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Limitation to General Rule of Republication by Codicil - Colley v. Britton

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Comments and Casenotes

Limitation To General Rule Of Republication By Codicil

Colley v. Britton[1]

Alice H. Read died on January 17, 1954. Item 6 of her will dated October 24, 1950 provided: "I give and bequeath to my friend, Norma Hardy Britton, the sum of two thousand ($2,000.00) dollars, . . ." Marie C. Colley was made residuary legatee and Mrs. Britton was appointed executrix. On April 11, 1953 the testatrix wrote a letter directed to an official of the bank in which she had a safety deposit box. The letter requested the bank to take two thousand dollars worth of her bonds from her attorney, Mrs. Britton, which were to be gotten from the safety deposit box, and to send them to the United States Treasury in order to have placed on them " 'Payable on death to Norma Hardy Britton'. *This is done so that she can take the bonds immediately upon my death and not have to wait for the administration of my estate.*"[2] Pursuant to the authority of this letter on May 1, 1953, the United States Government reissued to the testatrix $2,000 in Series G bonds made payable on death to Mrs. Britton. On April 13, 1953, the testatrix executed a codicil to her will in which she made additional legacies. The codicil made no express reference to the two thousand dollar legacy to Mrs. Britton. On March 18, 1955, Mrs. Britton filed a first and final account in which, among other distributions, she allowed herself $2,000.00 as per the terms of the will. The residuary legatee, Marie C. Colley, filed a petition to set aside this accounting alleging among other things that the payment by the executrix, Norma Hardy Britton, to herself of the sum of two thousand dollars was a double distribution since Mrs. Britton had already received the sum of two thousand dollars through the medium of United States Savings Bonds bought and held by the testatrix under the term " 'POD to Norma Hardy Britton'."[3] The Orphan's Court dismissed the petition, and on appeal the Court of Appeals reversed and remanded.

The Court declared that the pecuniary legacy of $2,000.00 had been *adeemed* by the transfer of the bonds to Mrs.

[1] 210 Md. 237, 123 A. 2d 296 (1956).
[2] *Ibid*, 244.
[3] *Ibid*, 242.

Britton in the testator's lifetime.[4] It further stated that though the codicil to the will operated as a republication of the whole will as of the date of the codicil, nevertheless, "a codicil does not operate to revive a legacy which has been satisfied or adeemed".[5]

The holding in this case with respect to the satisfaction of a general legacy by an inter vivos gift to the legatee from the testator is in accord with a long list of Maryland cases on this subject.[6] However, it is individually significant in that it marks the first instance in which the Court of Appeals has had to consider directly the question of the effect of a codicil upon an adeemed or satisfied legacy.

A codicil to a will draws the will down to the date of the execution of the codicil.[7] The codicil may serve simply as an addition to an existing will or it may republish a prior revoked will.[8] Where it republishes a prior revoked will by drawing it down to the date of the execution of the codicil, inconsistent intervening wills and codicils are replaced by the later codicil.[9] Where the will was originally valid and has never been revoked there have developed several limitations to the general doctrine that a codicil makes a will speak as of the date of the execution of the codicil.

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[4] *Ibid*, 247; but see Langdon v. Astor's Ex'rs., 10 N. Y. Super. Ct. (3 Duer) 477, 541 (1854); [rev'd. 16 N. Y. 9 (1857)]:

> "Although the words 'ademption' and 'satisfaction' and the corresponding words 'adeem' and 'satisfy' are frequently used by judges and text-writers as convertible terms, having the same signification, yet, . . ., each, in its technical application to the provisions of a will, has a distinct and appropriate meaning; 'ademption' in its strict sense, being predicable only of specific, and 'satisfaction' of general legacies."

1 SYKES, MARYLAND PRACTICE, Probate Law and Practice (1956) Sec. 86; also 2 WORDS AND PHRASES, Ademption, 532.

[5] *Supra*, n. 1, 247-8.

[6] Rhein v. Wheltle, 206 Md. 1, 109 A. 2d 923 (1954); Loyola College v. Dugan, 137 Md. 545, 113 A. 81 (1921); Selby v. Fidelity Trust Co., 188 Md. 192, 51 A. 2d 822 (1947); Gallagher v. Martin, 102 Md. 115, 62 A. 247 (1905); Wallace v. DuBois, 65 Md. 153, 4 A. 402 (1886); see also, MILLER ON CONSTRUCTION OF WILLS (1927), Sec. 144; SYKES, *loc. cit. supra*, n. 4; 57 AM. JUR. 1080, 1094, 1100, Wills, Secs. 1579, 1596, 1605; 69 C. J. 998, Wills, Sec. 2199.

[7] See notes 9-15, *infra;* Weaver v. McGonigall, 170 Md. 212, 183 A. 544 (1936); SYKES, *op. cit. supra*, n. 4, Sec. 24; MILLER, *op. cit. ibid*, Sec. 61; 57 AM. JUR. 428, Wills, Sec. 626; 68 C. J. 868, Wills, Sec. 586.

[8] In Re Thomas' Estate, 220 Iowa 50, 261 N. W. 622 (1935); Derr v. Derr, 123 Kan. 681, 256 P. 800, 53 A. L. R. 515 (1927); Gooch v. Gooch, 134 Va. 21, 113 S. E. 873 (1922); 68 C. J. 867, Wills, Sec. 585; 57 AM. JUR. 340, 420, Wills, Secs. 488, 613.

[9] In re Cazaurang's Estate, 42 Cal. App. 2d 796, 110 P. 2d 138 (1941); In re Cambell's Will, 170 N. Y. 84, 62 N. E. 1070 (1902); Derr v. Derr, *ibid*, n. 8; Austin v. First Trust & Savings Bank, 343 Ill. 406, 175 N. E. 554 (1931); Loyola College v. Dugan, *supra*, n. 6.

An early Maryland decision adopted the general rule that a codicil republished the will so as to make it speak as of the date of the codicil[10] and the subsequent decisions have reaffirmed the rule with almost formulaic application.[11] Upon the hearing of the instant case, the time was ripe for the imposition of limitations upon the general rule in accordance with decisions in other jurisdictions where such limitations had already been recognized.

Originally this doctrine developed out of the efforts of English courts to enable a devisee to take lands which had been acquired by the testator subsequent to the execution of the will but prior to the making of a codicil. The result was conditioned upon the requirement that such lands be embraced within the description given by the terms of the original devise.[12] In 1750 the doctrine was extended to permit after acquired lands to pass by codicillary republication even though the codicil referred only to the legacies in the will.[13] The doctrine reached full maturity in 1792, when it was held that the mere execution of a codicil republished the will as of the date of the codicil unless a contrary intention was therein shown.[14] The net result of these early cases suggested that the date of the codicil was the point of reference to be used when construing the language of the will.

The primary reason for the development of the doctrine disappeared in 1837 when the English Statute of Wills permitted after acquired lands to pass under an original devise, the terms of which were broad enough to include the after acquired property.[15] This result was produced by a rule of construction that the will was to be construed at the death of the testator for devises and bequests of a general nature.

As if in anticipation of the development of the doctrine of codicillary republication, in 1698 an English court declared that a presumption of satisfaction of a legacy by an *inter vivos* gift from the testator could not be rebutted by "words of ratifying and confirming . . . though they amount

[10] Jones v. Earle, 1 Gill. 395, 400 (Md., 1843):

"The will and the codicil constitute one instrument; and the codicil revoking, in terms, a portion of the will, has the effect to republish the will as of the date of the codicil, . . ."

[11] Gilmer v. Aldridge, 154 Md. 632, 637, 141 A. 377 (1928); Weaver v. McGonigall, 170 Md. 212, 183 A. 544 (1936); Syfer v. Dolby, 182 Md. 139, 32 A. 2d 529 (1943); Lederer v. Safe Dep. & Tr. Co., 182 Md. 422, 35 A. 2d 166 (1943).

[12] Archerly v. Vernon, 1 Comyns. 381, 92 Eng. Rep. 1121 (1724).

[13] Gibson v. Rogers, 1 Ambl. 93, 27 Eng. Rep. 58 (1750).

[14] Barnes v. Crow, 4 Bro. Ch. 2, 29 Eng. Rep. 747 (1792).

[15] 7 Wm. IV & 1 Vict. c. 26 (1837).

to a new publication, being only words of form, and declare nothing of the testator's intent in this matter".[16] One year after the passage of the Wills Act this limitation upon the doctrine of codicillary republication with respect to the revival of revoked, adeemed or satisfied legacies was reaffirmed in England.[17] The ensuing one hundred years saw additional limitations placed upon the general doctrine whenever a strict application of the general rule would defeat the testator's intentions.[18] In 1907 a charitable bequest which had been republished by a codicil within a statutory period of invalidation was sustained, the court saying with respect to the general doctrine, ". . . it is equally well settled that there are limits to the doctrine. The rule is subject to the limitation that the intent of the testator is not to be defeated." The court went on to say that the doctrine should be applied "not as a rigid formula or technical rule, but as a useful and flexible instrument for effectuating a testator's intentions".[19] It would seem as though recent English cases consider the limitation on the doctrine first and then apply the doctrine only if it will carry out the testator's intent.[20]

The acceptance of limitations to the general doctrine of codicillary republication of valid wills has had a parallel growth in the United States. As in England, almost as soon as the doctrine was established it began to be qualified. Various state courts have held that the republication of a valid will by a codicil will not rebut the presumption of an advancement to the testator's child[21] nor will it revive an

[16] Izard v. Hurst, 2 Freem. 223, 22 Eng. Rep. 1173, 1174 (1698). Here, however, the presumption of satisfaction was raised by the fact that the testator was in *loco parentis* to the legatee.

[17] Powys v. Mansfield, 3 My. & Cr. 359, 376, 40 Eng. Rep. 964, 971 (1837).

> "It is very true that a codicil republishing a will makes the will speak as from its own date for the purpose of passing after-purchased lands, but not for the purpose of reviving a legacy revoked, adeemed, or satisfied. The codicil can only act upon the will as it existed at the time; and, at the time, the legacy revoked, adeemed, or satisfied formed no part of it. Any other rule would make a codicil, merely republishing a will, operate as a new bequest, . . ."

[18] Rolfe v. Perry, 3 De. G. J. & S. 481, 46 Eng. Rep. 722 (1863); Hopwood v. Hopwood, 7 H. L. C. 728, 11 Eng. Rep. 290 (1859); In re Elcom, 1 Ch. 303 (1893); In re Moore, 1 Ir. Law R. 315 (1907); Re Heaths Will Trusts, 1 A. E. Rep. 199 (1949); In re Hardyman, Ch. 287 (1925); Berkeley v. Berkeley, 2 A. E. Rep. 154 (1946).

[19] In re Moore, *ibid*, 318.

[20] In re Hardyman, *supra*, n. 18. A bequest to a wife who predeceased the testator was held to apply to the second wife upon republication of a codicil because it appeared the testator so intended. Re Heath's Will Trusts, *supra*, n. 18. A restraint on a bequest was allowed even though a codicil republished the will after a statute had invalidated all such restraints since this appeared to be the testator's true intent.

[21] Paine v. Parsons, 14 Pick. 318 (Mass., 1833).

adeemed or satisfied legacy.[22] It was reasoned that the codicil republished the legacy but in its adeemed or satisfied state. The instant case is in line with these holdings.

Subsequent decisions started employing the language of the English courts in describing limitations to the doctrine.[23] Thus, speaking with regard to the rule that the codicil makes the will speak as of the date of the codicil, a Pennsylvania court said in 1916:

> ". . . this rule is not absolute; it does not apply in every case and for all purposes; nor does it, of necessity, alter the construction of the will, its original date still being a factor for purposes of construction and interpretation. Moreover, the rule is subject to the limitation that the intention of the testator must not be defeated thereby."[24]

More interesting, however, has been the lack of uniformity among the states in recognizing limitations to the general doctrine in certain classes of cases. For example, with respect to situations involving the lapse of a devise or bequest where anti-lapse statutes have been enacted, several states, including Maryland, have unequivocally denied the operation of these statutes where there has been a republication by a codicil after the death of the devisee or legatee, concluding that the legacy, given to a dead person, is *void,* and not lapsed.[25] Conversely, several state courts have held the descendents of a legatee who was dead when the codicil was made but living at the execution of the will took by force of an anti-lapse statute.[26] There is

[22] Langdon v. Astor's Executor, 16 N. Y. 9 (1857); Alsop's appeal, 9 Pa. St. Rep. 374 (1848); Trustees Unitarian Society v. Tufts, 151 Mass. 76, 23 N. E. 1006 (1890); Tanton v. Keller, 167 Ill. 129, 47 N. E. 376 (1897); Hayes v. Welling, 38 R. I. 553, 96 A. 843 (1916); Howze v. Mallet, 57 N. C. 194, 197 (1858). "In other words, the legacy stands in the will; but it stands there as a satisfied legacy." 68 C. J. 870, Wills, Sec. 587.

[23] Lansdale v. Dearing, 351 Mo. 356, 173 S. W. 2d 25, 29 (1943); Hourigan v. McBee, 130 S. W. 2d 661 (Mo. App. 1939); Mass. Audubon Soc. v. Orman Vill. Imp. Ass'n., 152 Fla. 1, 10 So. 2d 494 (1942); In re Edwards' Estate, 254 Pa. 159, 98 A. 879 (1916).

[24] In re Edwards' Estate, *ibid,* 882.

[25] Billingsley v. Tongue, 9 Md. 575 (1856); Weaver v. McGonigall, 170 Md. 212, 183 A. 544 (1936); Gibbons v. Ward, 115 Ark. 184, 171 S. W. 90 (1914); Dunn v. Kearney, 288 Ill. 49, 123 N. E. 105 (1919); In re Mathews' Estate, 176 Cal. 576, 169 P. 233 (1917), noted in 6 Calif. L. R. 312 (1918), and 31 Harv. L. R. 901 (1918); Matter of Bradley, 119 Misc. 2, 194 N. Y. S. 888 (1922); Rippel v. King, 126 N. J. Eq. 297, 8 A. 2d 777 (1939). See also: 57 AM. JUR. Wills, 420, Sec. 614 and 146 A. L. R. 1366.

[26] Twitty v. Martin, 90 N. C. 646 (1884); Lewis v. Corbin, 195 Mass. 520, 81 N. E. 248 (1907); Ex parte Newton, 183 S. C. 379, 191 S. E. 59 (1937); In re Pearson's Estate, 211 Pa. 183, 60 A. 585 (1905); Re Gibbons, 192 Okla.

strong support for the latter position in Schouler's text on wills.[27]

In construing legacies to charities, the courts have also had a tendency to avoid the general doctrine where republication would avoid the legacy. In these situations the courts have refused to permit the will to speak automatically as of the date of the codicil and give more weight to the probable intention of the testator as gathered from the surrounding circumstances.[28] This problem generally arises in states which have statutes prohibiting such gifts within a certain period prior to the testator's death.[29] It does appear, however, that where the codicil within the prohibited time period would have the effect of increasing a legacy for charitable purposes, such increase would be denied.[30] It appears once again that the intention of the testator overrides any mechanical application of the doctrine of codicillary republication.

The execution of a codicil after a statute has intervened to change the law under which the will was originally executed raises the issue of the application of the general rule. Generally it is held that a statute passed after the execution of the will, may be made applicable by the execution of a codicil to the will after the statute has taken effect.[31] There is dictum in a Maryland case suggesting the

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378, 137 P. 2d 928, 146 A. L. R. 1361 (1943). See also: In re Hardyman, *supra*, n. 18; Perkins v. Micklethwaite, 1 P. Wms. 274, 24 Eng. Rep. 386 (1714).

[27] 1 SCHOULER ON WILLS, EXECUTORS AND ADMINISTRATORS (6th ed., 1923), Sec. 684, criticizing the application of codicillary republication to a lapsed legacy, ". . . although a codicil usually republishes a will still it will not do so where the effect of republishing is to render void a legacy otherwise valid . . ."

[28] In re Morrow's Estate, 204 Pa. 479, 54 A. 313 (1903); In re McCauley's Estate, 138 Cal. 432, 71 Pac. 512 (1903); In re Pence's Estate, 117 Cal. App. 323, 4 P. 2d 202 (1931); Appeal of Carl, 106 Pa. 635 (1884); In re Darlington's Estate, 289 Pa. 297, 137 A. 268 (1927); In re Bingaman's Estate, 281 Pa. 497, 127 A. 73 (1924).

[29] California, Georgia, Idaho, Iowa, Mississippi, New York and Pennsylvania have such statutes.

[30] Lightner's Appeal, 57 Pa. Super. 469 (1914).

[31] Eaton v. Eaton, 88 Conn. 286, 91 A. 196 (1914). A codicil, executed after repeal of a statute against perpetuities, validated a devise which was void under the statute; Brimmer v. Sohier, 1 Cush. (Mass.) 118 (1848). A codicil after the passage of the statute brought the will within the operation of the statute so as to pass after acquired lands; In re Greenberg's Estate, 261 N. Y. 474, 185 N. E. 704, 87 A. L. R. 833 (1933). A codicil executed after the effective date of a statute creating a right of election under intestacy law permitted wife to renounce a nominal bequest in prior will; Ayres v. The Methodist Church &c., 5 N. Y. Super. Ct. (3 Sandf.) 351 (1849). Devise to a corporation made invalid by operation of a statute passed after execution of will but before making of codicil.

possibility of a similar result in this state.[32] On the other hand, there is authority that, if the testator's intention would be defeated by the application of the doctrine, the codicil does not have the effect of making the will subject to the provision of an intervening statute.[33] This view was recently endorsed by an English court which refused to invalidate restraints on the alienation of a devise though such restraints were declared invalid by a statute taking effect after the execution of the will but before the making of a codicil.[34]

An examination of the text authorities reveals a general agreement that the intention of the testator should govern the application of the general rule that the codicil makes the will speak as of the date of execution of the codicil.[35] With respect to limitations on the general rule of republication of a will by a codicil, the *Colley* case is a sound and well reasoned decision in line with prior English and state court decisions. It has taken the initial step toward possible further limitations.

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[32] Weaver v. McGonigall, *supra*, n. 25, 218:

". . . conceding that the execution of the codicil . . . was a republication of the original will, and that by virtue of the codicil the effect of section 335A was made applicable to the will . . ."

[33] In Harrison's Estate, 10 Pa. Dist. R. 45 (1901). An intervening anti-lapse statute was not made operative upon a prior will by a subsequent codicil because the intention of the testator as gathered from both the will and codicil would have been defeated.

[34] Re Heath's Will, 1 A. E. Rep. 199 (1949). *Cf.* Coale v. Smith, 4 Pa. St. Rep. 376 (1846) where debts, incurred after the execution of a will which discharged indebtedness but before the codicil, were also discharged.

[35] 1 SCHOULER, WILLS, EXECUTORS AND ADMINISTRATORS (6th ed., 1923), Sec. 679:

"The general effect of republication is to make a new will at the date of republication; to bring the old will down to the new date and make it speak from that subsequent time, but this is no technical rule to override the true intent of the transaction and its force is limited accordingly."

BAGBY, MARYLAND LAW OF EXECUTORS AND ADMINISTRATORS (2d ed., 1927), Sec. 119 (with respect to the Maryland anti-lapse statute). ATKINSON, WILLS (2d ed., 1953), 468:

"When a will is republished by codicil, this had the effect of making the will speak as of the date of the codicil, though, according to the modern and better view, this doctrine should be applied only in the cases where a reasonable result in accordance with the testator's probable intention is reached thereby."

1 JARMAN, WILLS (8th ed., 1930), 218:

". . . yet this rule is subject to the limitation that the intention of the testator be not defeated thereby. If, therefore, the testator in making his will, obviously means its provisions to apply to a state of circumstances existing at its date, republication will not make its provisions apply to the state of circumstances existing at the date of the codicil."

1 WILLIAMS, EXECUTORS (12th ed., 1930), 119; see also Evans, *Testamentary Republication*, 40 Harv. L. R. 71 (1926); 57 AM. JUR. 428, Wills, Sec. 626; 68 C. J. 868, Wills, Secs. 586-590; 69 C. J. 52, Wills, Sec. 1118.