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BLACK V. JOBLING.

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the age of twenty-one years out of my capital to be paid to them individually by my executors.” This was duly attested.

The will of 1865 and the codicil of 1866 were in the testator's possession, but at his death they could not be found. The defendant, as a legatee named therein, propounded the paper of 19th October, 1867, and the plaintiffs pleaded that it was not executed according to the statute 1 Vict. c. 26; that if well executed, it was executed as a second codicil to his last will and codicil; and that he destroyed them with an intention to revoke them and also the said alleged codicil.

The case was heard before Lord Penzance on May 29.

*Dr. Deane, Q. C., and Pritchard*, appeared for the plaintiff; and *A. Slaveley Hill, Q. C. and Tristram, Dr.*, for the defendant.

J. H. Mitchell proved that the testator called at his house to ask him to draw a codicil to his will; that he did so, and that it was duly attested; and that the testator said that his capital was increasing, and that he had £1,100 he wished to leave to his daughter's family, and that he had already given them a farm and the stock upon it.

June 29.—Lord PENZANCE, after reciting the facts of the case, said:—The general proposition relied on against the codicil was that a codicil stood or fell with the will; that, no doubt, was a general proposition which was obtained in the Prerogative Court. I took the trouble to ascertain what under the old law were the exceptions, although the result of the case does not appear to me to be very satisfactory.

The earliest case is that of *Barrow v. Barrow*, 2 Lee. 335. There a testator made a will and a codicil, the whole effect of the codicil being to give the residue of his property to his wife. He afterwards burned the will, saying it was useless. The Court there held that it was clear that the codicil was not destroyed by the burning the will, but was a substantive instrument. The codicil gave the residue, and no one could say what that was, without having read the will, which disposed of the other portion of the property, but the Court, nevertheless, so held.

The next is the case of *Medlycott v. Assheton*, 2 Add 231, which was decided in 1824. There the will was made in April, 1820, and in December, 1820, the testatrix wrote a codicil giving £100 each to the two trustees named in her will, and dividing some trinkets among her friends. In 1824 she looked over the papers in her writing-desk, several of which she burned, and a few days afterwards wrote to her attorney desiring him to destroy her will. The Court held that it was altogether a question of intention, and that the legal presumption that the codicil fell with the will might be rebutted by showing that the testatrix intended the codicil to operate notwithstanding the revocation of the will, and as the circumstances were not sufficient to establish such an intention, the codicil was held invalid.

The next was the case of *Tugart v. Hooper*, 1 Curt. 289, decided in 1836. The paper was found in the writing-desk of the deceased, and it commenced thus: “This is a codicil to my last will and to be taken as a part thereof.” The Court, in pronouncing for the paper, said that

in all cases where the codicil had been considered void by the destruction of the will there were circumstances which showed that the codicil was dependent on the will.

In the other cases it was laid down that the codicil was revoked where the will was revoked; but in this case it was held that where the codicil was so revoked there were circumstances which showed it to be dependent on the will.

These are all the cases on the point before the passing of the statute, and certainly the result is not satisfactory.

The consideration of these cases leaves upon the mind no very definite idea of what is meant by “dependent on the will.” In one sense, any codicil that makes any disposition of property at all, must be considered to be dependent on the will which disposes of the rest, for the codicil conveys only a part of the testator's intention regarding his property, and the motives inducing that particular part of his intention cannot with any certainty be discovered from the motives which induced the disposition of the rest.

It is difficult if not impossible to predicate of a particular bequest in a codicil that the testator would have made it if he had disposed of his other property in any different manner than that expressed by his will. It may be that the independence of the will spoken of must be something of a more limited character. And the meaning of the cases may be that a codicil is independent of the will unless it is of such a character that the giving validity and effect to it without the will to which it was intended to be attached would produce some manifest absurdity. I am not sure that even this rule is capable of being easily applied to all the cases that might arise, and I have serious doubts whether such a rule is to be gathered from the cases with sufficient distinctness to justify the Court in adopting it. But all these cases occurred before the Wills Act. Now the section of that Act is most distinct and positive in its terms. “No will or codicil,” &c. And I should have had no hesitation in holding that the intention of that section was to do away with all implied revocations and relieve the subject from the doubt and indistinctness in which the cases had involved it. But there have been two cases decided since the Act. The first of these. *In the Goods of Halliwell*, 4 Notes of Cases, 400. The codicil was dated September 5th, 1845, and commenced thus:—“This is a codicil to the will of me R. H. and which I desire to be added to my will,” and it related solely to account between himself and his partners, containing no bequest or appointment. The testator died on the 7th of September, 1846, and he expressly declared shortly before the making of the codicil that he had made a will and that it was then in existence. In that case, the Court said that, supposing it all to have been destroyed, the codicil would, upon the general principle, fall with it, but held that there was an exception in favour of the paper, inasmuch as it seemed to have been made for a particular purpose, and admitted to proof. Then comes the case of *Clogstown v. Walcott*, 5 Notes of Cases, 623, in which the will was made in 1840, the codicil in 1842. In April, 1846, he destroyed it all, and in so doing so expressed anxiety about the codicils observing this better. It would not affect the codicils with it. In that