caution, as Mr. Edis expected that the whole would undergo the revision of the deceased, and that would make him less careful on this second interview to explain the matter more fully, and exactly, or to write down this important alteration, and read it over to the deceased, and take care that he fully understood the nature of this change.

The Court, therefore, has not the least doubt or hesitation in rejecting paper B; but in respect to A I shall strike out the clause written since the deceased's death. With the exception of that clause the paper is fully proved to have been dictated by the deceased, read over and approved by him, and by referring to the will of the brother to contain the testamentary intentions of the deceased. Nothing which passed afterwards has satisfied me that the deceased in any degree departed from or altered those intentions.

I pronounce for A, together with the will of Jacob Wood therein referred to, as together containing the will of the deceased, the words of the clause in A being first struck out.

The Judge accordingly struck out with his own hand the following words in paper A:—"If children: if none, to leave all estate and effects subject as hereunder."

[375] MOORE AND METCALF *v.* DE LA TORRE *v.* MOORE.(*a*) Prerogative Court, Hilary Term, Jan. 23rd, 1816.—A mutilation of a will held to amount to a cancellation, and that cancellation not to revive a prior will of nearly similar import.

[Affirmed, p. 406, post. See *Cutto* v. *Gilbert*, 1854, 9 Moore, P. C. 145. Applied, *O'Leary* v. *Douglass*, 1878, 3 L. R. Ir. 331.]

Catherine Moore died August 16, 1813, possessed of a personal estate amounting to about 30,000l.; she left three sons, Thomas, George, and Peter; Peter was a lunatic.

The following testamentary papers were found at her death:—

(A) "In the name of the Father, and of the Son, and of the Holy Ghost. Amen.

"I, CATHERINE DE KILLIKELLY AND MOORE, widow to the late George Moore, of Ashbrook, and Moore Hall, Esq., declare, before my God and man, my last will and testament, under my hand and **[376]** seal, in my perfect senses and good health, that if the Almighty pleases to call me to himself, on the road going to Ireland, or any where else, or by some other unforeseen accident, as we are all mortal, leave every thing I possess in Spain, England, Ireland, or any other part of the world, as property, lands, houses, money, jewels, plate, linen, and every kind of houseal furniture of every description, between my son Thomas Moore, and my son Peter Moore, if the latter gets back his senses again; in case it is not God's will this should happen to him, pray his Br. Thomas Moore, to do by him as it would be most comfortable to be done to himself, if himself was the person inflicted by the divine hand. I name my son Thomas Moore sole executer of all I have, or will have, or possess. In my husband's will, made in Alicant the year 94, is expressed, that if any of my sons disobed me in any respect, I might give his share to any other of his sons, as I pleased or thought proper. I now exclude and disinheirite my eldest son, George Moore, (possessing all his father's lands in Ireland,) him and all his heirs for ever and ever, to have the least claim or title to any thing belonging to me; as likewise, any thing that his father left to my disposal upon no pretext whatever, for his ungratefulness, undutifulness, and disrespect to me, the best and fondest of mothers to him more than any of her other sons, **[377]** that brought John and Tom to be jealous of me on his account, when he got the last sum out of my power, as only executrice, gives himself away for life, into a family that he knows in his heart were the means of his father's and brother's most miserable and untimely death; who the meanest

(*a*) The author has been induced, in compliance with the suggestions of several of his professional friends, to give this case, both in the Court of Prerogative and the Court of Appeal, and also the case of *Johnson* v. *Johnson*, decided in the Prerogative Court in the course of the last year, a priority over many cases which have preceded them. It is thought that the important points of testamentary law, which have been agitated in both instances, will justify this preference.

and most ill-natured of sons, his recompence to me for all my sincere affection and tenderness I had ever for him in particular is to conclude his ruin, without even leting me know one word, neither ask my advice, or wait for my answer, which he ought to have done, after so often protesting to me he would rather *die* than once offend me, and that he was coming over to Spain, who can believe such a person. I declare before God, who *is* the Searcher of hearts, that he has deceived me more than I can have words to express, therefore in my turn must renounce him to be my son, and errace him as much as possible out of my memory, till my latest breath; I leave my B^r^. Mr. Bryan Paul de Killikelly, one 100 pounds; my S^r^. Fanny at Rouen *in* France, one 100 *pounds*, a year while she lives to pray for me; to my niece O'Neill de Arlox, fifty pounds a year while she lives, or for life; to Micaela Perez, for her good services, a piset a day for life; to my two nieces in Lisbon, fifty pounds each; to the nun Miss Morony in Paris, twenty pounds to pray for me; to Do-**[378]**-loxes my grand niece, daughter to O'Neill de Arlox, fifty pounds to pray for me; to my nephew, Mr. Arthur, twenty pounds to pray for me; if please God I die in Ireland, I desire my son Thomas to have *me* carried to Galway, to be buried in the Convent of Fryar's, of St. Dominick, near the place where my uncle, bishop Killikelly lays, as I should never consent to leave my bones on any spot belonging to my once dearly beloved son. I desire my son Thomas to have my funeral as simple as possible, no ostentation, but corresponding to me. I leave two thousand masses to be said for me from the day of my death, as fast as they clergy can say them, looking out for the best and poorest livers, at 6 reals each mass; three high mass's, and the whole office, to be said before I am laid under ground; 20 pounds to be given to the poor the day of my burial; to Micaela Antonio, and Visenta, mourning, and an ounce each; to Marg^ta^. the French maid, her wages to be paid, her mourning, and an ounce besides, to Tomasas S^n^. and nephew an ounce each: my nurse's son in Bilboa: two ounces my son Tom's nurse, and ounce Aug^n^. mourning, and an ounce of the 14 in Mr. Moore will to be portioned I only paid three of them, they must be paid by my son Tom, if I don't live to do it; of the two thousand mass's I leave to be said for the repose of my soul, 200 **[379]** of them must be offered in the Capuch *in* convent, in Alicant, where my dear aunt is buried, and fifty in each church, and convent in Alicant likewise for me; all my best silk cloaths to be cut up and made into vestments, for the altar; all my other cloaths and linen to be divided between my S^r^. Fanny and my niece Helen O'Neill; what they don't like of them I leave to Micaela, and the other good servants that shall attend me in my last sickness, paying them well besides; to my confessor 10 guineas to pray for me; let him and the other clergyman who says mass for me and assits at my funeral, be payed as they ought to be. I leave a guinea to the woman who will dress my corps; if I die in London, I order my body to be buried at St. Pancras; the 9th and 30th day after my decease, to be said each day 33 masses if possble, they can do it; in case the Court of Spain dos not continue to pay the Spanish chapel here, I will take it for my Acc^t^ to pay the clergy, the four now in it, 4 women, and the porter, besides the boy's school, and must get one for thirty-three girls at my expence. I have money here in the funds, besides six thousand dollars for this purpos, in my trunks in Spain. I have a small anuity here of twenty guineas a year, in peaceable time, this sum I leave for ever and ever to have masses said for the repose **[380]** of my soul particularly, must be offered by clergy without reprove from heaven. I leave Micaela and Marg^ta^, the bed and bedstead they lay on in my house in Alicant, with two pair of sheets each, and to Micaela 3 table-cloths, and 11 napkins with blue strips, I had three French ones; to my niece Helen O'Neill, 4 pair of my own sheets 4 middleing table-cloths, 2 dozen napkins, 1 dozen fringed towels, 1 dozen coarse new cloths, that she should pray for me; Mrs. Atby one hundred pounds. I thank God I have no debts to pay, but forgive my B^r^ what he ows me. I better my son Thomas in every thing which the laws of Spain permits, provided he don't marry like his B^r^ Geo. into a family he knows I dislike, my niece de Arlox, will tell him one of them. George married without ever leting me know one word of his match, neither asked my advice, nor waited for my consent; for this reason exclude him for ever and ever, to claim any inheiritance

from me, nor do I wish ever to see him while I live, nor any body belonging to him, for carring my gray hairs to the grave with sorrow. I leave Pedro Perez, mourning; and an once to Maria, the old woman, that come to diner for charity, half an onze to pray for me; to her son, the Capuchin Fryar, half an onze to say forty masses in my intention at a pisset. I leave all my [381] power to my son Thomas, in regard to any property belonging to his Br Peter to manage it for him, till please God he gets back his five senses, excluding his Br. George to have any thing to say to him, except to give up by my commands the fortune his father left him in the Irish will, being a better Br. and dutiful son; and do declare, that George did not follow my advice about geting him back his senses, and for so doing I shall never forgive myself to have sent him from Spain, to be tutered by such an unworthy son as George has proved to me by his undutiful actions. My blessing to my two sons Thomas and Peter, may heaven shower upon them both every blessing, to be good and dutiful to the fondest and best of mothers.

"I sign with my own hand and seal

"CATHERINE DE KILLIKELLY AND MOORE. (L.S.)

"London, 29th May, 1808."

B.

(The black lines are to shew in what manner the original paper was found cut.)

"In the name of God, Amen.—I, Catherine Moore, late of Alicant, in the kingdom of Spain, but now of Wimpole-street, in the parish of St. Mary-le-bone, in the county of Middlesex, in the kingdom of England, widow, do make and publish this my last [382] will and testament, in manner following, (that is to say) I will and desire that my dear son, Thomas Moore, shall and do, as soon as conveniently may be after my decease, procure my remains to be decently and carefully deposited in some appropriate place in England, until a convenient opportunity shall by him be obtained for safely conveying my remains by sea to Spain; and when such opportunity and conveyance shall have been so found and obtained by him, then I will and direct that my said son, Thomas Moore, do and shall cause and procure my remains to be decently and carefully conveyed to the city of Alicant, in the kingdom of Spain aforesaid, and afterwards that he shall procure them to be interred in my own vault in the Capuchin church, outside the said city. I also will and direct that all my just debts, funeral expences, and the charge of the probate of this my will, be paid out of my personal estate by my said son, Thomas Moore, my executor, and charged and chargeable with the payment thereof. I devise, give, and bequeath all my lands, tenements, and hereditaments, whether in freehold or copyhold, and also all and singular my personal estate, goods, chattels, household furniture, plate, books, wearing apparel, stock in the public funds, ready money, bonds, mortgages, notes of hand, and all other securities for money, [383] rent, arrears of rent, interest of monies, debts due and owing to me, and all other my estate and effects, of what nature and kind soever, and wheresoever situate, whether it be in Spain aforesaid, or in England, Ireland, or elsewhere, that I shall be seized or possessed of, interested in, or entitled to at the time of my decease, unto my said dear son, Thomas Moore, to have and to hold the same, and every part thereof, unto him the said Thomas Moore, his heirs, executors, administrators, and assigns, for ever, or according to the nature and quality thereof, and to be by him, my said son, Thomas Moore, peaceably and quietly held, occupied, and enjoyed for ever, free from the claim or demand of any other person or persons whomsoever, and only subject to the payment of my debts, funeral and testamentary expences as aforesaid: and further, to be subject to such legacies (if any) which I may hereafter bequeath by any codicil or codicils to be added to this my will. And, lastly, I do hereby nominate, constitute, and appoint my son, Thomas Moore, sole executor of this my last will and testament; and I do hereby revoke and make void all former and other wills by me at any time heretofore made, and do declare this only to be my last will and testament. In witness whereof I, the said Catherine Moore, the testatrix, have, at the bottom of the first [384] sheet of this my will, (the whole whereof is contained in two

sheets of paper) subscribed my name, and to this second sheet, my hand and seal, this thirteenth day of December, in the year of our Lord one thousand eight hundred and ten.

"Signed, sealed, published, and declared by the above named Catherine Moore, the testatrix, as and for her last will and testament, in the presence of us, who, at her request, and in her presence, and in the presence of each other, have subscribed our names as witnesses thereto, } C. MOORE. (Seal.)

"Eleanora Archdeacon, } East Street,
"Edw[d] Archdeacon, } Manchester
"P. Archdeacon, } Square."

C.(*a*)

"London, the 6th August, 1812.

"In the name of God, Amen.—I, Catherine Moore, widow of the late George Moore, of Ashbrook, and Moore Hall, Esq. in the county of Mayo, in Ireland, make my last will and testament, in my perfect senses and good health, not knowing how soon, neither the hour or instant, that the Almighty God **[385]** should call me to himself out of this world. wish and desire my will should be made in the following manner by a lawer approved of; I bequeath my son Peter Moore while he lives unsain, three hund[d] pounds a year, that he should be well taken care of, and have what may be comfortable to him in his present state, but if God pleases to give him back his five senses whatever I bequeath must be divided in three equal parts, and give him one of the 3 parts, but then as to the three hundred pounds a year, I bequeath that to him besides for ever and ever, to him and his exors heirs lawfully begoten, as he was, to me the only obedient and more dutiful to me than my two mentioned sons; I bequeath to my sister Fanny de Killilly, now at Rouen, fifty pounds a year while she lives, and at her death to fifty pounds more to pay her funeral expences. I beques my B[r]. B.: P.: Lynch de Killikelly now at Bilboa, one *two* hundred pounds, and forgive him the 9000 R[s]. he owes me. I all my juels, plate, linen of all kinds, with *all* my silk cloaths: furniture of this *house*, must be sold for as much as can be got for it, not to sell it in a hurry. I leave it in charitable *uses*, but hope to live to sell it myself be I desire, and give away my carpit, which my aunt gave me with the sofa, and 12 armed chairs to a friend which I don't name, as *it is* my will and pleasure so to do; this house, without the furni-**[386]**-ture, I leave to my niece Helen O'Neill for ever, and after her to her daughter Doloxes, if she proves dutiful to her mother, otherwise she may disinherit her, they must never sell it, but must go to one of her sons who shall be most dutiful to her. I leave my two nieces in Lisbon, Mrs. Cusin and Mrs. Cloughan x one hundred pounds each for once, and my niece in Paris, the nun, Helen Moroney 50 pounds once; to Micaela Perez, I leave her 3 reals plate every day while she lives, with mourning for her, and if I have any *other woman* in Clara Ramiro, to pay their wages till the day of my death, and give them *mourning;* to blind Pira 2 reals a day while he lives. I pray that my corps should be buried with my dear aunt, at *the* Capuchins in Alicant, in the vault I got made there myself. If they won't permit I should be buried there, I desire, at my own expens, to be sent in a decent manner to Galway, in Ireland, and be buried near the place my uncle Peter, the bishop, lies, in the chapel of the Dominican friars. In case I shall be buried *there*, bequeath them two hundred pounds for my funeral expenses, and charitable uses. To my faithful serv[t] Tomasa Cloreas S[n] 20 dollars *once*. To her son twenty more *once*. To Tom's nurse 30 dollars once current dollars, and desire my son Thomas to sell every thing that belongs to me in Spain, or any where else, with all *my* acc[ts], and give **[387]** them up clearly and justly to my executors, that they should dispose of every thing that belongs to me as I shall

(*a*) There were many erasures and interlineations in this paper

desire or put in writing. As to the lease of this house, I shall dispose of it myself; that my will should be valid in Spain; leave one guinea to the holy house of 'Jerusalem.' I annull every other will I have wrote myself, or got it wrote by any other person, except this one of this date, which I now write with my own hand,

"I name as my two executors,
D[n] Manuel de la Torre,
Father, & Mr. Frans
Archdekin.

"CATHERINE MOORE.

"I bequeath my son Peter all I have to leave in this world, for his being to me an obedient and dutiful son, till he became unsain; and as it is God's he should be so, leave him all I my property, that he should be taken better *taken* care of, and live more comfortably; but if he dies without coming to his five senses, and even if he only gets them at his death, I desire my executors to appropriate all my property I left my son Peter, to be laid out in charitable uses, as ."

This paper was endorsed

"Mrs. Moore,
"of Alicant.
"Last Will."

[388] Besides these there was the draft of a will dated Dec., 1810, by which the deceased bequeathed all her property to Thomas Moore, and the following form of a codicil:—

E.

The lines round this paper are to shew in what manner the original was found cut.

Form of a codicil to the will (if such be intended).

"Whereas by my will hereunto annexed, bearing date the day of December, 1810, I thereby give, devised, and bequeathed unto my dear son Thomas Moore, all my real and personal estate, of which I should die seized, possessed of, interested in, or entitled to, subject only to the payment of my debts, funeral, and testamentary expences, and such legacies as I might bequeath by any codicil to be added to my said will. Now I do hereby further bequeath unto [here name the nature and amount of the further bequests, and the exact descriptions of the persons to whom such legacies are bequeathed]. And I do hereby declare and direct that all the said legacies bequeathed in and by this codicil to my said will, are and shall be accounted and are charged upon all my estate and effects so devised and bequeathed to my said son Thomas Moore as aforesaid; and that the same are to be paid by him out of my estate and effects, within after my decease. And I do ordain and declare this **[389]** present writing to be a codicil to my said will annexed hereto; and that it shall be taken and accepted as part thereof; and I do hereby confirm my said will in every particular thereof, that is not hereby altered. In witness whereof, I have to this codicil set my hand and seal, the day of 18

Signed, sealed, declared, and published by the said Catherine Moore, as and for a codicil to be annexed to her last will, and to be taken as part thereof, in the presence of ."

(Endorsed)
Copy for a codicil.

Paper C was propounded by Mr. Metcalf, the committee of Peter Moore. Paper B by Thomas Moore, who also, in the event of B being pronounced to be cancelled, propounded paper A. George Moore prayed an intestacy.

Mr. Edward Darell deposed, "That he was at school with Thomas Moore, with whom a correspondence and intimacy were kept up, which led to his becoming, in the year 1809, acquainted with his mother; and that she often sent to him to talk with

her; and he continued to be acquainted with her till two or three months [390] next before her death, by which means, as well as by declarations of deceased, as long as he was acquainted with her, he knows that she entertained a very particular regard and affection for Thomas Moore, and she spoke to deponent as having made him her heir entirely of every thing; but with a qualification, as it appeared to him, from what she said, that she expected her said son would be submissive to her; and she repeatedly spoke of his elder brother being possessed of an ample fortune, by succeeding to his family estates in Ireland, on his father's death, and of her being offended with him very highly; and likewise speaking of her other son, Peter Moore, becoming deranged, she said all her hopes were in her son Thomas; and she entrusted him with the management of her pecuniary concerns.

"That from his earliest acquaintance with Mrs. Moore, and as long as he was acquainted with her, she constantly expressed herself as highly displeased with and offended at her eldest son, George Moore; and assigned as reasons for such displeasure, his not paying her her jointure, and his marriage; and the deponent engaged himself in or about the month of April or May of the year in which she died in endeavouring to effect a reconciliation between her and her said eldest son; but he was unable to prevail with her on such occasion, and she was not reconciled to him as long as he knew her; and till deponent so last knew her she, the said deceased, in his hearing, made use always of the most [391] forcible expressions, purporting to and expressing her displeasure against him, and accusing him of ingratitude and various acts of baseness, and declaring that she did not, and never could again look upon or consider him as her son, and that he should never be benefited by any property she might leave behind her."

The same witness answered in reply to an interrogatory, "That the deceased did, about the period of her said son Thomas going to Spain, in the summer of 1812, as well as afterwards, mention to the respondent her disapprobation of his intermarrying with his present wife, as not being a proper match for him: but the respondent did not see or hear from her after the said marriage took place; and he knows not, nor has heard, nor has ground whereon to believe, that the deceased was, and uniformly declared herself to be, greatly exasperated and offended with him on that account, and that she never forgave him, or would ever permit his wife or her children, by her two former marriages, to see or visit her; save that, previous to the said marriage, she, the deceased, made declarations to the respondent that such would be the case, when she talked to him to induce him to discourage her son from the said marriage."

Mr. Thomas Lowten, an attorney at law, deposed, "That he was several times in company with the deceased, and her son, the articulate Thomas Moore, and until some months before her death, [392] and on such occasions, as well as when absent from her, she appeared to have, and by her expressions of him, as he verily believes, had, a very particular regard and affection for him, and until about a month before her death, she appeared to him to look upon, and did, as he verily believes, look upon him as the special and peculiar object of her testamentary bounty; and she several times, in his hearing, spoke of her having made, and told him she had made, her said son her sole heir; and left him every thing; and she dwelt much upon her elder son George having got all the family estates in Ireland, as well as the personal property, which she said she had given him power to collect, but he had not paid her her dower, or the legacies given to his brothers by his father's will, and she said he became possessed of considerable property by the death of his eldest brother, John; and mentioned her other son, Peter, as becoming deranged in mind, and very often spoke of her being greatly offended with the said George Moore. That, by his acquaintance and intercourse with the said deceased, who used constantly to send her said son, Thomas Moore, to him, he knows that she entrusted her son Thomas Moore with the care and management of her pecuniary concerns, and he believes that he had the management of every thing, as she appeared not to do any thing without him; and she did, until about a month before her death, on various occasions, in his hearing, declare and express her regard and affection for the said Thomas Moore, and her full confidence [393] in him, and she said to him, as late as in July next preceding the month of August, in which she died, that she had made him her heir; that she did, within the last month of her life, when he was in company with her, say, when speaking of the said Thomas Moore, who was in Spain, that she was surprised she could not hear from him respecting her affairs, after which, within the same month,

in a letter in her handwriting, addressed to deponent (the said Thomas Moore having arrived from Spain, and being in London, where he had seen him) she desired him, after what had passed in Spain, not to consult her said son about her affairs; and in conversation she afterwards told him she had heard her said son had been deranged in his mind in Spain (which he apprehends was what she alluded to, in saying, after what had passed in Spain) and the deponent remonstrated with her on the impropriety of such her determination, and said how much she would be assisted by him in giving her answer to a bill in Chancery, filed against her by his brother George; and she at last consented that the deponent should advise with Thomas Moore about preparing such answer; but requested he would not let him know that she had desired him so to do; that he remembers (but whether within the last month of her life, or not, he cannot say) when she appeared dissatisfied with the said Thomas Moore (and being the last occasion of her speaking of him) in an odd sort of way shrugged up her [394] shoulders, and said, 'I had' or 'I have' (he cannot say which) given him every thing."

Mr. Anthony Gower deposed, "That he had known the deceased nearly forty years. That shortly before, and thinks it may have been as late as a month next before the death of the said deceased, who was in the habit of frequently calling upon him, that he last saw and was in company with her; and she, the said deceased, constantly appeared to have, and as he verily believes had, and entertained a great regard and affection for her son, the articulate Thomas Moore, to which he is enabled to depose from the expressions she always, in his hearing, used towards him; that she did many times say that she doated on the said Thomas Moore, and that she had made him her heir; but she did sometime before her death tell him that she suspected Thomas was going to marry; and within the last six weeks of her life, but more particularly as to time he cannot depose, she told him he was married, which appeared to displease her; that in speaking of this she said her said son, whom she doated upon, and whom she had made her heir was married, with which she appeared to be, and was dissatisfied."

Mr. Daniel French, barrister at law, deposed, "That he was, on several occasions, in company with Mrs. Moore, until the day next before the day on which she died; that, on the first occasion of sending for him, she signified to him that her said son was going to take some step displeasing [395] to her; but whether it was his departure for Spain, or what it was, he, to whom she particularly mentioned such, cannot now from recollection set forth; and she did, as he well remembers, then say, speaking of her said son Thomas, that he was the only person for whom she had any love; and that she had made a will in his favour, regularly signed and attested, and left the whole to him, and desired deponent to mention to him what it was that so displeased her, which he was going to do, and which deponent did mention to him, though he now forgets what it was; and this deponent says, that at all times that he was in company with her, and down to the time of his last seeing her, she appeared to have, and as he verily believes had, and entertained a very particular regard and affection for her son, Thomas Moore; and she constantly to the deponent expressed and spoke of him as the peculiar object of her testamentary bounty; and during the latter part of his acquaintance with her, when she became displeased with him, said and declared to the deponent that her son, Thomas, was still the object of her bounty, though he had so much displeased her; and she did latterly frequently, when he was in company with her, request him to call on Mr. Butler, the conveyancer, and desire him to call upon her to make a new will, and which she so did about a month before her death; and on the last day next before her death, when he was coming from her house, the Reverend Mr. Garey, a priest, who attended her at the street door, told him [396] Mrs. Moore wished him to go to Mr. Butler, and desire him to call upon her. That, until her said son Thomas went to Spain, the deceased entrusted him with the care and management of her pecuniary concerns, and all other business of importance; and that when he went to Spain, which he did about a year before her death, she entrusted him with her affairs there; that about a month before her death she wrote a letter, in which she desired deponent to meet her son Thomas, at Yarmouth, on his return from Spain (where he had been, as he understood, in conversation with her, deranged in his mind) and accompany him to London; and soon afterwards, but before he so went to meet him at Yarmouth, she told the deponent she should always be afraid of his losing his mind again, and that he should only live in her house, provided the deponent would live with him; that the deceased, on various occasions, and at different

times, declared and expressed her regard and affection for, and full confidence in, the said Thomas Moore, to whom she had, as by him predeposed, said she had left every thing; and so declared and expressed herself until she spoke as she did to deponent, some weeks before her death, about her son Thomas having become deranged in his mind in Spain, on which her affections appeared alienated from her said son Thomas; and when she spoke of his being deranged, he was in Spain; after which time, within two or three weeks next before her death, she several times said and declared to the deponent that she would make a **[397]** will in such a way as if she had no sons; and spoke occasionally against both her sons, Thomas Moore and George Moore, with great acrimony. That he has frequently heard her express her displeasure against George Moore in the most pointed terms, and declare that she did not nor ever could again look upon him as her son, and that neither he nor his sons should be benefited by any property she might leave behind her.

"That several times in the course of the year in which she died she told him she had made Thomas her heir, and left him every thing; that one day, shortly before her death, she called on the deponent, and he went into the carriage to her, when she said, 'Now I consider that I have no sons or relations, and shall make other friends;' and a few days afterwards she repeated what she had said on the preceding day, and requested deponent to call on Mr. Butler, the conveyancer, in order to have a new will, saying, she felt herself very ill, and might probably die; on which he, from what she said, expressed his horror at the idea of her bequeathing her property away from her family; and saying that no good man would suffer himself to be benefited by her bounty at their expence, she replied she was determined to act as she thought proper; and finding her inflexible, he said to her, at all events, in case Mr. Butler should not come, I hope you will do nothing that will in the mean time disinherit your family, and leave your property in a state of eternal litigation; to which the said deceased answered, No, no, I have taken great care **[398]** of that matter, though, God forgive me, this morning I very near did something that would have made Tom remember (or suffer, he cannot say which), but if I die before I see Mr. Butler, which I think from my pain in my side I may very probably do, there is a will, by which the property will not go out of the family; but really poor Tom is quite mad, and you must live here with him, and we must have at dinner knives that will not cut; and deponent from thence was perfectly convinced that, until the hour of her death, she considered her said son Thomas Moore as the object of her bounty by will; but otherwise he cannot depose to her recognizing any will by her made; that on all occasions, when she inveighed most bitterly against her son Thomas, she uniformly relented towards the end, and gave him to understand that he was still the fondest object of her affections; that when she heard of Thomas's marriage, she did once or twice declare that her son George's was highly advantageous over Thomas's."

Mrs. Rooke deposed, "That the deceased had the greatest aversion to her son Thomas's marriage; and he has heard her say that neither George nor Thomas should be benefited by any property she might leave behind her."

Mr. Thomas Moore, in his answers to the allegation given in by the committee of Peter Moore, deposed, "That the deceased had a small flat deal box, and a small trunk in her bed-room, in both of **[399]** which she kept her money, keys, papers, memoranda, letters, and other things; and that, after her death, the papers marked C and B were found by Mr. Lowten in the presence of Edward Darrell, Daniel French, and the respondent, together in the said deal box; and the paper marked A was found in the said small trunk."

Swabey and Stoddart for paper C.

Jenner and Lushington for paper B or paper A.

Phillimore and Dodson for an intestacy.

Judgment (*a*)—*Sir John Nicholl.* In December, 1808, the deceased wrote a sort of temporary will; for it was clearly made with a view to a more formal instrument. It is merely signed—not attested—and from expressions which occur in it, must have been written with the intention of its being the preparation for a more formal will; strong terms are used in it; and it is written under feelings of great resentment, and for a temporary purpose.

(*a*) This judgment has been given rather in a compressed form as so much of the evidence has been detailed. For the arguments of counsel, see the next case.

Mrs. Moore's testamentary intentions were carried into more formal effect by the will of 1810; in that will every thing is given to her son Thomas; but she forbears to record the reproachful terms against her eldest son, which she had inserted in the other instrument. By the will of 1810 there were [400] no legacies; a form of codicil, however, was furnished to her by her solicitor. The will of 1810 not only superseded that of 1808; but was in great degree in execution of it, and represented it, for it was nearly to the same effect. It approaches the case of a draft which a person signs, and afterwards executes a will made from it; the draft is superseded, being entirely dependent on the will: if the will is revoked, the draft is revoked also.

If the Court is of opinion that this will was for a temporary purpose, and that a subsequent will was executed from it; the question which has been made as to the revival would hardly arise. Therefore, I may relieve myself in a considerable degree from going into the cases cited; though with respect to those cases, I cannot but observe that there is not, when the arguments come to be examined, much difference between the counsel with respect to the law. Those cases depend each on their particular circumstances. The only difference is, whether the presumption lies on the one side or the other. For whether there is a presumed revival or a presumed revocation, still it is admitted that the presumption, on whichever side it lies, may be repelled by circumstances; and the case would then revolve itself into a question of intention.

If it were necessary to decide the point, I should hold that it was not the presumption, when B was cancelled, that A should revive; and supposing the general presumption to be in favour of a revival, I should be most clearly of opinion that the presumption was repelled, and that it was not the intention of the deceased that A should revive.

The question then comes to the cancellation of [401] B; the Court must examine the appearance of the instrument itself; the three sheets were connected by tape, sealed by her own seal, the same seal annexed to the will itself; the fact is, that some one has carefully cut out, apparently with scissors, the whole of the instrument or margin, so as to detach it from its frame; the attestation clause also is cut through. It is the duty of the Court to put a rational construction on this act. In my judgment, it must have been done for the purpose of cancelling, revoking, and destroying the validity of this instrument. I can put no other rational construction on the act; it must have been done not equivocally, but decidedly, for the purpose of revoking the instrument; the form of the codicil also is cut in the same manner, so that it is not improbable, considering the character of the deceased, that she thought it in some way necessary.

The instrument being presumptively revoked, the next question is, by whom? Here there can be no difficulty, it was found in her own possession, and it is not suggested that any other person had access to it.

The presumption that the act was done to cancel the instrument may be repelled by shewing that it was done for some other purpose, or by some other person. Purposes are suggested by the ingenuity of counsel; but it is not enough to suggest; they must be proved. It is pleaded in the eighth article of the allegation that the act was not done by the deceased, or by any person under her authority; but the evidence adduced in support of the plea falls short of the averments. Indeed, it [402] strongly disproves them, and confirms the presumption of law.

In the first place, paper C was written in 1812. The deceased then intended a very different disposition—her son George, who had been excluded by A and B under strong circumstances of resentment, when she wrote C had been restored to her favour and bounty. It is by no means impossible that when she wrote C she might have cancelled B.

Before her death, something of a reconciliation had taken place with her son George, so as to admit him to an intercourse, though it was not a very cordial one, as the Chancery suit continued.

It is more important to observe that the confidence which in 1808 she entertained in her son Thomas, had been a good deal broken in upon; her letters have been introduced, passages have been cited from them which mark her maternal affection; but there are passages also in these letters which mark her displeasure against this son.

The character of the lady is distinguished by intemperance of mind and capriciousness; at any time in her life this might have produced a cancellation; she was not satisfied with her son Thomas's conduct while in Spain; charged him with neglect of

her affairs, and considered him as insane; after his return he committed what was in her opinion an act of great atrocity: he married without taking her advice; this was the same sort of circumstance which had induced her resentment against her son George; and she declared that she was more dissatisfied with Thomas's conduct than with that of George.

[403] These circumstances would naturally produce an alteration in the disposition of her property; the result of the evidence is that there was great resentment towards her son Thomas, and it is proved that till the last moment of her life she wished Mr. Butler to prepare a new will.

All these circumstances, so far from repelling, confirm the probability that the act was done with intention of revoking.

Mr. French's evidence does not alter the view now taken by the Court; she several times told him she had left her son Thomas everything; but on other occasions she said, "I have no sons or relations," and desired him to call on her every day; shortly afterwards she repeated this—Mr. French expressed his horror at her bequeathing her property from her family; but she said she was determined to act as she thought proper; finding her inflexible, he said, "he hoped she would do nothing to disinherit her family, and to leave her property in eternal litigation." To which she answered, "No, no, I have taken great care of that matter, though, God forgive me, I very near did something which would have made Tom remember or suffer (he cannot say which), but if I die before I see Mr. Butler, which, from the pain in my side I think very probable, there is a will by which the property will not go out of the family; but really poor Tom is quite mad, and you must live here with him, and have knives that will not cut."

In the conclusion which this gentleman (who was not acquainted with other declarations of the deceased) drew from this conversation, it is extremely difficult to concur. By what will, by **[404]** what instrument, and to what extent, was this provided? One day, just before her death, she said Tom was not fit to be his own master; nothing, therefore, could be further from her intention than to place the whole of her property under his care and direction, and to make him her executor.

The Court, however, can place little reliance on the sincerity of declarations—they are very easily misapprehended, and a trifling word may alter the whole import of them—and with a person of such a character, and under such circumstances, the declaration mentioned is too loose to be relied upon; and, above all, it would be extremely dangerous to depend upon them in opposition to the acts of the deceased; she alludes to something she had done that morning—it may have been cutting B or writing C, or something else.

The declarations—that she had no son, that she must make other friends—Mr. French says that she was inflexible—Mr. French's horror at her intentions—I doubt a great deal, not what the witness, but what the deceased herself meant; the Court must scrutinize declarations coming from the deceased as well as from the witness; there is nothing to shew that B was not cancelled after these conversations; from the expression "very near," though she might not then have done it, she might have done it the next morning; it has been admitted that it was impossible to depend one hour upon her conduct; her passion and caprice were so irregular that the only conclusion we can come to is that she had no fixt and determined mind upon the subject.

Here is an act of cancellation—it must be pre-**[405]**-sumed to have been done by the deceased—there is no evidence to shew that it was not done animo revocandi; every thing leads to the contrary conclusion. I pronounce against B.

Paper C has been propounded; the question is whether it is a deliberative or a complete paper; if it is of the former description, there must be evidence to shew that the deceased was prevented by the act of God from the due execution of it—it was written on the envelope of a former will—various interlineations and alterations occurred in it; it states that she wishes it to be made in the following manner by a "lawer approved," George and Thomas Moore are struck through—it leaves off in the middle of a sentence. The counsel have hardly ventured to argue this as a finished paper, there is a complete departure from all other wills, and its several parts are quite inconsistent with each other; it could only be sustained by evidence shewing that she had come to a final resolution that this paper should operate as far as it goes—there is not one tittle of evidence to supply the demands of law in this respect. Mr. Butler was sent for; but what to draw up the Court can form no opinion—it must be at a

loss to conjecture her settled intention. The only conclusion I can come to is that she died intestate. She might have intended to die testate; but the Court cannot make a will for her—it is enough that she did not intend either of these papers to operate. I must pronounce against them all: and for an intestacy.

[406] MOORE *v.* MOORE AND METCALF.(*a*) High Court of Delegates, Hilary Term, Jan. 31st, Feb. 3rd and 5th, 1817.—A mutilation of a will held to amount to a cancellation, and that cancellation not to revive a prior will of nearly similar import.

(An appeal from the Prerogative Court of Canterbury.)

The Judges who sate under this commission were Mr. Baron Richards, Mr. Justice Park, Mr. Justice Abbott, Doctor Arnold, Doctor Adams, Dr. Burnaby, and Doctor Gostling.

Dr. Phillimore, Dr. Dodson, and Mr. Heald for Mr. George Moore, and in support of the sentence of the Prerogative Court.

[407] The argument necessarily divides itself into two branches—

First. Whether B is a cancelled instrument.

Secondly. If B should be held to be cancelled, whether A does not, by necessary implication, and by construction of law, follow the fate of B.

As to the first point, we submit that if the testatrix cut B advisedly, the presumption must be that she cut it animo cancellandi. That from the circumstance of its having been found in her custody, and no other person having access to the box in which it was kept, the presumption must be that she cut it herself. And, lastly, these presumptions are confirmed and corroborated by the character of the deceased, and the state of her affections at the time of her death.

The manner in which B has been cut raises the inference that it has been advisedly cut; the attestation clause was entirely cut through, one of the seals which fastened the different sheets together was broken, and the several papers in their detached state were found scattered about the box. The rule of the civil law was that if the testator had mutilated a will himself, the heir could not claim under it; but if it could be shewn that another person had mutilated it, the will was good (Dig. lib. 28, tit. 4, c. 3). Consultò quidem deletâ exceptione petentes, repelluntur; inconsultò verò, non repelluntur, sive legi possunt, sive non possunt, quoniam si totum testamentum non extet, constat valere omnia quæ in eo scripta sunt. Et si quidem illud concidit **[408]** testator denegabuntur actiones: si verò alius, invito testatore, non denegabuntur. The expressions in this passage seem to characterize the very species of mutilation this instrument had undergone.

Such being the appearance the instrument presents on the face of it, a Court of law is bound to put some construction upon the act; it will not be sufficient to say that the testatrix (if such she is to be called) has done it in sport or to while away a vacant half hour—if she did it advisedly, the law will fasten on her the conclusion that she did it animo cancellandi.

Again, from the care with which the will was preserved, and from the place of its deposit being accessible to herself alone, the presumption must be that she cut it herself. Sin de facto testatoris haud quidem liqueat, sed testamentum tamen scriptum domi testatoris, et in arcâ reperiatur deletum, aut incisum; etiam tunc ex voluntate testatoris id factum præsumatur (Voet, Ad Pand. lib. 28, tit. 4). Moreover, it was found together with paper C, which paper, if completed, must have utterly annihilated it. In the eighth article of the adverse plea it is stated "that when paper B was found after the deceased's death, it was in the same plight and condition as it now appears, and that the cutting off the border or margin of the said paper was not done by the deceased, or any person under her authority or direction, with a view to destroy, cancel, or revoke the said will; but that down to the time of her death she recognized and considered the said paper writing B **[409]** as her last will and testament." It was extremely essential to have established this fact, and yet no evidence

(*a*) Paper C was not propounded in the Court of Delegates; but the committee of Mr. Peter Moore, who had prayed probate of that paper in the Prerogative Court, joined with Mr. George Moore in praying an intestacy, and appeared by his counsel: after some preliminary discussion, however, the Court refused to hear them, on the ground that there had been some informality in the mode of adhering to the appeal.

whatever has been adduced in support of this article of the allegation; by the witnesses examined, and the letters produced, the affections of the deceased at the latter period of her life appear to have been alienated from her son Thomas. Letters of the 28th of July and the 10th of Aug. are important in this view, as they embrace the period about which C was written.

C, too, but for the postscript, would be a finished paper; and in it we read recorded by her own hand that Thomas was undutiful and disobedient; he is placed on a level with George, for whom she entertained so deep-rooted an aversion, and every will she had ever made is annulled.

On this part of the case the character of the deceased is important; it is impossible not to be struck with the extraordinary features by which it is delineated in the evidence before the Court—her irritable and anxious mind, the vehemence of her passions, her tendency to act strongly and permanently on the impulse of the moment, all paved the way for the misery, vexation, and disappointment which she was destined to experience in her latter days. In return for the passionate affection she lavished on her children, she exacted from them implicit obedience and submission to her will; and, above all things, she held that they were bound to consult her wishes alone in disposing of themselves in marriage; to a mind constituted like this, influenced by the fervour of such warm affections, and liable to the agitations of such stormy **[410]** passions, the transition from ardent love to violent hatred was natural and easy; her eldest son, whom she had doated on to such an excess as to excite the jealousy of his younger brothers, had for many years been to her an object of aversion. Is it, therefore, surprising, or inconsistent with the ordinary course of human passions, that her youngest son, when he conducted himself in a manner similar to his eldest brother, should have excited in her mind similar feelings of indignation and resentment?

If we have established that B was mutilated animo cancellandi, it will be very difficult to maintain that when she did this act she did not also intend to cancel A—the wills are so essentially identified that one appears to be little else than the rough draft from which the other was transcribed, the same person was executor in both and both contained substantially the same disposition of her property.

But we may carry the argument higher, and assert that, by construction of law, A was destroyed when B was completed; and that A being destroyed, in order to have given effect to it again, there must have been some act of republication, or some revival by necessary implication, or something in short to shew that it was the wish and intention of the deceased that her first will should take effect after she had cancelled her second. This is the clear language of the Roman law.(*a*) Posteriore quoque testamento quod jure perfectum sit posterius rumpitur, nec interest, extiterit aliquis hæres, an non, hoc enim **[411]** solum spectatur, an aliquo casu existere potuerit. Idéoque si quis aut noluerit hæres esse, aut vivo testatore, aut post mortem ejus, antequam hæreditatem adiret, decesserit, aut conditione, sub quâ hæres institutus est, defectus sit, in his casibus pater-familias intestatus moritur. Nam et prius testamentum non valet, ruptum à posteriore; et posterius æque nullas vires habet, cum ex eo nemo hæres extiterit. In the same book of the Institutes, under the head of Quibus modis convalescit testamentum, there is a further illustration of this doctrine (Instit. lib. tit. 17, s. 7). All the commentators have concurred in the sense and stringency of these passages; the expressions of Vinnius are nec prioris testamenti sublatio pendet ab eventu aliquo, aut casu contingente post mortem testatoris, sed illud statim vivo adhuc testatore ipso jure per posterius rumpitur.

This doctrine will be found also in the Digest, lib. 28, tit. 3, s. 2, and in several passages of the code;(*b*) and it was carried so far that if a man, having made his will, was adopted into another family, and afterwards became emancipated, it was necessary that there should be some act to revive the will (Dig. 37, tit. 11, c. 11).

We are not, however, driven to stand on the extreme of this principle; in looking to cases, we may anticipate that that of *Goodright* v. *Glazier* (*d*) will **[412]** probably be pressed against us: it may be observed, however, that the dicta of the Judges in that very case admit that, under circumstances, the first will, though found entire, might have been held in law to be cancelled; both Lord Mansfield and Mr. Justice Yates

(*a*) Instit. lib. 2, tit. 17, s. 2, de posteriore testamento.
(*b*) Tunc autem prius testamentum rumpitur, cum posterius jure perfectum sit.
(*d*) *Goodright on the demise of Glazier* v. *Glazier*, Burrows, vol. iv. p. 2512.

admit that such a case might exist; but whatever may be the weight and authority of *Glazier's case* in Courts which are bound up by the decisions of the Courts of King's Bench, here we can only look to it as expressing the opinion of wise and enlightened judges as to the law which rules in the disposition of real property; here it cannot be considered as having any binding authority; for here we have in the records of this very Court an uninterrupted series of decisions for upwards of a century, flowing in a contrary course.

In *Whitehead* v. *Jennings* (Prerog. 1712. Deleg. 1714) Anthony Keck made his will in Aug., 1701; in 1712 he made another of a totally different tenor, in which his nephew was appointed executor and residuary legatee; in an access of passion against his nephew he burnt the latter will, he afterwards became reconciled to him, and sent for Mr. Tolson, his attorney, to make a new will; before the attorney arrived he was taken suddenly ill, and died in the course of the night, calling anxiously for him. The will of 1701 was propounded; but the Court pronounced for an intestacy.

In *Burt* v. *Burt* (Prerog. 1718) a will made in 1669 was found in the closet of the deceased; it was pleaded and proved that he had made another will in 1713; **[413]** the only account given of that will was that the wife said she had destroyed it, having found it in a cancelled state; she was materially benefited under the existing will, and the Court pronounced for an intestacy.

In *Helyar* v. *Helyar* (Prerog. 1754; 1 Lee, 281) Robert Helyar died in June, 1751, a batchelor, leaving Joanna Helyar a sister, William Helyar his nephew, and two nieces; by a will of Feb., 12, 1742, he bequeathed to his sister the moiety of a small estate they possessed together in joint-tenancy in Cornwall, and 2000l. in money. All his other estates and property he left to his nephew, whom he constituted also his executor and residuary legatee; he declared to his solicitor that his object was to keep the real estates in the male line of the family. The nephew made his will on the same day, by which he left his property to the uncle, and they exchanged copies of their wills; afterwards the nephew married and had a son; his uncle's affections became alienated from him, and in process of time he completely quarrelled with him, and declared he should never be benefited by him; and, accordingly, on the 19th of Dec., 1745, he made another will, in which his sister was executrix and residuary legatee in the stead of the nephew; that will was not found at the death of the deceased; and it was established to the satisfaction of the Court that the deceased had destroyed it himself. The case was argued at great length before Sir George Lee (from the manuscript notes of Sir Geo. Lee, see p. 166); five points were **[414]** made in favour of the will of 1742. First. That it was contrary to the statute of frauds to receive parole evidence of a will which did not exist. Secondly. That there was not sufficient proof of the factum of the second will. Thirdly. That the executing a second will was not of itself a revocation of the first. Fourthly. That there was proof that the second will was destroyed by the testator himself. Fifthly. That if the second will was destroyed, no act of revival was necessary to set up the first. Sir George Lee, however, decided against the will propounded, and pronounced Mr. Helyar to have died intestate, expressly on the grounds that the execution of the second will was a revocation of the first; and that where a second will had been destroyed, some act of revival was necessary to set up the first.

In *Arnold* v. *Hoddie* (Prerog. 1765) the deceased made a will in 1753, in favour of a Miss Arnold, whom at that time he was about to marry—he afterwards quarrelled with her; in 1760 he made another will, by which he bequeathed his property to a sister; the latter will was not found at his death, nor was there complete proof of the execution of it; but his aversion to Miss Arnold was proved, and Sir George Hay pronounced against the existing will.

As to the effect of these cases we do not mean to contend that under all circumstances, when a second will is destroyed, one anterior in date cannot revive; what we maintain is that we have so far adopted the civil law into our decisions as to con- **[415]** sider the factum of a second will as a presumptive revocation of a first, and that the burthen of proof is by such a circumstance thrown on the adverse party to repel that presumption. On the other hand, where circumstances have been such as to shew clearly that the deceased intended the first will to revive, these Courts have pronounced for them, as in *Stacey* v. *Dickens* (Prerog. Easter Term, 1724). *Vanier* v. *Hue* (Prerog. 1724), and in the latter case of *Passey* v. *Hemming* (Prerog. Michaelmas

Term, 1809. Deleg. 1812); but it has been only in cases where the intention has been satisfactorily made out that the presumption of law has been held to be repelled. The present case is stronger in its circumstances than either of those which were successively decided by Sir Charles Hodges, the Delegates, Sir George Lee, and Sir George Hay.

For the purposes of this argument, the cancellation of B is a strong circumstance against A. The writing of C is a powerful argument against A—the declarations of Mrs. Moore that "she would make her will as if she had no sons," that "Thomas and George should never inherit her property," her refusal to see Thomas Moore's wife, her indignation at his marriage, her sending for Mr. Butler to make a new will when she was dying, are all strong circumstances to shew quo animo B was cancelled, and that, by cancelling that paper, it never could be her intention that A should revive.

[416] Mr. Warren, counsel for Mr. Thomas Moore, contrà. The first question undoubtedly will be whether B is cancelled; the second will be whether, if B is cancelled, A is in force, i.e. whether B, which is originally upon the face of it a perfect will, has been, by any thing which has happened to it since, cancelled; and if so, whether, by cancelling B, paper A is revived, and is to all intents and purposes the same as if B had never been made.

To say that B is cancelled on the face of it, is very much to overstate the case; no case, no decision, has been adduced in support of this assertion: if this is to be decided by bare inspection, let us look to the rules which Swinburne (part vii. s. 16, p. 515) lays down on this head. "The third case is when the whole testament is not cancelled or defaced, but some part thereof only rased, blotted, or put out; for the other parts of the testament do remain firm and safe, as they were before, although the deletion were in the chief part of the testament, namely, the assignation of the executor."

If, therefore, a testament were drawn over with lines, there can be no doubt but that it must be considered as cancelled; so if it were drawn over with cross lines diagonally, in either case to repel the presumption, there must be evidence to shew that the party did not mean to deface it. Here there is nothing crossed or blotted out; if, instead of this will being cut, a line had been drawn along the top, passed down the side, and through the attestation clause; could it be contended that the **[417]** will was cancelled on the face of it, for there is no difference between the act of a knife and the act of a pen; it is material whether it be a cancellation primâ facie or not; if it is not, unless there is sufficient evidence to shew that the party intended to cancel it, it remains a good will. Suppose, again, this margin not to have been found; and that the will had been found without it in the drawers of the testatrix where she usually kept her papers of consequence; could it be said she did not keep it as her will? if she did not, why was it there?

Our opponents are not entitled to ask the reason why she cut the paper, for the paper is in itself perfect as a will; they, therefore, are to shew that this was done animo cancellandi; cutting through the attestation clause cannot be of more importance than cutting through the name of the executor; and we have seen in what light Swinburne regards that when he states that, though you cut out the assignation of the executor, still the will is good.

Per Curiam. Mr. Justice Abbott. "Blot out," not cut out.

Mr. Warren. "Erase, blot, or put out."

Per Curiam. Mr. Justice Abbott. Erase does not apply to cutting out.

Mr. Warren. In whatever way it was done, it would not alter the argument; evidence may be given to shew for what cause it was done; but whether cut, or drawn round with a black line, it can make no difference. We can only say there are many things done for which we can give no account.

[418] If, however, it should be held that there is something on the face of this paper which we are called upon to explain, then we have abundant evidence to shew that she did not intend to cancel it.

Bibb v. *Thomas* (Blackstone's Rep. vol. ii. p. 1043) was a case in which circumstances were equally strong as here; there evidence was brought by the heir at law, who claimed against the will, to shew the intent with which the act was done. If the Court is of opinion that explanation is necessary, the letters and the evidence supply it: in the former we see the language of a mind in a great degree subsiding from the anger she had once felt towards her son; and there are a variety of instances in them, as well as in the depositions, where she speaks of him with great affection.

The next question is, supposing B to be cancelled, what is the effect of that cancellation upon A? And this is a question of great importance, of great extent, and of considerable nicety, in consequence of the cases which have been cited. In *Goodright* v. *Glazier*,(*b*) the same argument was used, which has been used by my learned friend on the other side; but it was over-ruled by the Court.

There is no doubt but that the repeal of a subsequent statute sets up a preceding statute. This is a law as old as any in the country, and why? because the act which shewed the change of intention is removed by a subsequent act. It is difficult to conceive how these two cases are to be dis-**[419]**-tinguished. What is supposed to repeal the first? Undoubtedly the second. But then it is argued, the second will shews a change of mind; to be sure it does, it shews there was a change of mind at that moment. But does not the destruction of the second instrument shew a change of mind again? As altered, it is to take effect if the party does not change that will, and that is the distinction. His mind is shewn by the expression in the second will, if he does not cancel that. The will is ambulatory, and so it is no evidence of a change of intention so as to affect the former will; and this appears to have been the opinion of Lord Mansfield, and, as Mr. Justice Yates says, "A will has no operation till the death of the testator, it is the expression of a man's mind to take place after his death; as long as he lives he may alter his opinion. I tear the paper which expresses my sentiments, then, has not my mind reverted? he has revoked the revocation, and his mind comes back to its first intention."

In *Harwood* v. *Goodright* (Cooper's Reports, p. 1791) Lord Mansfield says, "It is settled that if a man by a second will revoked a former, yet, if he keep the first will undestroyed and afterwards destroy the second, the first will is revived." Lord Mansfield, speaking the sense of the Court, considers this as a clear established rule at common law. It stands upon the authority of these two cases.

Per Curiam. Mr. Justice Abbott. That would go a vast length; if you put it as an absolute proposition at law without any de-**[420]**-duction, that the cancellation of the second will revives the first. Suppose a man, having a wife and one child, should make a will, leaving his property in a manner suitable to the then state of his family—that he should afterwards have six children born, and then should make a will, which he should afterwards destroy. By setting up the first will, you would leave five of the children unprovided for. If you put it as an absolute proposition, that the cancelling of the second will would revive the first, cases might be put so distressing as to make one feel a little whether it was right.

Mr. Warren. Your lordships will do me the justice to recollect that I have only cited authorities.

Per Curiam. Mr. Justice Abbott. Certainly; and I put the question to you that you may fortify your opinion by reason as well as by authorities, if you can.

Mr. Warren. I presume to go no further than the authority of those cases, which certainly do lay it down as a decided principle of law without limitation.

Per Curiam. Mr. Baron Richards. But I think I may venture to say it has not been universally so considered. It is a great misfortune that dicta are taken down from Judges, perhaps incorrectly, and then cited as absolute propositions.

Mr. Warren. I do not apprehend there can be any mistake in the report: when Lord Mansfield mentions it, he does not say it is decided in such and such a case; but he considers it as a point perfectly established.

Per Curiam. Mr. Justice Abbott. **[421]** It certainly in the report is put as the settled law, excluding all question of intention.

Mr. Warren. If it is the law, therefore, whatever inconvenience may arise from it, it must remain the law till it is altered by the legislature, and nothing short of an act of parliament could do this; and, even admitting that possible difficulties may apply to this rule of law, this is not that kind of case which would call upon the Court to depart from the rule on account of any peculiar hardship.

In *Wright* v. *Netherwood* (*a*) Sir William Wynne observed, "The point seems a good deal like that which has been a vexata quæstio in these Courts, and brought before the Courts of Common Law, whether a will, which is revoked by another, is set up by the

---

(*b*) *Goodright on the Demise of Glazier* v. *Glazier*, Burrow, vol. iv. p. 2512.

(*a*) *Wright* v. *Netherwood*, Prerog. May 6, 1793, reported in the Notes of Mr. Evans's edition of Salkeld, vol. ii. p. 593.

destruction of the second." So that Sir William Wynne, coming many years after Sir George Lee, considered it as a vexata quæstio; the decision, therefore, in *Helyar* v. *Helyar* could not have set the question at rest. "There was a case to that effect," he says, "before Sir George Lee, *Helyar* v. *Helyar*, in which it was held that the will, being once revoked, remained so: but there was an appeal from that judgment to the Delegates, and it was never determined by them; the case of *Glazier* was directly contrary to that, and it was held that the first will was good." If, therefore, there was any meaning in words, he thought the latter decision the correct one. Supposing this case sent before a jury to decide, there can be no doubt but that, on the authority of the **[422]** cases cited, they would find for the will; but then, says my learned friend, the ecclesiastical law is different; you cannot have the personalty; it may be a very good law for the realty, but it is a very bad one for the personalty. This appears a strange proposition: there is no difference in the facts nor in the conclusion. It cannot be said that a different conclusion is to be laid down as matter of law, there being nothing but the simple fact that one relates to a landed, the other to personal estate. What is the ground of Sir W. Wynne's opinion in *Wright* v. *Netherwood*, that *Helyar's case* was wrong? Why? because the Court of King's Bench had decided the contrary; indeed, if this is the law, as I apprehend from these cases it clearly is, in the Court of King's Bench, it must be the law in the Ecclesiastical Court: it is impossible there can be one law applying to real estate,(*a*)[1] and another to personalty. Moreover in this Court *Passey* v. *Hemming* is directly in point in our favour.

Lastly, parole evidence cannot be admitted to affect paper A. There may be parole evidence to affect B. I admit it, because there is something on the face of B requiring explanation: but suppose B cancelled, what is there on the face of A requiring explanation? A is a perfect will; and if it had been the only paper in existence, there could have been no question about it; and, under the statute of frauds, no parole testimony can be given under to affect A. Stat. 29 Car. 2, c. 3, s. 22.(*b*) If parole testimony is admitted, it must **[423]** be in direct violation of this clause. Upon the face of the will all has been regular. Then no evidence can be given; if it were otherwise, verbal evidence might set aside a written will, and do all the mischief the statute of frauds was enacted to prevent.

Dr. Jenner, Dr. Lushington, and Mr. Taddy on the same side with Mr. Warren. With respect to the cancellation reliance has been placed on a passage from the Digest; and it has been argued that the word concido expresses exactly the species of mutilation which this paper has undergone: but when we come to look for the meaning of this word in dictionaries, we find it is that which least expresses the appearance of this paper; for it means to cut in small pieces, to tear to pieces. In the Dictionary of Ainsworth there are five meanings, one metaphorical, the others go to the complete destruction of the thing, to chop, to mince, to hurt, to ruin, or utterly destroy, i.e. if you find that the deceased has done an act which shall destroy the effect of the instrument, or the material upon which that instrument is written, then you may presume it to be a revocation, or act otherwise. Four modes of cancellation are pointed out by the statute of frauds, by tearing, burning, **[424]** cancelling, or obliterating: (*a*)[2] the act, therefore, which is to cancel an instrument, must be such a

(*a*)[1] *Passey* v. *Hemming*, Prerog. 1808. Deleg. 1812.

(*b*) "And be it further enacted that no will in writing concerning any goods or chattels, or personal estate, shall be repealed; nor shall any clause, devise, or bequest therein, be altered or changed by any words, or will by word of mouth only, except the same, in the life of the testator, be committed to writing, and after the writing thereof read unto the testator, and allowed by him, and proved to be so done by three witnesses at least." 29 Car. 2, c. 3, s. 22.

(*a*)[2] "No devise in writing of lands, tenements, or hereditaments, nor any clause thereof, shall, at any time after 24th of June, be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself or in his presence, and by his directions and consent; but all devises and bequests of lands and tenements shall remain and continue in force until the same be burnt, cancelled, torn, or obliterated by the testator or his directions, in manner aforesaid; or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses, declaring the same." Stat. 29 Car. 2, c. 3, s. 6.

one as shews an intention on the part of the deceased that that instrument shall not have effect; it must be an act that, at the time of doing it, shews that it was the intention of the deceased that the instrument should be destroyed by the act then performed upon it; this is the meaning of the methods found out by the statute of frauds for destroying a will of landed property. Those cited from the civil law are to the same effect; they imply that there shall be an act done not equivocal in itself, but which shall necessarily import an intention to destroy the instrument to which the fact is applied.

The substance of the paper remains complete; the greatest care has been taken that not a syllable of it should suffer from the act: it is true that in cutting it the attestation clause is cut through; but this is clearly not advisedly done; it was upon the second sheet of the will; it is the effect, therefore, of accident, and not of any intention to cut through **[425]** the essential part of the instrument itself. This is further confirmed by her not having cut through the attestation clause of the codicil; if the act is at all equivocal, the burthen of proof is on those who impeach the validity of the instrument to shew that it was done animo revocandi, and that proof must apply most strictly to the act itself.

The other point of the case of extreme importance, and one upon which a decision on the point would be highly desirable, not only in this, but in all courts where questions concerning wills are agitated. We maintain that, according to the principles of this, as well as of the Temporal Courts, a paper revoked by the execution of a subsequent paper is, by the cancellation of that subsequent paper, revived. The case of *Glazier* v. *Glazier* has established the law on this point; during the discussion of *Passey* v. *Hemming*, Mr. Justice Heath produced a note he had himself taken in Court of the judgment in *Glazier's case*, which carried the doctrine further than the case, as reported in Burrows, does. A statute which has been repealed, by the repeal of the repealing statute becomes operative again; and upon general principles it must be so held that the suspension of a second act revives a former act.

Per Curiam. Mr. Justice Abbott put this case—A will giving an estate to trustees for the benefit of A., with some few legacies. Let the testator make a second will giving that estate to A. and B. in joint-tenancy; suppose B. to die and several of the legatees, the effect of the instrument will be the same upon an estate of some thousand pounds, with the exception of some few hundreds; **[426]** would you say that the destruction of the second will is to set up the first; the generality of the principle would rule that. *Glazier's case* comes near that; and if you compare it to the repeal of a statute you must go to that extent.

ARGUMENT RESUMED.

The doctrine of the Ecclesiastical Courts does not go to that extent undoubtedly.

With respect to the authorities from the Digest, they have nothing to do with the subject; they have no bearing upon it; ours is not the civil law of Rome, our proceedings are grounded upon the jus gentium; rules proper for the Roman people would be improper for a country like this; we all know the solemnity with which wills were executed at Rome. The civil law said that when once a will is perfected there it must remain; in many instances it could not be revoked, it was not ambulatory, the principle was the opposite of ours. With us no testament can be of effect till after the death of the testator; we are, therefore, to appeal to common law, and not to civil law, for authority.

In *Jennings* v. *Whitehead* it appears that the deceased had told Mr. Tolsen, his solicitor, that he had a will in his possession which was not to his mind; that he was reconciled to his nephew Richard, and meant to give him 2500l. in Hampshire. It is a case, too, in which the whole tenor of his life, subsequent to 1713, shewed that the person he had once made executor and residuary legatee was never meant to be so again; it was pronounced an intestacy, because there was evidence to shew it could not be his intention by the **[427]** revocation of the second will to revive the first; the intention was clearly shewn to be contrary.

In *Burt* v. *Burt* the only evidence as to the destruction of the second will was that of the wife, by whom the destruction had been made; it is impossible, therefore, that there could be any evidence to shew that it was his intention that the first will should revive.

In *Arnold* v. *Hoddie*, when the instructions were given for a second will, the first

will and a codicil were in the hands of an attorney, and the testator had no opportunity of cancelling them; circumstances shewed that it was impossible he could have meant the will to revive.

In *Helyar* v. *Helyar* (*a*) Sir George Lee's judgment cannot be taken as a decision upon the law that an act is necessary to revive. Whatever may be his opinion he does not decide that; he con-**[428]**-siders all the circumstances as material. The case of *Helyar*, therefore, only goes to this, that circumstances are material to shew intention; and Sir George Lee would probably have decided differently had the case of *Glazier* been then decided.

Wright v. *Netherwood* shews Sir W. Wynne's opinion.

Passey v. *Hemming* has, however, as it has been generally understood, entirely disposed of this question: it unfortunately happens that we are in the dark as to the grounds of the decisions in this Court; but it is reasonable to conclude from that judgment that some act or declaration is necessary, in the case of a subsisting will, to shew it was the intention that it should not revive. The will established was in 1780; the testator died in 1807; it consisted of two separate papers, written within a short period of each other; they were attested only by two witnesses, and consequently were not good to pass real estates; he had made subsequent wills, and to a late period of his life was occupied upon another will which contained a different disposition of his property; but it was unfinished. The will of 1780 was found in a drawer in a garret, and there was nothing to shew that they had ever been recognized by the deceased. Sir W. Wynne said he should have felt extremely unwilling to have been bound to have pronounced against them; but he was not; he considered *Helyar's* as a case of circumstances from which it was impossible to believe that the first will contained his last intention, a departure of intention had been shewn by the variation in the second will, and that variation was proved **[429]** not by mere circumstances, but by the execution of the second will.

In another point this case essentially differs from all those in which the subsisting wills have been held to be void; namely, that in all of them there have been different executors in the second will from the first; a circumstance strong to shew a complete change of intention; here the executor is the same under both instruments. It is remarkable that all the finished wills in this case shew continued affection towards the same person, and this is not contradicted by any act of the testatrix, shewing any intention to dispose of her property in a manner injurious to him. There has not been any act established under her own hand, as an operative will, indicating a change of intention.

The law of the Ecclesiastical Court is that there may be evidence given that it was not the intention of the testator that the first will should be revived by the cancellation of the second; but that, if such evidence is not produced, the presumption must be that he meant to revive the first. The operation was only suspended by the factum of the second will; and the moment the second will is cancelled that suspension is taken off.

Dr. Phillimore in reply. Important as the case is on account of the principle of law it involves, the importance of it has been augmented by the course of argument adopted on the other side; it has been contended—

First. That if B is a cancelled paper, we are precluded by the statute of frauds from entertaining any question whatever with respect to the **[430]** validity of A. Secondly. That if the Court of King's Bench would pronounce for A, the Court of

(*a*) In the mention which is made of this case in the report of the case of *Goodright* v. *Glazier*, Burr. 4, 2512, Sir George Lee's judgment in *Helyar* v. *Helyar* is erroneously stated to have been affirmed by the Delegates, the fact being that the case was compromised in the Court of Delegates, and consequently did not come to an hearing there. In the manuscript notes of Sir George Lee, after the recapitulation of the grounds of his judgment, I find the following memorandum:—N.B.—"Mr. William Helyar has appealed to the Delegates, and prayed a commission of Lords Spiritual and Temporal; but, on hearing counsel, Lord Chancellor granted it only to judges and civilians, because the questions in the cause turned upon points of law. The cause was afterwards agreed, and Mr. Helyar renounced his appeal, and consented that the cause should be remitted back to the Prerogative Court, and upon the remission being brought in, I decreed administration to the sister and only next of kin, on the 19th of January, 1757."

Delegates is bound to do the same. Thirdly. That the Digest has nothing whatever to do with the question. If either of these objections are founded, we must be content to admit that there is an end of the question at issue. It is essential, therefore, that they should be set at rest.

Parole evidence is not introduced here to revoke a written will; but to prove a fact, viz. whether A is a will or not. The evidence is introduced not to revoke A, but to shew that B had ceased to be a will; cases of this description have been held not to fall within the statute of frauds; and the practice of the Prerogative Court has, ever since the passing of that statute, been to establish unfinished and unexecuted papers, whenever it can be shewn that it was the intention of the deceased, continued to the latest moment of his existence, that they should operate, even in cases where the most regular and formal wills have been found entire and uncancelled.

The objection is not new; we find from a note of the judgment in *Helyar* v. *Helyar*, in the handwriting of the eminent judge who decided it, that a similar objection was pressed in that case to any inquiry being made into the factum of an existing will; "but," to use his language, "the case (*a*) of *Sellars* v. *Garnet* in the Prerogative, October, 1748, was full to this point; for there an executed will was held to be revoked by a will wrote while **[431]** the testator was alive; but he died before it was brought to him, and the contents thereof were proved by witnesses who heard him give the instructions agreeable to what was wrote down. It was insisted that this parole evidence could not be received; that it was to revoke a written will by parole only, contrary to the statute; but both Dr. Bettesworth in the Prerogative, and the Delegates who affirmed this sentence in 1751, were of opinion that it was a will in writing, that the parole proof of the instructions ought to be received, and that it was not a case within the statute of frauds." This was the doctrine held in 1751; and subsequent practice has established and confirmed it.

The second point made against us is that if it could be shewn that the Court of King's Bench would hold paper A to be a will, this Court would be bound to establish it, inasmuch as it never can be said that there is one law for personal and another for real property. To this we reply that the Court of King's Bench has no authority whatsoever over the decisions of the Court. The argument, if good for anything, would go to constitute it as a Court of Appeal from the Ecclesiastical Courts. If so, for what purpose is the Court of Delegates convened, by commission under the great seal, to hear all appeals made to the king by virtue of the statute of Henry VIII.? and why is a still ulterior tribunal by a commission of review sometimes opened to suitors in this Court? The Ecclesiastical Courts exercise an independent jurisdiction in all cases over wills of personal property: the law they administer, from whatever **[432]** sources derived, is incorporated into, and has for centuries formed part of the established law of the land; the Court of Delegates is to them a Court of dernier ressort; the rules of law, and the decisions which have been handed down to your lordships by your predecessors here, are to be the sole guides of your sentence. The evil and inconvenience arising from the diversity of testamentary law in the Temporal and Ecclesiastical Courts is imaginary; the diversity exists to a great extent already; the will which can pass personal property to the greatest amount which the talent and industry of a British subject can accumulate it, may have no effect, and in practice frequently has none, over landed property; while it is valid with respect to one, it is a perfect nullity as to the other. Indeed, if it were permitted to us to look to the policy of a diversity of this kind in the administration of the testamentary law of England, we should confidently maintain that it was wise, politic, and well adapted to the mixed interests of the opulent and commercial country in which we live, that there should be a greater facility in disposing by will of personal than of real property. But this difference exists on great points of every day's occurrence; what evil, then, can result from it on a point which can only arise for decision now and then in the course of a century? It is sufficient, therefore, only to state on this part of the case, that if it can be made out satisfactorily that, according to the course of decisions in the Ecclesiastical Court, this lady would have been held to have died intestate, the Court of Delegates is **[433]** bound to affirm this sentence; and that even though cases might be cited from Courts of Common Law leading to a directly contrary conclusion.

(*a*) Cited from Sir George Lee's manuscript notes. In the case of *Helyar* v. *Helyar*, Prerog., Jan. 8, 1754.

Thirdly. The assertion that the Digest has no bearing on the subject could only have been resorted to under the conviction that it was impossible to open the Roman code without being overwhelmed by the force of the authorities which pressed against the argument of our opponents. The position is novel to the extent, at least, to which it has now been laid down; the civil law is not the text law of the Court in all instances; but it is positively so where our own law is silent: and beyond this, the whole of the testamentary law which we administer has its basis in the civil law; and, without an intimate knowledge of the Roman code, it would be impossible to acquire a knowledge of our practice, or understand the principles of our decisions. To illustrate this, by an example familiar to every one: the birth of children by the Roman law amounted to the revocation of a will; we have not adopted it to this extent; with us marriage and the birth of a child amount to presumptive revocation of a will; can any one be heard to maintain that we have not adopted our rule from the civil law? What was the conduct of Lord Camden,(*a*)[1] when a question of this sort came before him? He directed an issue to Sir George Hay to try the question, because the Civil Law Courts were best competent to expound the **[434]** law on this subject; so it is in this case, by the Roman law the cancellation of a second will ipso facto revoked a first; with us a second will cancelled is a presumptive revocation of a first; we do not push the argument further than this, we admit that the presumption may be repelled by circumstances. That the civil law has always been considered as the basis of the law of the Ecclesiastical Courts, we have only to refer to the dicta of Sir George Hay,(*a*)[2] Lord Camden, Lord Mansfield,(*b*) and Sir George Lee, which occur in the several cases which have been cited in different stages of the present argument. But it has been argued that the civil law is diametrically opposed to the testamentary law of England in principle; because, by the civil law, a will took effect in the lifetime of the testator, and was not ambulatory; once made, it could not be revoked, the testator himself had not the power of cancelling it; it happens, however, unfortunately for this observation, that the maxim, which is described as so peculiarly characteristic of the English testamentary law, is a fundamental maxim **[435]** of the Justinian code,(*a*)[3] and was transplanted from the Digest into the law of this country.

With respect to the points more immediately under discussion; it has been laid down broadly that, under all circumstances where the second will is cancelled, the first will must, as it were, ipso facto revive. Would this be a rule consistent with reason? Would it be desirable, on grounds of public policy and justice, that a rule of this description should be stern and unbending, that there should be no limitation to this doctrine, no qualification of it, whatsoever? Cases of extreme hardship will suggest themselves readily; cases in which the intention of the testator (the only sure guide for all Courts of testamentary law) might be obviously defeated by such a rule. Let us suppose, for instance, that the cases of *Whitehead* v. *Jennings* and *Arnold* v. *Hoddie*, had come before the Court of King's Bench, with a full development of all the circumstances which were laid open to the Ecclesiastical Courts; and can it be contended that in either of those cases the Court of King's Bench would have felt itself bound to have decided in favour of the subsisting wills? And yet it has been pressed, on the

(*a*)[1] *Shepherd* v. *Shepherd*, T. R. p. 51.

(*a*)[2] It was further objected that, by the Roman law, by which we proceed in this Court, the birth of children operated as the revocation of a preceding will. I agree that this is rightly stated from the Roman law, and that the Roman law, in general, guides our decrees; but it guides our decrees no further than where it is uncontradicted by the English law. Sir George Hay's judgment in *Shepherd* v. *Shepherd*, T. R. p. 51.

(*b*) Though, as to personal estate, the law of England has adopted the rules of the Roman testament; yet, a devise of lands in England is considered in a different light from a Roman will. Lord Mansfield, judgment in *Harwood* v. *Goodwright*, Cowper's Report, p. 1791.

(*a*)[3] Quemadmodum circa fideicommissa solemus vel in legatis, cum de doli exceptione opposita tractamus, ut sit ambulatoria voluntas ejus usque ad vitæ supremum exitum. Dig. lib. 24, tit. 4, c. 4.

Quod si iterum amicitiam redierunt et pœnituit testatorem prioris offensæ; legatum vel fideicommissum relictum redintegratur: ambulatoria enim est voluntas defuncti usque ad vitæ supremum exitum. Dig. lib. 34, tit. 4, c. 4.

authority of *Goodwright* v. *Glazier*, that the law is ab-[436]-solute and unalterable, and cannot be changed but by an act of parliament.

In *Glazier's case* the will destroyed, and the will subsisting, benefited the same person; and there does not appear to have been before the Court one single circumstance to shew that the deceased had in the slightest degree varied from the affection he entertained for the person to whom he had bequeathed his estate.

In *Harwood* v. *Goodright* the doctrine goes no further than this, that a subsequent will, though it be found to contain a different disposition from a former will, yet, if the particulars of that difference are unknown, cannot operate as a revocation of it.

If we have been successful in shewing the civil law is to guide our decisions, our argument remains untouched; since it is clear, both from the text law and the writings of the best commentators, that there can be no doubt as to the language of the civil law on this part of the case; the passage before alluded to from the commentary of Vinnius (Vinnius in Instit. lib. 2, tit. 17, s. 6, c. 2) embraces the whole argument: "Fingamus rursus testatorem, testamentum quod secundo loco fecerat, ac perinde quo prius ruptum erat, incidisse. Quæritur an restituatur prius, cujus tabulæ integræ manserant? Papinianus respondit, si id hoc animo à testatore factum sit, ut priores tabulas supremas relinqueret: voluntatem quæ defecerat recenti judicio rediisse et posse secundum tabulas priores bonorum possessionem pati. At inquies an non sic testamentum citrà [437] ullam solennitatem nudâ voluntate constituitur? Negat hoc jurisconsultus atque hanc objectionem sic removet, ut dicat, non quæri hic de jure testamenti, sed de viribus exceptionis, quo significat, recenti isto judicio, et simplici voluntate testatoris non constitui novum testamentum; sed si scriptus priore testamento hæres agat, et hæreditatem vindicet, eique objiciatur exceptio mutatæ voluntatis, posse eum hanc exceptionem elidere replicatione voluntatis reversæ, si constet, testatorem hoc animo, posterius testamentum, incidisse, ut prius iterum valere vellet." Throwing the burthen of proof therefore completely on the party setting up the instrument, and exacting from him some act to shew that it was the intention of the deceased that the first will should revive.

Per Curiam. Mr. Justice Abbott. The concluding sentences of the passage you have referred to, seem to me to make very strongly for your argument, stronger even than those which you have cited: "utique enim hic animus, ab hærede scripto, omninò probandus est, per codicillos putà, aut alias literas, quibus testator palam declaraverit, se velle priores tabulas valere, alioqui eum, tanquam quem utriusque voluntatis pœnituerit intestatum potius decedere voluisse interpretabimur."

ARGUMENT RESUMED.

Other passages might be cited to the same effect. From them the law of this Court is deducible. The practical operation of it has been established by a series of cases occurring at intervals from [438] 1714 to 1765. It has been admitted that no decision has occurred on this point from the case of *Arnold* v. *Hoddie* in 1765 to that of *Passey* v. *Hemming* in 1812. But it has been contended that, in the intermediate time, Sir William Wynne expressed an opinion decidedly hostile to the principle on which these cases had been adjudged. When the subject was indirectly brought to his notice in the case of *Netherwood* v. *Wright;* as if the obiter dictum of a judge could be taken as affording any fair criterion of what his opinion might be when a subject of this nature should be brought before him, or as if it were probable that any judge would, on an incidental point, step out of his way to give a decision on a question of this magnitude and importance.

Fortunately, however, we have the advantage of knowing what Sir William Wynne's (a) opinion really [439] was on this subject when his mind was immediately

(a) Now, under these circumstances, it appears clearly that the deceased, after having written the two papers which remain entire, executed two further wills, one in the year 1781, the other in the year 1798; but that these regularly executed instruments are each to the same purport, each to the same intent, as far as the two papers F and G go to make provision for the wife, and for the other relations who are there mentioned, it appearing clearly that the deceased's intention was in the first place to die testate; and, secondly, that substantially the intention of the deceased was to do that which he has done by the two papers F and G. I should be extremely loth to find myself bound by the practice of the Court to establish as to those two papers, containing, as I think they clearly do, and are proved to do, what was the intention

addressed to it in the case of *Passey* v. *Hemming*, he there states as the ground of the decision that [440] it appeared clearly both that the intention of the deceased was to die testate; and, secondly, that he always meant to do in substance that which the papers propounded would carry into effect; expressions which surely do not convey the idea that his opinion was in opposition to that series of cases which had been determined by his predecessors; indeed, from the perusal of his judgment in that case, it is manifest that, entertaining the opinion he did as to the particular case immediately under his consideration, he nevertheless felt the greatest anxiety not to depart from the tenor of those decisions, or to decide any thing which might even in appearance indicate an opinion adverse to the great authorities which had preceded him. This point was much laboured by him throughout the judgment. *Passey* v. *Hemming* has been pressed against us as conclusive; but that was a case decided upon its own special circumstances; several wills were before the Court in a cancelled state; in all of them the testator had constituted his wife executrix, and given her the residue; his affection to her was not shewn to have been changed, and the benefit to her was the characteristic feature of the will which was established. It may be observed also, that [441] *Hemming's case* was decided by a very thin commission of Delegates; and that the judgment of the Court below appears to have been much influenced by an erroneous statement of *Lord Alington's case*.

The counsel for Mr. Thomas Moore objected that it was not regular to allude, in reply, to a case which had not been before introduced into the argument.

Per Curiam. Mr. Justice Park. I think in this instance the allusion is justifiable; we have all been furnished, and very properly, with a copy of the judgment in *Passey* v. *Hemming*, in which *Lord Alington's case* is peculiarly referred to.

Per Curiam. Dr. Arnold. It is very material that the circumstances of *Lord Alington's case* should be correctly stated; certainly, in *Hemming's case*, there was a complete misapprehension of them.

ARGUMENT RESUMED.

Lord Alington died in 1722; (a) the will propounded was dated in 1685. It was stated in the argument on *Hemming's case* that there was clear proof before the Court that Lord Alington had made another will within a few years of his death, in which Sir John Jacob was executor, containing a wholly different disposition of his property, but that this latter will could not be found; and that it was on this point that the case turned. On in-[442]-vestigation, however, of the proceedings, it appears that there was no proof whatever before the Court of any second will ever having been completed; nor could the case have turned on this point; several inceptions of wills with revocatory clauses were produced; and the question was whether these inceptions of wills, coupled with length of time and great change of circumstances, would amount to the revocation of a will; and the Court decided in the negative.

The result of the consideration and comparison of all the decided cases appears to be that the presumption at common law is in favour of a revival, and the presumption in the Ecclesiastical Court is against a revival; but that either presumption may be rebutted by circumstances.

It has been said, however, that in all the cases where the making of a second will has been held to revoke a former will, there has been in the second a different executor, and a different disposition of the property; from which circumstances the

of the deceased down to the last of his testamentary life, owing to its appearing that there were testamentary papers afterwards cancelled; that they must be considered as revocations of these two testamentary papers, I should be extremely unhappy if I felt myself bound so to pronounce; but I think I am not; it appears to me that all the cases in which that decision has taken place have gone upon the ground that there were differences, that there were departures, and that what was the intention in the first paper was cancelled in the latter. I take it, by the civil law and the practice of this Court, a paper of a later date, containing a different disposition, would be a revocation of the former; and that, though the latter did not appear, and the former did, and was left; it should require some account, or some declaration of the circumstances, in order to give it effect.

Now I think in all the cases in which it has been held that the former will was

(a) The cause was entitled *The Duke of Somerset* v. *Sir John Jacob*, Deleg., Jan. 22, 1725.

change of intention, it has been argued, must necessarily have been inferred. To us it appears that the present is a stronger case than any one of those yet decided, from the very circumstance of the same executor being appointed in both the instruments; because, if it is once admitted that the deceased cancelled her second will from the aversion she had conceived towards her executor, and from her determination that he should not be entrusted with the management of her affairs, is it likely that she should intend to leave in force another will of nearly similar import, in which she constituted the same **[443]** person her executor, and bequeathed to him the bulk of her property? A, in fact, is the preparation for B; it is the substratum of it. A is informal and unsolemn; B is regular and solemn, and contains a direct revocatory clause.

With respect to the cancellation, this must be considered as the rock on which the counsel on the other side have split; to explain it away, they have been driven to resort to irrational and contradictory theories; it has been argued by one as the result of accident, by another as the effect of design; one has maintained that the deceased took great care not to cut through the attestation clause, while another has laboured to shew that not having the attestation clause before her eyes, she accidentally and inadvertently cut through it.

The passage from Swinburne has no application whatever to the present case; it merely goes to this, that if a will is not advisedly cancelled, even though it be cancelled and blotted in its most essential parts, it is not to be considered in law as cancelled; our argument is that, being found in the possession of the testatrix, if erased, it must be presumed to have been erased by her; primâ facie, it is mutilated; and it is for the party claiming benefit under the instrument to shew that the mutilation was accidental.

Again, we have been told, on the authority of Ainsworth's Dictionary, that "concido" means to cut in small pieces; and, consequently, cannot apply to the species of cancellation which this instrument has undergone; we do not deny this meaning of the word, but we deny that it is the **[444]** only meaning of it; and we assert that in the passage cited from the Digest, the construction of it is not limited to this signification. It is not so that the commentators have interpreted it. The glossary of Cujacius on this passage is, "irritum fit etiam testamentum si deleatur vel incidatur." And Voet (Voet, Ad Pandectas, lib. 28, tit. 4) understands concidit in the same sense. An autem consultò, an inconsultò ac præter testatoris voluntatem deletio, incisio, similiaque contigerint non juris, sed facti quæstio est. And again, consultò tabularum incisio, vel inductio aut cancellatio facta credatur, donec contrarium probatum fuerit. But if we are not to refer to commentators, but to dictionaries, Facciolati, who is of the highest authority among compilers of this class, states concidere in one sense to be synonymous with abrogare; and refers to this identical passage in the Digest as an example of such an use of the word.

No explanation then having been given of the cancellation, it must be presumed to

---

revoked by the cancellation of the latter. In all the cases I have looked into, at least, it appears that the intention of the deceased was varied; consequently, there was proof that he departed from the intention of the first paper.

In the case of *Helyar* v. *Helyar* the first will was in the year 1742. William Helyar, the deceased's nephew, was the executor; the deceased after that made another will, by which another person was appointed executor, and the latter will did not appear; but there was proof that the deceased declared his dislike to the marriage of William Helyar, who was the person appointed executor in the first will; that he declared that he had left him 40,000l., but that he would not leave him a farthing; from thence the Court concluded that the second will was inconsistent with the former, and on that ground revoked it.

In the case of *Jennings* v. *Whitehead* the first will was in May, 1711; by that he appointed his nephew, Henry Whitehead, executor and residuary legatee; in 1713 he made another will, appointing his wife executor; in that same year, in a passion, he burnt his second will. The will with the residue to Richard Whitehead still continuing in existence, he afterwards sent for an attorney to take his instructions for a new will, who asked him whether he had again received his nephew into favour. To which he replied, no, very far otherwise. Here was the clearest proof that could be, of a departure from the first will; and, therefore, the Court pronounced against the first will. Cited from manuscript notes of Sir William Wynne's judgment in the case of *Passey* v. *Hemming*.

have been done animo cancellandi; on the face of it it is most carefully done, and has all the appearance of design; the law cannot resort to fanciful suppositions in opposition to such an act; we admit the act to be equivocal, and that the presumption might have been rebutted, but we contend that all attempts to rebut it have failed.

Thus stands the argument on the documentary evidence; but when reference is had to oral testimony to shew that Mrs. Moore did not consider B as cancelled, and that her affection to her son **[445]** Thomas continued unabated till her death, the facts established by evidence utterly refute any such notion.

Mr. French shews his impression of what the deceased's intentions were, by the reasons he gives for not having, according to her request, sent Mr. Butler to her: all the witnesses speak to her displeasure, her dissatisfaction, and her acrimony (these are their expressions) at her son Thomas's marriage; to the bitter reproaches and opprobrious epithets she lavished upon him—to her declarations that she now considered herself as having no relations; and above all, there is clear testimony of the anxiety she expressed to the latest moment of her life, to see Mr. Butler for the avowed purpose of making a new will. It is in vain, in opposition to such stubborn facts, to argue that her letters begin and end with those expressions of affection and endearment, which a mother usually employs when writing to a son; that her anger was only occasional, and that she never seriously came to the resolution of making a new will.

The sum of the argument is that there is clear proof of the cancellation of B—that from the facts and documents before the Court, it is equally clear that if she intended to revoke A she must be presumed to have intended at the same time to revoke B; and though she might not, and probably did not, intend to die intestate, yet it is obvious that neither of the wills before the Court contain the disposition she intended to make of her property; **[446]** whatever that disposition might have been, it would probably have been inofficious. It may be some satisfaction, therefore, to the Court (if it is permitted to courts of justice to feel satisfaction on such subjects), that the only conclusion of law at which it can arrive is to pronounce for an intestacy, since there can be no doubt but that such a sentence will make a more just disposition of the property of this unhappy lady, than she, if she had lived a short time longer, would herself have made of it by will.

Feb. 5.—The Judges Delegates affirmed the sentence of the Prerogative Court of Canterbury; but gave no costs.

[447] JOHNSTON *v.* JOHNSTON. Prerogative Court, Hilary Term, Feb. 19th, March 1st, 1817.—The birth of children, combined with other circumstances, will revoke the will of a married man.

[Applied, *Castle* v. *Torre*, 1837, 2 Moore P. C. 133.]

James Johnston made a will on the 21st of July, 1793; he was then resident in the island of Jamaica, and had two children, a girl and a boy, and his wife was pregnant. By this will he bequeathed "10,000l. to his daughter, 10,000l. to the child of which his wife was ensient, and if more than one, then 10,000l. to each, and the residue of his property to his son." He quitted Jamaica shortly after the making of this will, and returned to England, where he continued to reside till his death, which happened suddenly, on the 3d of July, 1815, at his house in Wimpole-street; he had four children born subsequent to the date of his will; and his personal property at the time of his decease amounted to nearly 300,000l. His widow was possessed of a considerable landed estate in fee.

The will of the 21st of July, 1793, was propounded by the widow, who was one of the executors under it. The three youngest children, who were minors, appeared by their guardian, and prayed an intestacy.

At the time of the deceased's death, the will of the 21st of July, 1793, was in the custody of his agent in Jamaica; but in the pigeon-hole of an **[448]** escrutoire in the library in Wimpole-street was found a will bearing date June 21, 1793, originally prepared for execution, but afterwards altered in several places by the deceased, and obviously used as a draft for the will of July 21, 1793. There was also found within the blotting paper leaves of a writing book in the same escrutoire (*a*) the sketch of a

(*a*) This paper was propounded in the Prerogative Court on the 26th of June, 1816, as the last will of the deceased; but the Court held that it could not be entitled to