law of Wills*, in *COMPARATIVE PROBATE LAW STUDIES* 331, 345-46 & n.49 (1976).

103. 108 Cal. App. 3d 88, 166 Cal. Rptr. 298 (1980).

104. *Id.* at 90, 166 Cal. Rptr. at 298-99. The attorney who prepared this codicil testified that the decedent believed that revocation of the codicil would reinstate the provisions of the original will. The trial court subsequently struck this testimony, ruling it inadmissible. The appellate court's opinion did not discuss the propriety of this ruling. *Id.* at 91, 166 Cal. Rptr. at 299.

105. *Id.*

106. 56 How. Pr. 125 (N.Y. 1878); see text accompanying notes 77-85 *supra*.

cludes 'codicil,'” the term will is not synonymous with that of codicil. According to *Simpson*, quoted with approval in *Hering*, “in the term will, shall be embraced all codicils to a will, so that wherever the word will is used it shall have the same effect as if it had been written “a will and all codicils to it” to avoid the necessity of a repetition.”¹⁰⁷

The court also noted that this interpretation of section 75 is in accord with the earlier decisions in *Schnoor* and *Shute*, which emphasized the distinction between a will and a codicil. Unless the codicil expressly revokes the will, or is wholly inconsistent with it, the codicil does not operate as a revocation of the earlier will for purposes of section 75.¹⁰⁸ The court in *Hering* concluded that “section 75 applies only to a revoked will, rather than a portion of the will,”¹⁰⁹ and that “the common law rule, that revocation of a codicil leaves the original will intact, still prevails in this State.”¹¹⁰

Present Status of the California Rule

California courts have limited the operation of California's anti-revival statute to cases in which a prior will executed by the testator was entirely revoked by a subsequent instrument, either because of an express revocation clause or because the later instrument contained dispositive provisions that were wholly inconsistent with those of the prior will. The courts purport to distinguish between revocation by a subsequent will and revocation by codicil, applying section 75 only to the former situation, but it seems clear that the underlying basis for the distinction is total as opposed to partial revocation. The test for the application of section 75 is whether the two instruments are substantially similar; if they are, the anti-revival statute will not be applied

107. Estate of *Hering*, 108 Cal. App. 3d 88, 93 n.2, 166 Cal. Rptr. 298, 300 n.2 (quoting *In re Simpson*, 56 How. Pr. 125, 131 (N.Y. 1878)).

108. *Id.* at 97, 166 Cal. Rptr. at 303.

109. *Id.* at 99, 166 Cal. Rptr. at 304 (emphasis in original).

110. *Id.* at 93, 166 Cal. Rptr. at 300. The court in *Hering* stated that to hold otherwise would be tantamount to judicial legislation, revising § 75 “to include words not in the statute” This would “make it read similar to the current New York statute, which now provides in relevant part, ‘If after executing a will the testator executes a later will which revokes or alters the prior one, a revocation of the later will does not, of itself, revive the prior will or any provision thereof.’” *Id.* at 95, 166 Cal. Rptr. at 302 (quoting N.Y. Est., POWERS & TRUSTS LAW § 3-4.6(a) (McKinney 1981)) (emphasis the court's). The court did not refer, however, to *Osburn v. Rochester Trust & Safe Co.*, 209 N.Y. 54, 102 N.E. 571 (1913), in which the court applied the anti-revival statute to a case of partial revocation many years before the New York statute was revised. See text accompanying notes 67-76 *supra*.

and, upon a revocation of the later instrument, the earlier instrument will be given effect.

Under the California rule, therefore, if a testator makes a will leaving his or her estate to *A*, then makes a will leaving the estate to *B*, and later destroys the second will, section 75 applies and the testator dies intestate. If, however, a testator makes a will leaving Blackacre to *A* and the residue to *B*, then makes a second will leaving Blackacre to *X* and the residue to *B*, and thereafter revokes the second will, the courts are likely to denominate the second will a codicil. In that situation, the anti-revival statute will not be applied, and the provisions of the first instrument will control the disposition of the testator's property.

This distinction between will and codicil, or more realistically between total and partial revocation, apparently derives from an application of the common law and ecclesiastical rules regarding the time at which a revocation is deemed effective. California courts have long applied the ecclesiastical rule to a total revocation, so that in the first of the preceding hypotheticals, when the testator executed the second will, the gift to *A* was immediately revoked and could not be revived because of section 75. When the revocation is partial, however, the courts apply the common law rule, so that the revocation contained in the later instrument is ambulatory and has no effect until the testator dies with the later instrument in force. Thus, in the second example, the gift of Blackacre to *A* was never effectively revoked, and the anti-revival statute has no application. The gift to *A* would only be revoked if the testator died with the later instrument unrevoked.

This analysis is supported by the *Shute* court's reasoning:

It is not a question of whether the act of revoking the second will served to revive or restore the first one, but of whether the act of executing the second will in and of itself had the effect of revoking the first will. . . . "[W]e think that the second instrument was in effect a codicil and that its execution did not revoke the first will. . . ."

The decedent having intentionally revoked an instrument which was in practical effect a codicil, no inconsistency remains which nullifies any part of the first will¹¹¹

In *Shute*, the possible revocation was by implication, that is, the two instruments were partially inconsistent;¹¹² there was no express revocation of the earlier will or any of its provisions. The court in *Her-*

111. Estate of *Shute*, 55 Cal. App. 2d 573, 577-79, 131 P.2d 54, 57 (1942) (quoting Estate of *Schnoor*, 4 Cal. 2d 590, 592, 51 P.2d 424, 425-26 (1935)).

112. 55 Cal. App. 2d at 577, 131 P.2d at 57 (1942).

ing, however, indicated that the same rule should apply when there is an express partial revocation.¹¹³

The distinction between will and codicil, or between total and partial revocation, as a basis for the operation of section 75, could lead to absurd results. For example, suppose that a testator having an estate valued at \$1,000,000 makes an initial will leaving \$750,000 to *A* and the residue to *B*. Later she executes a second instrument, leaving \$750,000 to *A* and the residue to *C*. She subsequently tears up the second instrument. Under the *Shute* case, a change in the disposition of only one quarter of the estate is a mere codicil, and the first will, deemed unrevoked, may be probated in its entirety.¹¹⁴ If the gift to *A* is only \$10,000, however, the will-codicil distinction falters: the court may denominate the second instrument a codicil and probate the first will in its entirety; or, because the change is so extensive, the court may deem the residuary gift to *B* to have been revoked at the time of the execution of the second instrument, thereby causing the residue to pass by intestacy. Arguably, under the rationale of *Hering*, the revocation of the residuary gift was never effective, and the anti-revival statute should not be applied, leaving the first will entirely intact.¹¹⁵

The only qualitative distinction between the preceding hypothetical and the facts of *Hering* is the testator's intent. In the hypothetical, there is no evidence of the testator's intent other than substantially inconsistent dispositions; in *Hering*, there was credible, although possibly inadmissible,¹¹⁶ testimony that the testator intended that the provisions of the earlier will be reinstated.

The key to the question of revival should be the testator's intent. Nevertheless, the California anti-revival statute applies without regard to the actual or probable intent of the testator. California courts, to effect the testator's intent and avoid intestacy as much as possible, have carved out an exception to the operation of the statute based on the illogical distinction between total and partial revocation.

All solutions to the problems of revival, both judicial and legisla-

113. Estate of *Hering*, 108 Cal. App. 3d 88, 98, 166 Cal. Rptr. 298, 304 (1980).

114. The court in *Shute* noted that "the provisions of the second will were not inconsistent with those of the first insofar as nearly three-fourths of the estate is concerned," and held that the second will should be treated as a codicil. 55 Cal. App. 2d 573, 578, 131 P.2d 54, 57 (1942).

115. The court in *Hering* stated that there can be no revocation for purposes of § 75 without either an express revocation or wholly inconsistent provisions, neither of which is present in this example. 108 Cal. App. 3d 88, 97, 166 Cal. Rptr. 298, 303 (1980).

116. If § 75 were deemed applicable, such evidence would be inadmissible, and the trial court so ruled. See notes 34, 104 *supra*.

tive, have been found wanting.¹¹⁷

The primary problem with the common law rule of "automatic revival," under which revocation of the second instrument automatically leaves the first will in force, is that it may thwart the decedent's intention to die intestate. It may restore and give effect to a will that the decedent had expressly revoked,¹¹⁸ thus disregarding the testator's manifest desires.¹¹⁹

The major criticism leveled at the ecclesiastical rule, which gives effect to the intention of the testator in determining whether to revive an earlier and revoked will, is that it effectively allows the validity of a will to be established by extrinsic evidence.¹²⁰ Allowing extrinsic evidence, however, may allow fraud. The framers of the New York anti-revival legislation posited the dangers of admitting parol evidence as the primary rationale for the adoption of the statute: "[T]he admission of parol evidence in any case to ascertain the intentions of the deceased is contrary to the whole spirit and policy of the statute of wills, and is calculated to let in all the mischiefs which its salutary provisions were framed to prevent."¹²¹ Thus, the primary purpose of the anti-revival statute is the prevention of fraud.

The operation of the statute, however, may invite fraud. Suppose that a testator dies leaving a will that gives all his property to *A*, but when this will is offered for probate, the testator's next of kin produces evidence that a later will had been executed that left the estate to *B*. The second will is not in existence, but may be established by the testimony of a single witness for the purpose of establishing revocation of the earlier will. The testator is thus deemed to have died intestate, and, under the anti-revival statute, extrinsic evidence is not admissible to prove otherwise.¹²²

117. It has been suggested that "[n]o 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 3, § 21.55, at 443.

118. 2 BOWE & PARKER, *supra* note 3, § 21.54, at 438, 443; Ferrier, *supra* note 3, at 267-68, 271.

119. ATKINSON, *supra* note 27, § 92, at 477.

120. 2 BOWE & PARKER, *supra* note 3, § 21.54, at 443.

121. Report of Revisers of N.Y. Statutes of 1827-1828, pt. II, c. VI, § 61 in 3 N.Y. Rev. Stat. app. 633-34 (2d ed. 1836), *quoted in* Ferrier, *supra* note 3, at 267.

122. *See* Estate of Bassett, 196 Cal. 576, 238 P. 666 (1925); *see also In re Andrews' Will*, 88 N.Y.S.2d 32, 38 (1949), in which the New York Surrogate's Court, confronted with such a situation, stated: "It is a matter of important public policy that a testator should not be exposed to the frustration of his testamentary provisions by the too facile acceptance of oral testimony to the effect that his will had been revoked by a later alleged, but missing, will under some such circumstances as those by which we are confronted in the present instance."

A rule that fails to effect the intentions of testators, that forces courts to draw arbitrary distinctions to prevent its operation,¹²³ and that may promote fraud should be abandoned. Although there may be no ideal solution to the revival problem, the dangers that California's statute seeks to obviate are less than the evils that it fosters. A variation of the ecclesiastical rule should be substituted for California's present anti-revival statute.

Such legislation might take the form of Uniform Probate Code section 2-509,¹²⁴ which constitutes a limited revival doctrine.¹²⁵ Under this section, if a testator executes a second will, which totally or partially, either by express terms or by implication, revokes a prior will, and thereafter revokes the second will by some physical act, such as tearing or burning, then a presumption arises that the first will is still revoked, either in whole or in part. Extrinsic evidence, however, is admissible to rebut this presumption, either in the form of a testator's contemporaneous or subsequent statements that he or she intended the first will to be effective, or as evidence of the circumstances surrounding the revocation of the second will.¹²⁶ This principle applies regardless of whether the second instrument is denominated a will or a

A person, having duly executed his will, should . . . be able to feel some sense of security and reassurance as to safely reposing confidence in probate courts to protect his solemn directions in relation to the posthumous devolution of his earthly possessions. This is especially true in a case where (as here) neither the alleged revoking instrument, nor a proven copy thereof, is produced." See also Evans, *Comments on the Probate Code of California*, 19 CALIF. L. REV. 602, 611-12 (1931); Ferrier, *supra* note 3, at 272-73.

123. See text accompanying notes 114-15 *supra*.

124. Uniform Probate Code § 2-509 provides as follows: "(a) If a second will which, had it remained effective at death, would have revoked the first will in whole or in part, is thereafter revoked by acts under Section 2-507, the first will is revoked in whole or in part unless it is evident from the circumstances of the revocation of the second will or from testator's contemporary or subsequent declarations that he intended the first will to take effect as executed. (b) If a second will which, had it remained effective at death, would have revoked the first will in whole or in part, is thereafter revoked by a third will, the first will is revoked in whole or in part, except to the extent it appears from the terms of the third will that the testator intended the first will to take effect."

125. UNIFORM PROBATE CODE § 2-509, Comment. The issue of revival was the subject of some dispute at the National Conference of Commissioners on Uniform State Laws. Some Reporters suggested that, because the Code facilitates the execution of wills, revival should not be permitted in the absence of a re-execution of the revoked will or the execution of a new will incorporating the revoked will by reference. Other Reporters advanced the view that a testator's clear intent ought to be given effect, even if this involves the admission of parol evidence. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM PROBATE CODE SECOND TENTATIVE DRAFT § 2-508, Comment at 55 (Fourth Working Draft 1968). The latter view was ultimately adopted as § 2-509.

126. R. Effland, *Wills: Execution, Deposit And Contractual Arrangements*, UNIFORM PROBATE CODE PRACTICE MANUAL § 2.10, at 25-26 (1972).

codicil. Thus, if a testator makes a will and then a subsequent codicil that revokes part of the will, and he or she later destroys the codicil, the first will may be probated in its entirety if it is evident, either from the testator's statements or the general circumstances, that the testator intended the entire original will to be effective.¹²⁷

The adoption of the Uniform Probate Code provision would obviate many of the difficulties faced by the California courts in the partial revocation cases. For example, in *Estate of Hering*,¹²⁸ the court could have admitted the oral statements made by the decedent to his attorney indicating that he intended his earlier will to stand and, on the basis of this evidence of the testator's intent, could have rationally concluded that the presumption of prior revocation had been overcome. In *Estate of Shute*,¹²⁹ the two instruments' substantial similarity could be interpreted as indicating the testator's intent that his original will be given effect. Substantial dissimilarity between the two instruments could be interpreted as indicating the testator's intent that the original will not be given effect.

The drafters of the Uniform Probate Code recognized the dangers inherent in the admission of extrinsic evidence to establish the testator's intent, but determined that the use of extrinsic evidence to establish intent in the revival situation is justified for several reasons:

- (1) [S]uch evidence is admissible in any case involving revocation by act in order to prove that the act itself is intended as a revocation;¹³⁰
- (2) in many states the same evidence could be used to establish dependent relative revocation¹³¹ and thus allow probate of the second will as unrevoked;¹³² and (3) there is general understanding among

127. *Id.*

128. 108 Cal. App. 3d 88, 166 Cal. Rptr. 298 (1980). See notes 103-14 & accompanying text *supra*.

129. 55 Cal. App. 2d 573, 131 P.2d 54 (1942). See notes 94-102 & accompanying text *supra*.

130. Revocation of a will generally requires some evidence of an intention to revoke on the part of the testator. Because a physical act is inherently ambiguous, extrinsic evidence is admissible to show the accompanying intent to revoke. See ATKINSON, *supra* note 27, § 88, at 454.

131. The doctrine of dependent relative revocation is employed by courts to give effect to a will when a testator has purportedly revoked that will, either by physical act or subsequent instrument, while laboring under a mistake of law or fact. Finding that the revocation was dependent upon the existence of the situation as the testator believed it to be, courts applying this doctrine will hold that the will is not revoked. *Id.*

132. See, e.g., *In re Alburn's Estate*, 18 Wis. 2d 340, 118 N.W.2d 919 (1963), in which the court held that the revocation of a second will, made on the erroneous assumption that a first will would be thereby revived, was not to be given effect under the theory of dependent relative revocation. A similar result was reached in *Estate of Thompson*, 185 Cal. 763, 198 P. 795 (1921).

non-lawyers that the earlier will, still intact, is good if the revoking instrument is destroyed.¹³³

The testator's intent would be best served by a statute that avoids both the arbitrary distinctions drawn by California courts between wills and codicils and partial intestacy, the result under the current New York law.

Conclusion

This Article has traced the history of the California anti-revival statute and analyzed its application by the California courts. The Article concludes that the statute has resulted in anomalous distinctions, may thwart the intentions of testators, and is conducive to fraud. Because of this, California Probate Code section 75 should be repealed and Uniform Probate Code section 2-509 should be adopted.

133. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM PROBATE CODE § 2-508, Comment at 97 (Third Working Draft 1967).