

not help thinking that in both those cases the court of construction had acted upon a sort of feeling that, in truth, the one instrument was intended to be an entire substitution for the other.

The position of the court granting probate is very different in this matter to that of the court of construction. The Probate Division decides whether the two documents are to be admitted to probate or not, and in doing so, in cases of doubt, admits external evidence (see *In the Goods of Bryan*, 96 L.T. Rep. 584, (1907) P. 125), but the court of construction is bound to accept the finding of the Probate Division that there are two testamentary documents, and must construe them in accordance with that finding. An authority for this principle is to be found in the old case of *Foy v. Foy*, 1 Cox 163, where Sir Lloyd Kenyon said that although he should have had great doubt (in case it had been competent to him to have decided the question) whether the last paper, which was proved as a codicil, was not, in fact, a new will, and therefore revoked all the others; yet as the Ecclesiastical Court had granted probate of them all, he was bound to consider them all as subsisting in full force. The Probate Division is the successor of the Ecclesiastical Court.

This principle has to be particularly borne in mind where the second document describes itself as the last will. The mere fact that the second document is described as the last will will not ipso facto revoke an earlier will. Thus in *Simpson v. Foxon*, 96 L.T. Rep. 473, (1907) P. 54, the later instrument commenced, "This is the last and only will and testament of me," but the president held that it was not the testator's only will, and that "last and only" did not revoke his former testamentary dispositions.

The statement in Theobald on Wills (p. 159) that "If the instrument by which the second gift is made is not a codicil, but is described as a last will and testament, the presumption is strong that it was intended to be in substitution so far as it goes for the prior instrument" is too wide.