Wills & Estates
Winter Term 2018

Lecture Notes – No. 7

REVOCATION OF WILLS

The Succession Law Reform Act provides the basic rule:

> 15. A will or part of a will is revoked only by,
>
> (a) **marriage**, subject to section 16;
>
> (b) another will made in accordance with the provisions of this Part;
>
> (c) **a writing,**
>
> **(i) declaring an intention to revoke**, and
> (ii) made in accordance with the provisions of this Part governing making of a will; or
>
> (d) **burning, tearing or otherwise destroying it by the testator or by some person in his or her presence and by his or her direction with the intention of revoking it**.

Thus, revocation is either automatic (by operation of law) or by explicit or implicit act of the testator or testatrix.

s.15(a) Revocation by Operation of Law: Marriage

At one time, the common law and earlier statutes established grounds that would automatically revoke a Will in a variety of circumstances. The present law takes a less drastic attitude but still presumes revocation on marriage. Why? Marriage represents a fundamental change in one's life by which one acquires significant new rights and obligations based on social expectations which are recognized by law.

Please note:
Both Alberta and British Columbia have reformed the succession law in those provinces to eliminate this form of revocation.

Banton v Banton
(1998), 164 DLR (4th) 17 (Ont. Gen. Div.); cb, p. 334

Marriage is a contract, and is void if either of the parties is incapable of making that contract through mental incapacity. The test for testamentary capacity is different than capacity to marry. Notwithstanding that one might lack testamentary capacity but have the capacity to marry, marriage in such circumstances revokes an earlier will.

In this case, the elderly testator married a second wife in suspicious circumstances and then executed a new Will. Cullity J distinguished between capacity to marry and testamentary capacity:

> A finding of a lack of testamentary capacity does not necessarily determine whether an individual has the mental capacity to marry; nor is testamentary capacity at the time of marriage required before the marriage will revoke a will: *McElroy, Re* (1978), 22 O.R. (2d) 381 (Ont. Surr. Ct.); *Park Estate, Re*, [1953] 2 All E.R. 1411 (Eng. C.A.).
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> **It is well established that an individual will not have capacity to marry unless he or she is capable of understanding the nature of the relationship and the obligations and responsibilities it involves. The burden of proof on this question is on those attacking the validity of the marriage and, in my judgment, it has not been discharged in this case. There is virtually nothing in the evidence to suggest that George Banton's mental deterioration had progressed to the extent that he was no longer able to pass this not particularly rigorous test. The medical evidence indicates his acceptance of the marriage and even in the last months of his life when he was at Village Park, he spoke of his wish to return to his wife -- albeit along with his then caregiver and companion, Ms. Yolanda Miranda.**
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> …
>
> **While I believe that it may well be the case that a person who is incapable both with respect to personal care and with respect to property may be incapable of contracting marriage, I do not believe that incapacity of the latter kind should, by itself, have this effect. Marriage does, of course, have an effect on property rights and obligations, but to treat the ability to manage property as essential to the relationship would, I believe, be to attribute inordinate weight to the proprietary aspects of marriage and would be unfortunate.** Elderly married couples whose property is administered for them under a continuing power of attorney, or by a statutory guardian, may continue to live comfortably together. They may have capacity to make wills and give powers of attorney. I see no reason why this state of affairs should be confined to those who married before incapacity to manage property supervened.
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> George Banton was found by Dr. Chung to have capacity as far as personal care was concerned. Moreover, despite his physical problems, his weakened mental condition and his loss of memory, he was able to carry on more or less normal discourse on simple everyday matters. Strangers, like Carol Davis and Mr Allen, who met him briefly did not notice anything abnormal about his mental state. On the basis of a one-hour examination Dr. Silberfeld concluded that he had capacity to manage his property. Obviously he was still capable of presenting a brave face to the world. The more thorough examination by Dr. Chung revealed what those close to him already knew: that his judgment was severely impaired and his contact with reality tenuous. Despite these problems, I have no doubt that, with care and attention and avoidance of stress, **he was capable of coping with the**

> **more mundane problems of everyday living and I do not see why the right to marry should be withheld from persons in his position**.
>
> Accordingly… I find that, notwithstanding George Banton's incapacity to manage property on December 17, 1994, he had capacity to marry and that his marriage to Muna was valid. In consequence, his will of January 30, 1991, was revoked and, in view of my other findings, he died intestate.

Conflict of laws:

There is a very nice illustrative case that intersects with the law of revocation of wills.

In **Davies v. Collins, 2011 NSCA 79**, the testator entered into marriage on his death-bed in a foreign jurisdiction. He was domiciled in Nova Scotia but resident in the foreign jurisdiction. The law of Nova Scotia governed the admission to probate of his will and it was held, after scrutiny of the validity of the marriage and its consequences under foreign law, that the will was revoked. Per Bryson J.A.:

> 13 Under s. 17 of the Nova Scotia Wills Act, the marriage of a testator revokes his or her Will. The law of Trinidad and Tobago is to the same effect, except in the cases of marriages in extremis. Both the Wills Act and Probate Act, Laws Trinidad & Tobago, c. 9:03, s. 48 and the Marriage Act, Laws Trinidad & Tobago, c. 45:01, s. 42 provide that marriages in extremis do not revoke a prior Will.
>
> 14 In essence, the argument of Ms. Davies is that the status of Dr. Davies' last Will should be determined under the law of one jurisdiction - that of Trinidad. She points to the apparent contradiction between Nova Scotia recognizing a marriage in extremis — a form of marriage not known to our law — but then giving effect to s. 17 of the Wills Act, whereas in Trinidad marriages in extremis do not revoke a Will.
>
> 15 On appeal, Ms. Davies agreed that the judge was correct to recognize the validity of the marriage between Dr. Davies and Ms. Collins since it was a valid marriage in Trinidad, the lex loci celebrationis, (the law of the place of celebration). There was no challenge regarding Dr. Davies' capacity to marry. But Ms. Davies argues that the judge erred by not applying the matrimonial property consequences of such a marriage according to the law of Trinidad. For marriages in extremis, that means no revocation of Dr. Davies' Will.
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> ...
>
> [after reviewing the authorities on domicile]
>
> 26 To summarize on this point: in each of these cases the relevant domicile is that of the testator at the time of marriage. Matrimonial domicile is not used in a sense independent of the testator's personal domicile, as Ms. Davies is arguing. Justice Rosinski made no error of law in declining to accept Ms. Davies' argument here. Once the appellant accepts — and the judge found — that Dr. Davies' place of domicile at the time of marriage

> was Nova Scotia, revocation of the Will fell to be determined under Nova Scotia law.

The interesting point here is that the form of the marriage in Trinidad would not have revoked the will if the testator was domiciled there, but given his domicile was in Nova Scotia, the consequence was to revoke the will given that Nova Scotia law governed the succession law aspects of the dispute.

s.16(a): Wills Made 'In Contemplation of Marriage' are Not Revoked

> 16. A will is revoked by the marriage of the testator except where…
>
> (a) there is a declaration in the will that it is made in contemplation of the marriage;

Re Coleman
[1976] Ch 1 (Ch); cb, p. 337

A will made in contemplation of marriage *to a particular person* is not automatically revoked upon the celebration of that marriage – the Will may feature a declaration (express or implied) that the Will is to survive.

Here the testator was a widower when he married his second wife. Two months before the marriage he made a new Will giving her (she was described as 'my fiancee' and her name) property including his home. He died a year later. The widow argued that the marriage revoked the Will and that the testator died intestate. His brother argued in favour of the Will. Megarry J found for the brother on the construction of the whole of the Will notwithstanding that the term 'fiancee' seemingly contemplates a change of circumstances in the circumstances of the testator:

> 'Fiancee' is a word which means a woman who is engaged to be married, or is betrothed, and 'my fiancee' must mean a woman engaged to be married to the speaker. When a man speaks of 'my fiancee' he is speaking of 'the woman to whom I am engaged to be married.' It seems to me that in ordinary parlance a contemplation of marriage is inherent in the very word 'fiancee.' The word 'wife' is a word which denotes an existing state of affairs, and one that will continue until death, or, these days, divorce: but I do not think that it could reasonably be said that there inheres in the word 'wife' any contemplation of, a change of that state of affairs, whether by death or divorce. 'Fiancee' seems to me to be quite different, in that it not only describes an existing state of affairs but also contemplates a change in that state of affairs.

MacLean Estate v Christiansen
2010 BCCA 374; cb., p.341, fn 11

The parties were cohabiting, decided to marry, the testator made a Will, they married, and he then died. Was the Will revoked? No.

The Will spoke of the cohabitational spouse then wife as 'my spouse'. The trial judge held this was insufficient to find that the Will was made in contemplation of marriage. Per Pitfield J:

> [17] With respect, the reference to "my spouse, Karen Christiansen", is not a declaration of intention to marry Ms. Christiansen. In common parlance, the testator and Ms. Christiansen were "common law spouses" when the will was executed. By the time they were legally married, the testator and Ms. Christiansen were also spouses for purposes of legislation such as the *Family Relations Act,* R.S.B.C. 1996, c. 128 and the *Income Tax Act,* R.S.C. 1985, c. 1 (5th Supp.) as they had cohabited by that time for more than two years in a marriage-like relationship. The fact the parties could be described as spouses did not accord them the status of married persons.
>
> **[18] The *Wills Act* is not ambiguous. It speaks of the consequences associated with marriage. Marriage is the lawful union of one person with another. A common law relationship is not marriage. A will cannot survive the conversion of a common law relationship to one of lawful marriage absent the finding of a declaration within the will that it is made in anticipation of that marriage, and the conversion of that relationship to one of legal marriage. In this case, the only reference to the status of Ms. Christiansen, then and in the future, is the word "spouse" contained in clause 3.b., and that is not sufficient.**
>
> [19] It is obvious that the result dictated by the *Wills Act* is inappropriate in this case. If the testator had made his will when the parties were not legally married and the parties had remained in a common law relationship from and after June 22, 2007, the will would have been valid. What defeats the will is the conversion of a marriage-like relationship, which is accorded virtually all of the rights and obligations attached to a legal marriage, to one of legal marriage. Perhaps it is for that reason, among others, that Bill 28, introducing the *Wills, Estates and Succession Act* during the 2008 Provincial Legislative Session contains no provisions comparable to ss. 14 and 15 of the *Wills Act*.

On appeal, 2010 BCCA 374, the trial judge was reversed:

Per Kirkpatrick JA:

> [18] The appellant contends that the chambers judge erred in not finding that the use of the term "spouse" in conjunction with the creation of the spousal trust in favour of Ms. Christiansen, together with the extrinsic evidence before the court, was sufficient to establish that it was

Mr. MacLean's intention that the marriage to Ms. Christiansen would not revoke the will.

[19] Ms. Christiansen opposes the appeal on the basis that the law in this province is clear and well-settled – in the absence of a declaration that the marriage is contemplated, the marriage of a testator revokes any prior wills.

…

[28] The question then in the case at bar is, whether the words in the will "my spouse, KAREN CHRISTIANSEN", and the creation, by words, of a spousal trust in favour of Ms. Christiansen and the appointment of "Karen" as the trustee of the spousal trust fund amount to sufficient declaration that the will is made in contemplation of the subsequent marriage.

[29] The respondent submits that in accordance with the holding of the chambers judge, the words do not amount to sufficient declaration, absent which the Court may not consider extrinsic evidence.

…

[33] The *Shorter Oxford English Dictionary*, 6th ed. (Toronto: Oxford University Press, 2007), notes the origin of the word "spouse" from the Latin *sponsus* bridegroom, *sponsa* bride, and defines "spouse" as a "married person; a person's lawfully married husband or wife".

[34] Similarly, in *Taylor v. Rossu*, 1998 ABCA 193 (CanLII), 1998 ABCA 193, 161 D.L.R. (4th) 266 at para. 92, the court held that "The ordinary meaning of the word "spouse" is a person who is joined in lawful marriage to another person."

[**35] On that basis, there is arguably no ambiguity and the term used in the will can be said to refer to Mr. MacLean's wife whom he was yet to marry, Ms. Christiansen.**

[36] By contrast, the chambers judge found no ambiguity because, at the time in question, Mr. MacLean and Ms. Christiansen were living in a "common law" (or "spouse-like") relationship. There is authority to support that conclusion…

[37] If one accepts that the word "spouse" may refer to either a legally married person or a person living in a marriage-like relationship, then the use of the word in the circumstances at bar was ambiguous. Extrinsic evidence is thus admissible to determine the meaning in this case.

[38] The circumstances of the making of the will in this case were summarized in the appellant's factum:

(a) The Will was made after joint tax and estate planning with Ms. Christiansen.
(b) Both Mr. MacLean and Ms. Christiansen were sophisticated financial professionals.
(c) The Will was executed after the wedding date and arrangements had been set.
(d) The solicitor preparing the Will knew of the wedding; was invited to and attended the wedding reception and advised Mr. MacLean and Ms. Christiansen on honeymoon travel arrangements to Italy.
(e) [The Will] was prepared at a time when Mr. MacLean and Ms. Christiansen were living in a stable, long-term, common-law relationship.
(f) The Will provides for benefits to Ms. Christiansen under a spousal trust.
(g) The Will speaks of Ms. Christiansen as his spouse.
(h) The Will addresses and balances the needs of Ms. Christiansen and of Mr. MacLean's children.
(i) As their wedding date approached in May 2007, Mr. MacLean told Ms. Christiansen that he intended to have a Will and Power of Attorney in place before they were legally married.

[39] When one examines the terms of the will and the circumstances in which it was prepared, there can be no doubt that Mr. MacLean intended that the will would survive his marriage to Ms. Christiansen and provide for her for the remainder of her life. On her death, the one-half of the residue of the spousal trust then remaining would form part of the residue for the benefit of the testator's children. This was obviously a carefully constructed estate plan. The extrinsic evidence overwhelmingly supports the construction that "spouse" meant Mr. MacLean's legal spouse, to whom he was, at the date of making the will, not married but was clearly contemplating marrying.

[40] Further, the whole will was drafted in a manner in which it cannot be said that only the gift to Ms. Christiansen was contemplated. The spousal trust and the children's fund were planned as an integral part of a whole. In my opinion, the whole will was, when one examines the extrinsic evidence, expressed to be made in contemplation of the impending marriage to Ms. Christiansen.

[41] As the Supreme Court of Canada stated in *Marks v. Marks* 1908 CanLII 22 (S.C.C.), (1908), 40 S.C.R. 210 at 212:

> In other words, it is claimed that there cannot be any one who can answer to that description "my wife" except the one person who may in law be decided to be such.
>
> I do not think the law so binds us.

> Unless it does, I do not see why we should pervert the most obvious intention of this testator. I think we are bound to read his language in light of all the circumstances that surrounded, and were known to him when he used it and give effect to the intention it discloses when so read.

[42] This construction of the will further satisfies the legal presumption against an interpretation of a will that would create an intestacy. Thus, in *Re Harrison; Turner v. Hellard* (1885), 30 Ch. D. 390 at 393-394 (C.A.), Lord Esher, for the Court, held:

> ... when a testator has executed a will in solemn form you must assume that he did not intend to make it a solemn farce – that he did not intend to die intestate when he has gone through the form of making a will. You ought, if possible, to read the will so as to lead to a testacy, not an intestacy. This is a golden rule.

[43] It follows that I would find that the references to "spouse" in the will and the extrinsic evidence establish that Mr. MacLean's will was made in contemplation of his marriage to Ms. Christiansen. I would therefore order that the will be admitted to probate.

Thus, 'in contemplation of marriage' is a question of fact.

Re Ramalho Estate
2008 CanLII 35270 (Ont S.C.J.)

A Will made in contemplation of marriage remains valid if the marriage was never entered into, and the gift to the named spouse was not conditional on the marriage being entered into by the parties.

s.16(b): Spousal Election to Preserve the Will

> 16. A will is revoked by the marriage of the testator except where… (b) the spouse of the testator elects to take under the will, by an instrument in writing signed by the spouse and filed within one year after the testator's death in the office of the Estate Registrar for Ontario;

There are few cases on this provision which allows for the surviving spouse to preserve the will rather than take on the intestacy.

Re Browne and Dobrotinic
[1958] OWN 91 (HC); cb, p.343

The deceased was married. He separated from his first wife and then began to live with his second wife; they cohabited for many years, and were married after a divorce decree was issued in respect of the first marriage. The plaintiff made a Will in favour of the second wife during the period of cohabitation, and she later filed an election under the predecessor section to s.16(b) at the time of probate but in the wrong office. However,

notice was properly given to parties that might contest the Will and thus there were no grounds for revocation.

Per Moorhouse J:

> It should be observed that in England the Law of Property Act, 1925 (Imp.), c. 20, s. 177, provides that a will expressed to be made in contemplation of marriage is not revoked by solemnization of the marriage contemplated. Were this Court to adopt the argument of the applicant it would be a clear case of a strict and literal interpretation of the statute defeating the purpose of the statute.
>
> **Having regard to the intention of the Legislature as this Court understands it from a reading of the Wills Act, it must be held that the matter of filing was a directory matter and did not go to the substance of the legislation. In the instant case all those parties who would inherit in the event of an intestacy have been notified and have failed to appear. This Court must find that the election was properly made and that the will is a valid will and was not revoked by the failure to file the election so made in the proper office** and that, accordingly, a good title has been shown by the vendor.

s.16(c): Preservation of Powers of Appointment

A disposition in a Will made pursuant to a power of appointment and where the Will is revoked by marriage will still be effective where the property does not go to the testator's personal representative, heirs, or estate in default of the appointment.

The original section 18(2) of the Wills Act 1837 (UK) read:

> Every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin under the Statute of Distributions

[It now reads: '(2) A disposition in a will in exercise of a power of appointment shall take effect notwithstanding the testator's subsequent marriage unless the property so appointed would in default of appointment pass to his personal representatives.']

The Succession Law Reform Act reads:

> 16. A will is revoked by the marriage of the testator except where… (c) the will is made in exercise of a power of appointment of property which would not in default of the appointment pass to the heir, executor or administrator of the testator or to the persons entitled to the estate of the testator if he or she died intestate.

The meaning of this section (as is its counterpart under the Wills Act 1837, both in its original form and as amended) is confusing. Certainly it relates to powers of appointment – that is, where the donor gives a 'power' to donee, who may in his or her absolute discretion appoint (give to another) the donor's property to an appointee (a third party).

Suppose as follows:

1. In 2002, A is given property and a power of appointment whose terms say that s/he may appoint the property to any person that s/he wishes **but without any provision for the property's disposition if A fails to appoint the property**.

2. In 2003, A makes a will in which s/he exercises the power of appointment by directing his/her personal representative (executor) to give the property to C.

3. In 2004, A marries.

The effect of the marriage is to revoke the Will; thus, on A's death and there being no new Will, the property will fall into A's estate and will go to A's spouse on an intestacy.

4. Suppose instead, that A was given a power of attorney exercisable in A's will **but under its terms provided a gift in default of its exercise to the Canadian Red Cross**.

The effect of the marriage is to revoke the Will except in respect of the exercise of the power of appointment, because the property would 'in default of the appointment pass to the heir, executor or administrator of the testator or to the persons entitled to the estate of the testator if he or she died intestate'.

Re Gilligan
[1950] P 32; cb, p.346

Here there was a trust settled by the testator in 1890 in contemplation of marriage. This meant that the property subject of the trust was to be held for the benefit of the testator and his wife for life, with a gift over to any children. If there were no children, then the testator could appoint one-half of the trust property in his Will, and, the other half of the trust property would go as on an intestacy as if the testator had not been married. If the testator did not in fact appoint one-half under his will, then that half would also go as on an intestacy as if the testator had not been married.

The wife died in 1902. The testator and his wife had no children on her death.

In 1910, the testator made a Will exercising the power of appointment under the trust in favour of his nephews and nieces except for £500 which went into his estate.

In 1912, the testator married and made a second marriage settlement – the second wife was given a life interest in the trust funds. In 1916, he died. There were no children of this marriage either. In 1946, the second wife died and thus her life interest terminated.

The issue then became whether the marriage in 1912 had revoked the 1910 will – or did the exercise of the power of appointment survive because there was a default provision in favour of the testator's nieces and nephews. As the widow had no interest as the property would be distributed on an intestacy as if the testator had never married, the clause survived the subsequent marriage.

Partial Revocation by Change In Circumstances; s.17(2) and Divorce

Please note the partial abolition of a common law rule in the statute:

> 17.(1) Subject to subsection (2), a will is not revoked by presumption of an intention to revoke it on the ground of a change in circumstances.
>
> *Exception on termination of marriage*
>
> (2) Except when a contrary intention appears by the will, where, after the testator makes a will, his or her marriage is terminated by a judgment absolute of divorce or is declared a nullity,
>
> (a) a devise or bequest of a beneficial interest in property to his or her former spouse;
>
> (b) an appointment of his or her former spouse as executor or trustee; and
>
> (c) the conferring of a general or special power of appointment on his or her former spouse,
>
> are revoked and the will shall be construed as if the former spouse had predeceased the testator.

The statute's terms require that the contrary intention be apparent on the face of the will rather than implied from the surrounding circumstances; see ***Re Billard Estate*** **(1986), 22 ETR 150 (Ont HC); cb, p.349.**

The provision, and similar provisions in other provinces, have been held to be of retrospective effect; *Page Estate v. Sachs* (1993), 12 0.R. (3d) 371 (C.A.); *Re Hayward Estate* 2011 NSCA 118.

Revocation by Act of Testator

15. A will or part of a will is revoked only by,

(c) a writing,

(i) declaring an intention to revoke, and
(ii) made in accordance with the provisions of this Part governing making of a will; or

(d) burning, tearing or otherwise destroying it by the testator or by some person in his or her presence and by his or her direction with the intention of revoking it.

Re Davies
[1928] Ch 24; cb, p. 353

The Will may be revoked by an express declaration of revocation in a subsequent testamentary instrument - the declaration must evidence the intention to revoke but need not be in any particular form of words. A declaration of complete or partial revocation can be implied in the wording of a later instrument. The entirety of the earlier Will need not be revoked in such circumstances.

In this case a farmer made a Will which gave 'all my farms and lands' in a certain parish in trust, and the residue of the estate in other trusts. He later bought additional land in the same parish and made a codicil to his will giving that land to his daughter for life, and then to his grandson – the codicil, however, didn't vest fee simple ownership in the land to anyone, merely established life interests. It was held that the provisions of the Will itself were not revoked, and that title went with the other lands into the established testamentary trust in respect of 'all my farms and lands' in the earlier instrument.

Leonard v Leonard
[1902] P 243; cb, p.357

The testator may evidence his intention to revoke the Will through a physical act of destruction of the Will itself. Like an express or implied revocation through a subsequent instrument, the revocation can be intended to be partial if the remaining part left un-destroyed is intelligible on its own.

Here the testator left a Will of 5 pages, but it was apparent that the first two pages were made after the last three pages (though attested to by the same witnesses) and included a general revocation of earlier instruments. Were the three pages of the earlier will revoked? Yes – the destruction of the first two pages was an act of revocation, notwithstanding that the last page still had a signature. Moreover, the three remaining pages were not intelligible on their own. Per Gorell Barnes J:

> This case is a remarkable illustration of the danger of testators meddling with their wills when once they have executed them properly.

…

Applying the principles to be gathered from those cases, I am of opinion, from an examination of the last three sheets of this document, that they are practically unintelligible and unworkable as a testamentary document in the absence of the original sheets 1 and 2, and that the destruction of sheets 1 and 2 must be taken as having had the effect of destroying the validity of the whole will. The testator must be taken to have intended what his act would necessarily lead one to conclude as to his intention: having destroyed the earlier portions - pages 1 and 2 - he must have intended to revoke also the remaining portions - pages 3, 4, and 5. He did not intend these last three pages to be his operative will without doing something more. He intended to put two other sheets on to them. Up to that point the will was, in my opinion, legally revoked.

…

It becomes, therefore, a question whether, at the time the deceased in the present case signed and caused the witnesses to put their signatures to these two pages (1 and 2), he did that as his will or part of his will, or simply to shew that they formed part of a will to which the signature at the end of the will was to give validity.

In my opinion those signatures were only put on the two pages in question to identify them, and to make them valid if the will was valid at the end. That was, unfortunately, an abortive act. The later sheets had no effect by themselves, and they had no effect to render the sheets 1 and 2 operative.

The result is that none of the sheets can be treated as a valid document of a testamentary character, and my judgment - unfortunate, I am afraid, for some of the parties - must be that this will must be pronounced against, and, if there is no other will, there will be an intestacy as to the whole of the deceased's estate.

Presumptive Revocation

DeLack v Newton
[1944] OWN 517 (Surr Ct); cb, p.361

Where a Will was made and can be proven to be in the possession of the testator during his life and which cannot be found on his death after a thorough search is made, it is presumed that the testator revoked the will; *Sugden v. Lord St. Leonards* (1876), 1 P.D. 154 (Eng CA); *Allan v Morrison* [1900] AC 604; *Sorkos v Cowderoy* [2004] O.J. 4920 (S.C.J.). The presumption can be rebutted by evidence that the testator regarded the lost Will as valid or by other evidence that is consistent with the Will be regarded by the testator as still in existence and still operating; *Re Perry* (1924), 6 OLR 278 (CA).

Here the testatrix directed her sister to destroy her first Will, but not in her presence. She did so. The second Will was defective. The first will was proved by oral evidence buttressed by the presumption *omnia praesumuntur rite esse acta* ('all things are presumed to be done solemnly', also known as the presumption of regularity).

Sugden v. Lord St. Leonards
(1876), 1 P.D. 154 (Eng. C.A.)

Edward Sugen was an eminent lawyer. A successful advocate, he was appointed King's Counsel, served as Lord Chancellor of Ireland and later as Lord Chancellor of Great Britain. It was odd that on his death in 1875 his will could not be located. Stranger still, Lord St. Leonards, as he was at his death, was said to be was in the habit of reading his will every night, and that his daughter Charlotte had to listen to it so many times over the years that she had memorized most of it. *Was the will revoked?*

In the appellate stage of the probate proceedings, Cockburn C.J. said '[i]t seems to me utterly impossible to suppose that... such a man as Lord St. Leonards would voluntarily have destroyed this will, whether for the purpose of revoking it, or making another, or for any other purpose that could be conceived. My mind revolts from arriving at any such conclusion, and I feel bound to reject it.' Charlotte's written recollection of the will was admitted to probate.

In Canada, *Sugden v. Lord St. Leonards* is still accepted for the proposition that the presumption of revocation is ''more or less strong' according to circumstances such as the character of the testator and his relation to the beneficiaries, the contents of the instrument, and the possibility of its loss being accounted for otherwise than by intentional destruction;' *Lefebvre v Major* [1930] SCR 252, 257 per Anglin C.J.C.

Conditional Revocation

Like making the Will, revocation is an intentional act. Destruction premised on a mistaken belief that the Will is invalid does not result in revocation as the intent to revoke isn't present. Thus, in **Re Sorenson (1982), 10 ETR 282 (BCSC); cb, p. 367**, a codicil based on a mistake of fact (that certain legatees were dead who were actually alive) does not revoke the earlier provisions of the Will as the intent was not to revoke a valid disposition but make alternative dispositions given that the original disposition could not be carried out.

'Dependent Relative Revocation' is a term to describe conditional revocation of a Will on substitution by another Will. Thus, if the first Will is revoked on the condition that the second Will is effective, the first will remains effective if the second Will fails – however, this is a presumption that is rebuttable in respect of whether such a condition was in fact intended by the testator.

Thus, the testator must have considered the substitution of the second Will for the first will at the time of revocation (e.g. tearing up the first Will) – the act of destruction alone doesn't allow the presumption to operate.

Re Jones
[1976] 1 Ch 200 (Eng CA); cb, p.370

The testatrix made a Will leaving some land to her nieces. Before her death a few years later, she told her bank manager that she wanted to leave the land to her nephew's children. She went to the solicitor's office but he could not see her. She died the next day. After she died, the Will was found – it had been partially mutilated, including a portion that had been cut off that had most of the dispositions (including the land in question) which the testatrix had signed. It was held that the doctrine of conditional revocation did not apply. Per Buckley LJ:

> **The fact that at the time of the mutilation or destruction the testator intended or contemplated making a new will, is not, in my judgment, conclusive of the question as to whether his intention to revoke was dependent upon his subsequently making a new will.** A testator who has made a will in favour of A may become disenchanted with A and decide not to benefit him. He may well at the same time decide that in these circumstances he will benefit B instead of A. It does not by any means follow that his intention to disinherit A will be dependent on his benefiting B, or making a will under which B could take.
>
> If he were told that for some reason B could not or would not benefit under his new will, would the testator say, "In that case, I want my gift to A to stand," or would he say, "Well, even so, I do not wish A to benefit"? In the former case, his *animus revocandi* at the time of the destruction or mutilation of his will could properly be regarded as dependent on the execution of a new will, but not in the latter.
>
> **It is consequently necessary to pay attention to the circumstances surrounding the mutilation or destruction of the will to discover**

whether any intention that the testator then had of revoking the will was absolute or qualified, and if qualified, in what way it was qualified.

…

There was no direct evidence of any belief by the testatrix that the destruction of her will was a necessary precondition of making an effective new will…