brought in his claim under the administration suit, As he had not done so, he had lost his remedy against the executors, and must follow the assets. A contrary decision would give rise to the greatest inconvenience, and in this case the argument went to the extent of asking the Court to retain the money till the determination of the lease. His Honour could not accede to the application of the executors, who were, in his opinion, exonerated from liability; and, resting on the authority of *Bennett* v. *Lytton* and *Williams* v. *Headland*, made the order as prayed.

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### Black v. Jobling.

*Wills Act (1 Vict. c. 20, s, 26)—Will and Codicil not found at death—Presumed to be revoked—Probate granted of subsequent Codicil.*

A. died having made a will and codicil, neither of which on his death was found. But a second codicil duly executed was found. It recited that the testator had already bequeathed to his grandchildren everything upon or relating to a certain farm. The question was whether that second codicil could be admitted to probate, or whether it fell with the will.

*Held*, that as this codicil had not been revoked by any of the modes indicated by the Wills Act (1 Vict. c. 20, s. 26) as the only means by which a codicil can now be revoked, it was entitled to probate.

[17 W. R. 1108].

The testator, Ebenezer Black, late of Grindon, in the County of Northumberland, died on 8th of May, 1868.

He made a will in February, 1865, and added a codicil in October, 1866. The codicil gave an annuity of £100 instead of a bequest of fifty shares in the West Hartlepool Dock and Railway Company which he had given in the will to his daughter Ann Jobling, and directed his trustees to dispose of his interest in his farm in Tenham-hill, together with the farming stock, &c., and to hold the proceeds arising therefrom in trust for the five children of his daughter Ann Jobling. Subsequently, by a deed of gift dated May 27, 1867, he "gave and devised" the same farm of Tenham-hill to his daughter and her children.

On the 19th of October in the same year he executed another codicil as follows:—

"I Ebenezer Black farmer Grindon in the parish of Norham in the County of Northumberland having already bequeathed to my five grandchildren issue of my daughter Ann Jobling to wit Mary Thomas Jane William and Ann Jobling the lease stock and profits with everything upon or relating to the farm of Tenham-hill they paying all rents taxes and whatever charges may come against the said farm of Tenham-hill in addition to which I now bequeath to each of the above-named children of my daughter Ann the sum of £300 sterling money when they attain 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 Vic. 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. Staveley 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