SOUTH AFRICAN LAW COMMISSION

WORKING PAPER 17

PROJECT 22

# REVIEW OF THE LAW OF SUCCESSION: ALTERATION AND REVOCATION OF WILLS

April 1987

INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

The members of the Commission are -

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PREFACE

This working paper has been prepared by the research staff of the Commission to serve as a basis for the Commission's deliberations. The points of view, conclusions and recommendations contained herein should not at this stage be regarded as those of the Commission. The working paper is being published in full to provide persons and bodies wishing to comment or to make suggestions for the development, improvement, modernisation or reform of this particular branch of the law with sufficient background information to enable them to place substantiated submissions before the Commission.

Any request to treat comments or parts of comments on the working paper as confidential will be respected. If no request for confidentiality or anonymity is made the Commission will assume that commentators agree to the Commission's quoting from or referring to comments and attributing comments to commentators.

Any person or body wishing to make oral representations to the Commission should submit a brief résumé of his or its proposed representations, together with a request to be heard by the Commission, to the Commission in writing.

It would be appreciated if written comments, representations or requests, could reach the Commission by 20 November 1987. Please refer to the previous page for the address to which correspondence should be directed. Please communicate with the researcher if you are unable to submit your comments in time.

The researcher responsible for the investigation, who may be contacted for further information, is Mr M Cronje.

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## 1. INTRODUCTION

1.1 The alteration and revocation of wills is a subsection of the review of the law of succession included in the Commission's programme in 1975. In the light of comments received the Commission has decided to limit its investigation to the following subjects:

- Law of intestate succession.
- Formalities for a valid will and custody of wills.
- Alteration or revocation of a will.
- Disqualifications from inheriting.
- Succession rights of adopted children.
- Substitution in the law of succession.
- The introduction of a legitimate portion or the granting of a right to maintenance to the surviving spouse.

1.2 The Commission submitted its report on the law of intestate succession to the Minister of Justice on 16 April 1985.[1]

1.3 On 28 August 1987 the Commission submitted its Report on the introduction of a legitimate portion or the granting of a right to maintenance to the surviving spouse to the Minister.

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1 South African Law Commission Report on the review of the law of succession: Intestate succession 1985.

1.4 A working paper on the formalities of a will,[2] hereinafter "Working Paper 14", was published for comment during October 1986.

1.5 This working paper contains a discussion of the alteration and revocation of wills and provisional proposals for the reform of this section of the law of succession. The other subjects mentioned above will be dealt with in a subsequent working paper.

## 2. FORMALITIES FOR THE ALTERATION OF A WILL

### (a) Introduction

2.1 The question dealt with here is what formalities are required for the alteration of or changes to an existing completed will[3] or a partially executed and therefore incomplete will.[4]

### (b) The position before 1 January 1954

#### (i) Introduction

2.2 It was accepted traditionally that alteration of a completed or incomplete will may be divided into two categories:

(i) alterations which introduce new provisions; and

(ii) alterations which do not introduce new matter but merely remove or delete existing provisions.[5]

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2 South African Law Commission Working Paper 14 Review of the law of succession: Formalities of a will June 1986, hereinafter "Working Paper 14 on formalities of a will".

3 Alterations made after execution.

4 Alterations made before or during execution.

5 B Beinart "Testamentary form and capacity and the Wills Act 1953", 1953 South African Law Journal 159-179, 280-298, hereinafter "Beinart (Footnote Continued)

2.3 It should also be borne in mind that a distinction is made on a factual basis between alterations (of whichever category) made in a completed will and those made in an incomplete will.

(ii) Alteration of an incomplete will

2.4 The position under common law was anything but clear.[6] Broadly speaking it may be accepted that no formalities were required for this category of alterations but that it was rightly regarded as part of the process of the making of the will and that the will as a whole had to be a valid one. If the will was formally valid other grounds of material invalidity could, however, still be relied on regarding the alterations - for instance that the alterations were made without the consent of the testator or that he did not have the necessary intention to revoke (animus revocandi).[7]

(iii) Alteration of a completed will

2.5 The position was that in the Cape Province and probably also in the Orange Free State and Transvaal no formalities were required for mere

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(Footnote Continued)
1953 SALJ", at 287; M M Corbett, H R Hahlo & Gys Hofmeyr The law of succession in South Africa Cape Town: Juta 1980, hereinafter "Corbett", at 58; N J van der Merwe & C J Rowland Die Suid-Afrikaanse erfreg 5e uitgawe Pretoria: Van der Walt 1987, hereinafter "Van der Merwe and Rowland" 178 et seq. See par 2.51 below for the position in Scotland.

6 Van der Merwe and Rowland 178 et seq; Corbett 59 et seq; Beinart 1953 SALJ 287 et seq and 294 et seq; Lee and Honoré Family, things and succession 2nd edition by H J Erasmus, C G van der Merwe & A H van Wyk, Durban: Butterworths 1983, hereinafter "Lee and Honoré", par 572 at 393; D Meyerowitz The law and practice of administration of estates 5th edition Cape Town: Juta 1976, hereinafter "Meyerowitz", footnote 4 at 25; A P J Bouwer Die beredderingsproses van bestorwe boedels 2e uitgawe Pretoria: Van der Walt 1978, hereinafter "Bouwer", at 418. See Raymond v Master of the Supreme Court: In re estate late R K Kahn 1933 NPD 711.

7 Van der Merwe and Rowland 179.

deletions (that is the removal of existing matter). However, once additions had been made the existing formalities of a will had to be complied with.[8]

2.6 In Natal section 10 of Act 2 of 1868 provided that all obliterations or interlineations in a completed will were valid only if the will was thereafter validly re-executed or if the obliterations or interlineations were confirmed in a separate memorandum provided that this memorandum complied with the applicable formalities of a will. It was also provided that if a part of a will was obliterated in such a way that the original text became illegible, the obliterated part was regarded as pro non scripto (even if the above-mentioned formalities were not complied with).

(c) The position after 1 January 1954

(i) Alterations made before execution

2.7 The Wills Act 7 of 1953 does not deal with this case. Therefore, the position at common law, set out above,[9] still applies.[10]

2.8 Professor Beinart suggested[11] that it was desirable that legislation lay down that alterations made before or during execution should be initialled by the testator and witnesses, whether existing matter is cancelled or new matter is added. In the discussion above[12] it was submitted that the common law had rightly required no formalities for this category of alterations.

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8 Cf Gow v The Master 1936 CPD 296; Van der Merwe and Rowland 179.

9 Par 2.4.

10 Moskowitz v The Master 1976 1 SA 22 (C) 23F.

11 1953 SALJ 295.

12 Par 2.4.

2.9 It is suggested that the Wills Act should lay down clearly that no further formalities are required for alterations made to a will before or during the valid execution of the will.[13]

(ii) Alterations made after execution

2.10 Sections 2(1)(b) and 2(2) of the Wills Act 7 of 1953[14] deal with certain of the alterations under this heading, namely only a "deletion, addition, alteration or interlineation". The relevant rules in these cases are that -

(a) this type of alteration is rebuttably presumed to have been made after execution of the will, and

(b) the applicable will formalities must be complied with in respect of this type of alteration.

2.11 If alterations fall within the scope of the section but the formalities have not been complied with, the alterations are invalid. The original text is therefore valid - even if it has been obliterated in such a way that proof aliunde (from another source) is necessary.[15]

2.12 An alteration which is not a "deletion, addition, alteration or interlineation in a will" is not covered by the section. The common law therefore applies in these cases. The problem is to determine which cases are covered by the common law and which by section 2(1)(b).

(d) The meaning of "deletion"

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13 See par 2.57 below for the amendment which is proposed.

14 These sections are reproduced in the Annexure to this Working Paper.

15 Van der Merwe and Rowland 184.

2.13 Professor Beinart[16] submitted that deletion in a will (the wording of section 2(1)(b)) is not the same as deletion of a will. As the common law rules regarding revocation have not clearly been repealed, the common law, according to Professor Beinart, still regulates cases like the deletion of a whole will, and the provisions of section 2(1)(b) need not be complied with.

2.14 Professor Beinart's view has been confirmed by court decisions[17] and other writers.[18]

2.15 The court decisions referred to in the previous paragraph related to cases where lines had been drawn through the whole will. The same principle ought to apply if the testator strikes out his signature[19] or writes "cancelled" between lines drawn across the cover of the will.[20]

2.16 There can be little doubt that all cases of the revocation of a will are still regulated by the common law and not by section 2(1)(b). It is proposed that the common law should continue to regulate the revocation of a whole will but that the revocation of part of a will by deleting or destroying it should be dealt with as a "deletion".[21]

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16 1953 SALJ 293 et seq.

17 Senekal v Meyer 1975 3 SA 372 (T) 379A; Marais v The Master 1984 4 SA 288 (D) 291F.

18 Van der Merwe and Rowland 181 footnote 20; Corbett 62; Lee and Honoré 394 footnote 2; Meyerowitz 25; Lila E Isakow The law of succession through the cases Cape Town: Juta 1985, hereinafter Isakow, 49 and 86; J C Sonnekus "Vereistes vir testamentsherroeping" 1982 Tydskrif vir die Suid-Afrikaanse Reg 110-127, 230-243, hereinafter "Sonnekus 1982 TSAR", at 242; Ian B Murray "Law of Succession" in 1979 Annual of South African Law 267.

19 Corbett 62 footnote 26; Meyerowitz 25.

20 Cf Sonnekus 1982 TSAR 242.

21 Par 2.18 et seq below.

2.17 The revocation of a will by destruction is discussed below.[22]

2.18 Professor Beinart[23] discusses the question whether "deletion" includes cases where words are erased, cut out or pasted over. He refers to the dictionary meaning of "deletion", namely, "complete effacement, blotting out, destruction or obliteration" which was also the original Latin meaning. He refers to the following arguments in support of his view that "deletion" covers only "obliterations, partial or complete, made by means of writing instruments":

- The change in meaning because "deletion" was used and not "obliteration" as in the English and the old Natal Act.

- "Skrapping" in the Afrikaans text points to such a meaning.

- The absurd position that a testator who erases, cuts out, pastes over or even burns out words in a will has to append his signature in the presence of two witnesses.

2.19 The courts have not yet had the opportunity of deciding this question. All the writers on this matter point out that the position is not clear. Some support Professor Beinart's interpretation.[24] The other writers do not dispute his interpretation either.[25] Meyerowitz[26] points out the problems that will arise if section 2(1)(b) applies to cases where the original is no longer legible - if the formalities have not been complied with the original writing will stand; the original writing will have to be proved by evidence aliunde which will in most cases be an impossible task; under common law the effect of such deletions depends upon whether the testator

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22 Par 3.34 et seq.

23 1953 SALJ 292.

24 Van der Merwe and Rowland 183; Meyerowitz 25.

25 Corbett 62 and 91; Lee and Honoré 394 footnote 2; Isakow 49.

26 At 25.

had the intention to revoke; the Wills Acts 7 of 1953 does not purport to sweep away the common law in regard to revocation.[27]

2.20 Deletions which make the original illegible create a practical problem. If the deletion is regarded as invalid it does not help much if it is not possible to determine what the original wording was.[28] The common law[29] and the English law[30] distinguish between deletions which make the original illegible and other deletions. The Law Reform Committee (England)[31] considered whether "apparent" should not be extended to include deciphering by chemical processes or infra-red photography. The Committee did not recommend any change in this regard.

2.21 Except for the practical problems there is no reason to make special provision for deletions which make the original illegible. Why should a distinction be made between a testator who draws one line through a word and a testator who draws several lines or pours a few drops of acid on words? Should a person who makes unauthorised alterations be rewarded for thoroughness? The practical problem does not occur in the case of deletions only. The same practical problem arises if a will is completely destroyed in a case where there is no question of revocation. It may also happen that parts of a written will are illegible. It is not necessary for the law to provide expressly that no effect shall be given to illegible provisions. This follows as a matter of course. The question whether the illegible parts invalidate the whole will can also be decided according to the rules which apply to partial destruction - the question is whether the

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27 Ibid.

28 Meyerowitz 25.

29 Van der Merwe and Rowland 179; Corbett 59.

30 Par 2.46 below.

31 Twenty-second report (the making and revocation of wills) Cmnd 7902 London: Her Majesty's Stationery Office 1980, hereinafter the "England Report", par 3.44 at 23.

remaining provisions can be read as an intelligible whole.[32] The England Report[33] concedes that the construction of the word "apparent" to mean "optically apparent" may logically be difficult to justify but states that problems can be avoided by the application of the "doctrine of dependent relative or conditional revocation".[34]

2.22 It is suggested that no special provision should be made for deletions which make the original illegible.

2.23 It is not necessary to take a stand on the correctness of Professor Beinart's interpretation of "deletion" as including only deletions made by means of writing instruments. The position is so uncertain[35] as to necessitate legislation.

2.24 It is suggested that uniform requirements should be laid down for alterations made after the execution of wills and that no distinction should be made between alterations which introduce new matter and alterations which do not introduce new matter. Uniform requirements for alterations after execution have applied in South Africa for decades and it would cause too much disruption if this position were to be changed now. In line with this view a distinction should be made between deletions by means of a writing instrument and other deletions only if there is a good reason for such a distinction.

2.25 The only possible reason for such a distinction is that writing instruments and witnesses are not always available. In such a case the testator who makes deletions would not have a writing instrument available to confirm the deletion with his signature. Writing instruments are so

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32 Corbett 89; Van der Merwe and Rowland 191. Cf Beinart 1953 SALJ 170; Van der Merwe and Rowland 125 and Corbett 39 regarding wills certain pages of which have not been validly executed.

33 Par 3.44 at 24.

34 See par 3.108 et seq below.

35 Par 2.18 and 2.19 above.

generally available that this reason does not carry much weight. Those persons in particular who are sophisticated enough to have a written will and to be concerned about the alteration of such a will have reasonable access to writing instruments. The possible argument that writing instruments or witnesses might not be available during an emergency can be countered by pointing out that an emergency is not a suitable occasion to execute a well-considered will or make alternations to a will. It seems undesirable for the law to allow a relaxing of formalities in an emergency.[36] Deletions by means other than a writing instrument do not appear to give a more reliable indication of the intention to revoke than deletions by means of a writing instrument.

2.26 It is submitted that the only justifiable distinction is one between deletions or destruction revoking the whole will and any other deletions or destruction.[37] It is suggested that the following definition of "deletion" be inserted in the Wills Act:

> "deletion" includes a deletion, cancellation, or obliteration not effected by means of a writing instrument but does not include a deletion, cancellation or obliteration which results in the revocation of the whole will.

(e) Alteration of printed will forms

2.27 The use of printed will forms on which only certain parts are to be completed by the testator creates a problem.

2.28 Van der Merwe and Rowland discuss this matter as follows:[38]

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36 Working Paper 14 on formalities of a will par 10.18 at 110.

37 When the requirements for the revocation of a will are discussed in par 3.27 et seq below the question whether the difference between the requirements for revocation and the requirements for execution of a will is justified will be discussed.

38 At 184. Our translation.

It is nowadays common for testators to use printed forms which are intended for completion as a will and leave blank spaces for insertion of the name of the testator as well as those of beneficiaries and executors. When completed, such a will, which is sometimes for the sake of convenience called a "commercial will", often displays a kaleidoscopic mixture of printed, written or typed words. The question immediately arises whether the completion of the blank spaces by the testator constitutes additions, alterations or interlineations within the meaning of section 2(1)(b) of the Wills Act. It is submitted that this is by no means the case. After all, the uncompleted printed form is not yet a will. Entries in the blank spaces cannot amount to an addition, alteration or interlineation made in a will. By inserting words the testator is executing his will. This original act of making the will can hardly be an alteration to the will. Or must it be accepted that one and the same act could simultaneously be the making of the will and the alteration of that which is being brought into being? If so, a testator who does not use the commercial will but is writing his will in long hand will have to adorn each word with his signature and those of two witnesses in compliance with the requirements of subsection 2(1)(b)!

Although our courts have not yet had the opportunity of giving a decisive ruling on this matter it may be expected with confidence that the typed or written parts of the commercial will will not as a matter of course be dealt with in terms of section 2(1)(b).

If the printed, written or typed words of the commercial will are deleted or altered or interlineations are made after execution of the will, subsection 2(1)(b) will undoubtedly apply.

2.29 A P J Bouwer[39] discusses administrative directives issued by the Chief Master in 1960:

- By inserting words, whether typed or in long hand, in the blank spaces left in the will the testator is executing his will. The insertion of the names of the testator, heir, legatee or executor is not an alteration after execution in terms of section 2(1)(b).

- Insertions of typed or written words which bring about a substantial change in the printed provisions of the will or alterations or deletions of printed words constitute alterations within the meaning of section 2(1)(b).

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39 Bouwer 426.

2.30 Although the courts have not yet considered this matter there can be little doubt that Van der Merwe and Rowland and the (non-binding) directives issued by the Chief Master correctly reflect the position - the completion of blank spaces in a printed will is not an alteration in a will. This does not mean that all problems have been solved. Some printed forms leave a rather large space between the last provisions and the place for the signature. The question whether such a signature appears "at the end" of the will has already been discussed in Working Paper 14 on the formalities of a will.[40] If testamentary provisions are inserted in the blank space it may be difficult to decide on the face of the will whether the additions were made as part of the execution. In case of doubt the presumption in section 2(2) should be decisive and compliance with the provisions of section 2(1)(b) ought to be required.

2.31 J C G Kamfer[41] suggested that legislation should either ban the use of printed will forms completely or enact measures to preclude what he called the abundant opportunities for fraud. According to Kamfer the legislature should for instance provide that any printed portions of the will which have been crossed out must be initialled by the testator and witnesses and that additions to the text should be written by the testator in his own hand, or that no blank spaces should be allowed. It is submitted that the present treatment of printed will forms as such[42] is satisfactory and that there is no justification for prohibiting printed will forms. The problems mentioned by Kamfer may also occur in the case of other will forms. Decided cases furthermore do not point to any particular problem regarding printed will forms.

(f) Is reform necessary?

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40 Par 9.46 et seq at 66.

41 Testamentsformalitiete in verskeie regstelsels Leiden: 1961, hereinafter "Kamfer", at 373.

42 Par 2.28 to 2.30 above.

2.32 In order to determine whether reform in this area is necessary a survey was made in the office of the Master, Pretoria, to determine whether invalid alterations present any problems in practice.

2.33 The testamentary writings lodged with the Master, Pretoria, in the first 8 000 deceased estates reported during 1980 were examined. Particulars of the survey appear in the Annexure to Working Paper 14 on the formalities of a will.[43]

2.34 On 10 of the 6 374 wills accepted by the Master (0,16 %) he indicated that alterations to the will were not validly executed.[44] Of these wills with invalid alterations 4 were handwritten, 1 on a printed form and 4 on wills apparently[45] drawn by attorneys. In the case of one of the wills it was not evident by whom the will had been drawn. No will presumably drawn by a bank or trust company was involved.

2.35 It appears from the survey that invalidly executed alterations occur in a small percentage of cases. Since the number of invalid alterations is so small it might be dangerous to draw conclusions from the distribution of the different types of will. The following table is nevertheless interesting:

| Type of will | Percentage of valid wills* | Percentage of wills not validly executed** | Percentage of invalid alterations |
|---|---|---|---|
| Bank/Trust Company | 54,8 % | 0,4 % | 0 % |
| Attorney | 24,4 % | 0,6 % | 40 % |

43 At 134 et seq.

44 See par 2.39 and 2.40 below for a discussion of the Master's procedure.

45 Par 1.2 of the Annexure to Working Paper 14 at 134.

| | | | |
|---|---|---|---|
| Written | 1,9 % | 29,6 % | 40 % |
| Printed | 4,6 % | 4,9 % | 10 % |
| Other | 14,3 % | 10,6 % | 10 % |

* Par 3.1 of the Annexure to Working Paper 14 on the formalities of a will at 136.

** Par 3.3 of the Annexure to Working Paper 14 on the formalities of a will at 137.

2.36 The handwritten wills, where experts are seldom involved, were once again the main culprits. The fact that alterations to printed wills do not really present problems suggests that the interpretation advanced above[46] is followed in practice. The absence of invalid alterations on wills drawn by banks and trust companies is probably due to the fact that these wills are not left in the client's custody. The invalid alterations to wills drawn by attorneys were probably made by the clients themselves on wills left in their custody.

2.37 Although invalidly executed alterations occur in only a small percentage of cases, it is suggested that any lack of clarity should be remedied by legislation.

(g) The application of the presumption in section 2(2)

2.38 Section 2(2) of the Wills Act 7 of 1953 creates a rebuttable presumption that an alteration (of the type dealt with in the Act) has been made after the execution of the will. The practical application of this presumption and the role played by the Master in practice are relevant here.

46 Par 2.30.

2.39 Section 8(4) of the Administration of Estates Act 66 of 1965 provides that the Master may refuse to accept a will for the purposes of the Act until the validity thereof has been determined by the court if it "appears to the Master that any such document, being or purporting to be a will, is for any reason invalid". The section refers to invalid wills and not to invalid alterations to a will. In practice the Master, in cases where he thinks that the alterations are invalid, makes an endorsement on the will that the will has been accepted but that the alterations have not been validly executed. If the alterations influence the appointment of an executor, the Master can rely on section 22(1) of the Administration of Estates Act. In terms of this section the Master may, if it appears to him that the nomination of any person as executor testamentary is invalid, refuse to appoint an executor until the validity of the nomination has been determined by the court. If the alterations influence the distribution of the estate the Master can rely on section 35(9) of the Administration of Estates Act - in terms of this section the Master may direct the executor to amend his liquidation and distribution account if the Master is of opinion that the account is incorrect, even if no objection has been lodged against the account.

2.40 What the Master's practice amounts to is that he indicates on receipt of a will whether or not he intends to ignore alterations to the will for the purposes of appointing an executor or the distribution of the estate.

2.41 Despite the decision of the Master that the alterations to a will are invalid or his acceptance of the alterations, it is open to any interested party to contest the validity of the alterations in the Supreme Court.[47] The Supreme Court may decide any question of fact which may arise. The presumption that alterations were made after execution may be rebutted in the Supreme Court and then the common law requirements for alterations made before execution apply and not the provisions of section 2(1)(b) of the Wills Act 7 of 1953.

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47 Meyerowitz par 3.7 at 13.

2.42 Because alterations to a will create opportunities for fraud it is submitted that the presumption that alterations were made after execution is justified.

2.43 Certain administrative directives issued by the Chief Master deserve attention here. The directives lay down[48] that the presumption in section 2(2) may be rebutted after consideration by the Master of:

- the contents of affidavits by witnesses or other persons present at the execution of the will,
- the form and appearance of the will, and
- the nature of the writing, whether it was prima facie written by the same person who wrote out the will, the colour of the ink and a comparison of the different parts of the will.

The directive also provides that if there is no attestation clause[49] and the Master has reason to believe that the testator and witnesses did not sign the will in the presence of each other in terms of the provisions of the Act, the Master will accept the will only on receipt of affidavits confirming the fact that the will has been duly executed.

2.44 It is submitted that the presumption in section 2(2) applies as soon as there are "alterations"[50] to the will. The rebuttal of this presumption is a question of fact. The Master does not have the machinery to decide questions of fact.[51] The lodging of affidavits is not conclusive

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48 Bouwer 426.

49 An attestation clause is a record of the manner in which the will was executed.

50 Par 2.10 above.

51 Working Paper 14 on the formalities of a will par 6.8 at 9. Cf Master of the Supreme Court v Stern 1987 1 SA 756 (T) 761C and 767B.

because the Master does not, like the Supreme Court, see to it that all interested parties are represented nor does he have the machinery or experience to test the correctness of the affidavits if they are placed in issue. If the Master assumes that the testator and witnesses signed in the presence of each other in the case of the execution of a will[52] he should assume this in the case of alterations to a will and in the case of a printed will form without an attestation clause as well. As in the case of execution the Master has to judge an alteration on the face of it. If it appears on the face of the will that "alterations" as defined in section 2(1)(b) have been made, the presumption in section 2(2) must apply until the contrary has been proved in the Supreme Court.

2.45 It was considered whether section 2(2) should not be amended to provide expressly that the presumption can only be rebutted in the Supreme Court. As the Supreme Court already has the final say in the matter[53] and since this problem seldom arises in practice, no amendment is recommended.

(h) The position in comparable systems

2.46 Section 21 of the Wills Act 1837 regulates the position in England. The section provides as follows:

> 21. No obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as herein-before is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

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52 In par 6.8 at 9 of Working Paper 14 it was noted that the Master in practice rejects a will only if it is invalid on the face of it and that the Master does not go into related questions of fact.

53 Par 2.41 above.

2.47 Similar provisions apply in Canada[54] and Australia.[55]

2.48 In England the Law Reform Committee[56] considered whether "apparent" should not be extended to include deciphering by means of chemical processes or infra-red photography. The Committee concluded however that any difficulty caused by a narrow construction of "apparent" could usually be avoided by the application of the "doctrine of dependent relative revocation".[57] The Committee rejected a discretionary power for the court to give effect to destructions and obliterations which did not comply with the requirements if the intention to revoke was clear. The Committee thought that a discretionary power would create more difficulties than it would solve.[58]

2.49 In addition to minor amendments the Queensland Law Reform Commission[59] recommended that the section be removed from provisions relating to revocation as it was concerned more with execution than with the broader issue of revocation.

2.50 The Law Reform Commission of Western Australia,[60] the Manitoba Law Reform Commission[61] and the Law Reform Commission of British

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54 See eg the Wills Act Manitoba sec 19 and British Columbia sec 17. Cf the Uniform Wills Act sec 18.

55 See eg the Wills Act Tasmania sec 21; Victoria sec 19 and Western Australia sec 10.

56 England Report par 3.44 at 23.

57 Par 3.108 et seq below.

58 Par 3.45 at 24.

59 Report on the law relating to succession QLRC 22 1978, hereinafter the "Queensland Report", par 12 at 8.

60 Report on wills: Substantial compliance Project No 76 part I 1985, hereinafter the "Western Australia Report", par 8.7 at 53.

61 Report on "The Wills Act" and the doctrine of substantial compliance Report 43 1980, hereinafter the "Manitoba Report, at 29.

Columbia[62] recommended that the court should be given a power to condone ("discretionary power") in order to give effect to alterations which did not comply with the formalities. Section 23 of the Wills Act of Manitoba has given effect to the recommendation by the Commission concerned.

2.51 In Scotland deletion of existing matter is regarded as partial revocation. Additions are apparently regarded as codicils.[63] In a document published for comment by the Scottish Law Commission[64] views were invited on a proposal that a power to condone should also apply to alterations to a will.

(i) Power to condone

2.52 In the Commission's Working Paper 14 on the formalities of a will it was recommended that the court should be given a power to condone - if the court is satisfied that a document which does not comply with the formalities of a will was intended by the deceased to be his will, the court shall declare such document to be the valid will of the deceased.

2.53 Overseas law reform bodies mostly hold the view that a power to condone should also apply to alterations to a will which do not comply with the formalities.[65]

2.54 The formalities for alterations are similar to the formalities for execution. If a power to condone is given in the case of one it should also be given in the case of the other.

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62 Report on the making and revocation of wills LRC 52 1981, hereinafter the "British Columbia Report", 63 et seq.

63 Scottish Law Commission Constitution and proof of voluntary obligations and the authentication of writings Consultative Memorandum No 66 1985 par 2.43 at 35 and par 2.51 at 42.

64 The making and revocation of wills Consultative Memorandum No 70 1986, hereinafter the "Scotland Memorandum", par 2.18 at 19.

65 Par 2.50 and 2.51 above.

2.55 It is recommended that the following subclause be added to clause 3ter recommended in Working Paper 14 on the formalities of a will:[66]

> (2) If a court is satisfied that alterations to a will were intended by a person who has since died to alter his will, notwithstanding that the alterations do not comply with the formalities for alterations to a will, the court shall declare the will as altered to be the valid will of the deceased.

(j) Summary of provisional recommendations regarding alterations to wills

2.56 The expression "deletion, addition, alteration or interlineation" appears seven times in section 2(1)(b) and 2(2) of the Wills Act 7 of 1953. It is recommended that this phrase be replaced, wherever it occurs, by "alteration" and that "alteration" be defined as follows in section 1 of the Act:

> 1. In this Act, unless the context otherwise indicates -
>
> "alteration" means a deletion, addition, amendment or interlineation.

2.57 Alterations made before or during execution form part of the execution of the will and no additional formalities are necessary.[67] The position at common law is so unclear that a reformulation of the rules is desirable.[68] The following amendment to section 2 of the Wills Act 7 of 1953 is recommended:

> 2(1) Subject to the provisions of sections three and three bis -
>
> (c) no further formalities shall be required for alterations made to a will if the will was validly executed after the alterations had been made.

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66 At 131.

67 Par 2.7 to 2.9 above.

68 Par 2.4 above.

2.58 Alterations made after the execution of a will must comply with the formalities required for the execution of a will as set out in section 2(1)(b). If the formalities for a will are adapted the changes should apply to alterations after execution as well. If a power to condone is given in the case of execution it should apply to alterations to a will too.[69]

2.59 Alterations to a will by means of deletions should not include deletions which under common law result in the revocation of the whole will,[70] but should include deletions not made by means of a writing instrument. It is suggested that a definition of "deletion" be inserted in section 1 of the Wills Act 7 of 1953.[71] It is not desirable to specify in detail where the signature or the certificate should appear.[72]

2.60 Although the above are the only amendments to the Wills Act recommended by the Commission, all matters which in the opinion of the Commission have a bearing on alterations to a will have been dealt with in the working paper. Comments on these matters,[73] or any other matter having a bearing on alterations to a will, would be appreciated.

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69 Par 2.52 et seq above.

70 Par 2.13 to 2.16 above.

71 Par 2.23 to 2.26 above.

72 The writers refer to the failure of the legislature to define "identified" in the Act - Lee and Honoré footnote 4 at 394; Meyerowitz par 4.12 at 24; Kamfer 347; Beinart 1953 SALJ 291; Van der Merwe and Rowland 182; Corbett 61; Isakow 49. The failure to specify the place for the signature or certificate does not give rise to any real problems. Testators who endeavour to "identify" the alterations usually sign close to the alterations. An attempt to specify the place for signature may lead to inflexibility which may create more problems than exist at present. In cases where the costs of a court application are justified a power to condone will solve problems which do arise.

73 See the "Contents" at (iii) above.

## 3. REVOCATION OF WILLS

### (a) Introduction

3.1 Revocation is the way in which a valid will is invalidated.[74] The act of revocation must be accompanied by an intention to revoke (animus revocandi), and a revocation made by mistake is not effective.[75] The revocation may apply to the will as a whole or to part of the will.[76]

3.2 Express revocation may be effected in a subsequent will or writing or by destruction of the will. Implied revocation will take place where a subsequent will or wills are executed with provisions inconsistent with the provisions of a prior will or by the voluntary alienation by the testator of assets specially bequeathed by him in a will.

3.3 Ideally, as is the case with the formalities of a will, the lawful wishes of the testator should always be carried out.[77] The question arises whether there are considerations of legal policy or practical considerations which justify limitations on the manner in which a testator may express his intention to revoke. Another question is whether the law should intervene if a testator fails to adjust his will to changed circumstances (for instance if the testator marries or is divorced from his spouse).

3.4 The method to be followed in this working paper is first to investigate the present position and identify possible defects. Then the question will be considered whether change is necessary and, if so, the changes which are desirable.

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74 Van der Merwe and Rowland 188; Corbett 86; Isakow 85.

75 Corbett 86; Isakow 85.

76 Van der Merwe and Rowland 188.

77 Working Paper 14 on the formalities of a will, par 4.4 at 5.

3.5 A stand will be taken on the question whether formalities should be limited to a minimum or whether it is not perhaps logical to lay down the same formalities for revocation as those applicable to the execution of a will.

3.6 Irrespective of the formalities required, the question arises whether the court should be given the power to give effect to an act of revocation which does not comply with the requirements. Such a power will correspond to the power to condone (dispensing power) recommended in Working Paper 14 on the formalities of a will.[78]

(b) Waiver of right to revoke

3.7 The general rule is that a testator cannot waive his right to revoke a will. A clause in a will in which a testator purports to waive his right to revoke the will (clausula derogativa) is unenforceable. The same applies to an agreement by a testator not to vary his will. The first of two exceptions is that a surviving testator who has accepted benefits under a joint will effecting massing cannot in a subsequent will make valid dispositions contrary to the provisions of the joint will. The second exception is that a succession pact (pactum successorium) contained in an antenuptial contract cannot be revoked without the consent of the other party.[79]

3.8 The present position regarding a testator's right to revoke a will does not appear to give rise to problems which justify a change. Nor do there appear to be objections in principle against the present position.

(c) Position in other legal systems

3.9 In England section 20 of the Wills Act 1837 provides as follows:

> No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner

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78 Par 7.9 to 7.63 at 14 et seq.

79 Van der Merwe and Rowland 188 et seq and 594 et seq; Corbett 31 and 87; Lee and Honoré footnote 1 par 574 at 395; Isakow 85.

herein-before required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is herein-before required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

Section 18 makes provision for "wills to be revoked by marriage except in certain cases"[80] and section 18A for the "effect of dissolution or annulment of marriage on wills".[81]

3.10 Similar provisions apply in Canada[82] and Australia.[83] A similar provision also applied in Natal[84] until it was repealed by the Wills Act 7 of 1953.

3.11 The England Report[85] refers to criticism of the decision in Cheese v Lovejoy.[86] "This is revoked" was written across the back of the will and it was screwed up and thrown into a wastepaper basket. It was held that this did not amount to actual destruction of the will as required by section 20. The Law Reform Committee[87] was opposed to a discretion for the court to give effect to any act which manifests an intention to revoke. The Committee also decided against the widening of the provisions of section 20 - the requirements for revocation should be as certain as possible and legislation cannot be expected to cover all varieties of conduct; wills of the Cheese and Lovejoy type are extremely rare.

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80 See par 3.119 et seq below.

81 See par 3.151 et seq below.

82 See eg the Wills Act Manitoba sec 16 and British Columbia sec 14. Cf the Uniform Wills Act sec 15.

83 See eg the Wills Act Tasmania sec 20; Western Australia sec 15 and Victoria sec 18.

84 Sec 9 Act 2 of 1868. See Corbett 90.

85 Par 3.40 at 22.

86 (1887) 2 p 251.

87 Par 3.41 at 23.

3.12 The England Report[88] states that the great majority of the submissions received recommended that the existing presumptions should remain - if a will which was known to be in the testator's possession was destroyed by him or cannot be found after his death, there is a presumption that the testator intended to revoke it. The Committee accepts that a presumption is necessary. The idea that destruction ought to be witnessed received almost no support. The report[89] points out that it is difficult to prove the contents of a will which has been destroyed without witnesses.

3.13 The Queensland Report[90] states that the corresponding provision did not attract much adverse comment. By virtue of the doctrine of dependent relative revocation limited or no effect can be given to a conditional revocation.

3.14 The Law Reform Commission of Tasmania[91] also rejects the suggestion that the destruction of a will should be witnessed. The Commission recommends that any method of destruction should suffice so long as the method used manifests a clear intention on the part of the testator to revoke the will.

3.15 The Western Australia Report[92] recommends that the dispensing power should also cover cases where a testator declares his intention to revoke a will in writing without complying with the formalities of a will.

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88 Par 3.42 at 23.

89 Par 3.43 at 23.

90 Par 20 at 13.

91 Report on reform in the law of wills Report No 35 Government Printer Tasmania 1983, hereinafter the "Tasmania Report", par 2 at 13.

92 Par 8.12 at 55.

3.16 The British Columbia Report[93] refers to Cheese v Lovejoy[94] and other cases where a will was enforced despite convincing evidence that the testator no longer intended the will to be effective. The report refers to cases where the will was crossed out. According to one correspondent virtually all the permitted modes of revocation by physical act are intrinsically more ambiguous than revocation by writing, even when the written revocation lacks Wills Act formality. The report rejects an extension of the acts effective to revoke a will because legislation cannot cover every possible method and such a provision would continue to concentrate on form to the detriment of substance. In addition, not all acts are unequivocal and everything depends upon the surrounding circumstances. The report recommends that the dispensing power be extended to cases of revocation. The report concludes that the threshold requirements[95] of a written document signed by the testator in the case of the creation of a will are clearly inappropriate in the case of revocation because even under current law destruction of a will is effective to revoke it. Although it is logical to permit oral revocation it is impractical to go so far. The report recommends that in addition to the existing methods of revocation the testator or another by his direction and in his presence can revoke a will by any act if the consequence of the act is apparent on the face of the will and the court is satisfied that the act was done with the intention of revoking all or part of the will.

3.17 The Manitoba Report[96] alludes to the difficulty in interpreting which acts fall within the terms of the statute regarding revocation by physical act. The report recommends[97] that the power to condone ("remedial provision") should apply to defects in revocation as well. This

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93 66 et seq.

94 Par 3.11 above.

95 Working Paper 14 on the formalities of a will par 7.44 at 25.

96 Par (c) at 10.

97 Recommendation 2 at 30.

recommendation was implemented by section 23 of the Manitoba Wills Act. The relevant portions of this section read as follows:

> Where, upon application, if the court is satisfied that a document or any writing on a document embodies ... the intention of a deceased to revoke ... a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will ... the court may, notwithstanding that the document or writing was not executed in compliance with all the formal requirements imposed by this Act, order that the document or writing, as the case may be, be fully effective as though it had been executed in compliance with all the formal requirements imposed by this Act ... as the revocation ... of the will of the deceased ...

3.18 In Scotland a testator may revoke his will by destroying it, by tearing it up, or by obliterating or cancelling the signature or the essential provisions, with the intention of revoking it. Part of the will may be revoked by cutting it our or cancelling or obliterating it with the intention to revoke. If part of the will has been deleted and the deletion has been initialled by the testator in a manner recognisable as his handwriting, this serves as proof that the deletion has been done by the testator. A will is probably also revoked if a testator instructs his solicitor, or some other third party, to destroy it but the instructions are not carried out.[98] When a will is proved to have been in the custody of the testator and it is not proved to have left his custody, then, if the will cannot be found on the testator's death, it is presumed to have been destroyed by him with the intention of revoking it.[99]

3.19 Professor Sonnekus points out that it is a premise of the law in the Netherlands that revocation is also an expression of his last wishes by a testator which is subject to the same formalities as the execution of a will. In the opinion of the jurists in the Netherlands the advantage of legal certainty carries more weight than the disadvantage that it is not so easy to alter or revoke an existing will as it is in most of the other legal systems in Western Europe.[1] In the Netherlands a testator may, however,

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98 Scotland Memorandum par 6.3 at 50.

99 Scotland Memorandum par 6.4 at 51.

1 Sonnekus 1982 TSAR 232.

revoke his underhand codicil without formalities in the same way as a will may be revoked in Germany, Belgium and France. (This underhand codicil can dispose only of personal clothing, jewellery and furniture.)

3.20 Professor Sonnekus thinks that the experience in these legal systems of Western Europe has shown that the fear of a considerable increase in fraud regarding wills did not materialize in practice.[2]

(d) Revocation by a later will

3.21 The most common method of revocation is expressly to revoke previous wills in a later valid will.[3] Revocation in a later will operates immediately upon the execution of the later will.[4] Thus the revocation remains effective even if the later will itself has subsequently been revoked.

3.22 There is no theoretical or practical objection against this method of revocation. It is the best method because there is usually no doubt about the intention of the testator and he can at the same time make dispositions in the place of the provisions being revoked by him. Theoretically there cannot be any objection against this method because the formalities which apply are the same as those for execution.

3.23 If a testator leaves more than one will and the last will does not revoke the previous will or wills, the wills must be read together and reconciled as far as possible. In so far as reconciliation is impossible the earlier will or wills or part thereof is deemed to be tacitly revoked. Extrinsic evidence is admissible to prove which will was executed last. A reference to a will as a "last will" is not conclusive. As a codicil is

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2 Ibid 234.

3 Bouwer 430; Van der Merwe and Rowland 188.

4 Van der Merwe and Rowland 189; Corbett 88.

normally intended to supplement a previous will, provisions of the will will not easily be taken to have been tacitly revoked by a codicil.[5]

3.24 The provisions of the earlier will are deemed to be revoked. Professor Sonnekus[6] thinks that the use of a fiction is a clear indication that the basic ground for this method of revocation has changed. He says[7] that the real subjective intention of the testator is not important here but that this is rather a case of lapsing of the will by operation of law. He concludes that, apart from problems of interpretation, tacit revocation by a later will gives rise to few problems in practice.

3.25 The question whether conflicting provisions in a later will result in revocation or a lapse by operation of law is not merely academic. If the later will is destroyed before the testator's death and the construction of revocation is applied, the conflicting provisions in the earlier will will not revive. In South African law a revoked will does not revive merely because the will which revoked it is in turn revoked.[8] If the later will is destroyed by the testator and the construction of lapse by operation of law is applied, it may be argued that the later will did not enter into force because it was destroyed before the death of the testator and that the whole of the first will remains in force.[9] It is submitted that cases where it can be proved that the later will with conflicting provisions had been destroyed are so rare that special provision for these cases is not desirable. It will usually be more in accordance with the intention of the testator to enforce the first

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5 Van der Merwe and Rowland 192 et seq; Corbett 87; Meyerowitz par 4.21 at 31; Bouwer 431.

6 1982 TSAR 127.

7 Ibid 235 e v.

8 Par 11.9 et seq at 113 of Working Paper 14 on the formalities of a will.

9 Cf Scotland Memorandum par 6.2 at 49.

will as a whole. This result can be achieved by application of the doctrine of dependent revocation.[10]

3.26 Tacit revocation by a later will can give rise to difficult problems of interpretation because the testator did not express his wishes clearly. It is nevertheless submitted that the courts have dealt with these cases in a logical and realistic way and that there is no need to change the present position.

(e) Revocation by a later will as the only method of revocation

3.27 According to the strict jus civile of the classical Roman law, a will could be revoked only by a later valid will. However, the praetor recognised damage done to the will if the testator damaged the will with the intention of revoking it.[11]

3.28 It is a premise of the law in the Netherlands that revocation is also an expression of his last wishes by a testator which is subject to the same formalities as the execution of a will. In the view of jurists in the Netherlands the advantage of legal certainty carries more weight than the disadvantage that it is not so easy to alter or revoke an existing will.[12]

3.29 The Tasmania Report[13] makes the following interesting observation:

> Whereas the making of a will may have important consequences upon the testator's estate when he dies, the revocation of a will is of no consequence at all. The original beneficiaries have never been entitled to anything, and therefore have lost nothing.

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10 Par 3.108 et seq below.

11 Sonnekus 1982 TSAR 111.

12 Ibid 232.

13 Par 2 at 13.

Although this observation is technically correct it is to be doubted whether a beneficiary would see it in this way. Someone who hopes to receive a benefit will be disappointed to learn that he inherits nothing. It will not matter much to him that the reason for not inheriting is that the will is invalid or has been revoked.[14]

3.30 The following arguments may be advanced in support of revocation by a later will as the only method of revocation: this is the best method to revoke a will and it should be encouraged; there is usually no doubt about the intention of the testator and he can at the same time make dispositions in the place of the provisions being revoked by him; this method of revocation promotes legal certainty; the law would be simpler if only this method of revocation were recognised; it is logical to require the same formalities for the revocation of a will as for its execution - if formalities are necessary to guard against errors and fraud at the time of execution it is logical to require the same formalities for revocation.

3.31 South African law has no general rule that a juristic act can be undone only in the way required for the doing of it.[15]

3.32 The following arguments may be advanced in support of the view that revocation by a later will should not be the only method of revocation: if all the circumstances indicate that a testator intended to revoke his will it is formalistic to insist on a later will before this intention is carried out; there is rather a trend to move away from formalities[16] and a return to the strict requirements of classical Roman law cannot be justified; South African law has since its birth allowed other methods of revocation and it would cause too much disruption if this position were changed drastically; notwithstanding their common basis in Roman-Dutch law, the modern law of the Netherlands and South African law have taken different courses;[17] the

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14 Cf England Report par 3.43 at 23.

15 Marais v The Master 1984 4 SA 288 (D) 292 I.

16 Working Paper 14 on the formalities of a will par 4.2 at 5.

17 Sonnekus 1982 TSAR 234.

other systems in Western Europe[18] and the common law systems[19] recognise other methods of revocation, and the law reform bodies of the common law countries are opposed to a requirement that revocation should be witnessed.[20]

3.33 It is suggested that revocation by a later will should not be the only method of revoking a will. The fact that revocation by a later will is the best method of revoking a will will be kept in mind when the presumptions and the application of the presumptions are discussed below.

(f) Revocation by destruction

3.34 Destruction of a will by the testator personally or by some person authorised by him constitutes the express revocation of the will provided that the testator had the intention to revoke it (animus revocandi).[21] "Destruction" does not necessarily mean that the will is completely destroyed. Therefore, this working paper occasionally refers to a "destroyed will" although a document still exists.

3.35 The will can be destroyed by tearing it up, shredding it, burning it, defacing it, cutting out the testator's signature or any other act of destruction.[22] It was pointed out above[23] that the provisions of section 2(1)(b) of the Wills Act 7 of 1953 regarding deletions in a will do not apply to the revocation of the whole will by "destruction" and that the common law still applies. Therefore, the common law still applies to cases where the testator draws lines through the whole will, strikes out his

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18 Ibid.

19 Par 3.9 et seq above.

20 Ibid.

21 Van der Merwe and Rowland 190 et seq; Corbett 89; Lee and Honoré par 577 at 396; Isakow 85 et seq; Meyerowitz 32; Bouwer 431; Sonnekus 1982 TSAR 236.

22 Ibid.

23 Par 2.13 to 2.16.

signature, or writes "cancelled" between lines drawn across the cover of the will. The definition of "deletion" recommended above[24] leaves no doubt[25] that the common law still applies to a deletion which results in the revocation of the whole will.

3.36 Under common law it is possible to revoke part of a will by destruction provided that the remainder still constitutes an intelligible whole. If not, the whole will is considered to be revoked.[26] It was recommended above[27] that "deletion" be defined as follows:

> "deletion" includes a deletion, cancellation or obliteration not effected by means of a writing instrument but does not include a deletion, cancellation or obliteration which results in the revocation of the whole will.

If this recommendation is accepted, revocation by partial destruction or deletion will be valid only if the formalities for execution as set out in section 2(1)(b) have been complied with. If this recommendation is not accepted it will be necessary to distinguish clearly between "deletion" and partial destruction. Proposals by those who favour this solution would be appreciated.

3.37 Destruction of a will does not result in revocation if it is done by a third person without the authority of the testator or by the testator himself while insane or otherwise acting unwittingly. Nor is the will revoked if it is gnawed by mice or decays through age or mouldiness or by

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24 Par 2.26.

25 See par 3.36 below.

26 Van der Merwe and Rowland 191; Corbett 89; Lee and Honoré par 578 at 397; Isakow 86; Meyerowitz 32.

27 Par 2.26.

accident.[28] If the will is destroyed in circumstances which do not result in revocation the contents of the will may be proved by extrinsic evidence.[29]

3.38 There is little doubt about the basic rules of the common law for revocation by destruction.[30] Any act which logically qualifies as an act of destruction will most probably be recognised by the courts. The presumptions of revocation are discussed below.

(g) Presumptions of revocation

(i) Original, copy or duplicate

3.39 Where a will which was in the testator's possession cannot be found after his death, there is a presumption that the testator revoked the will.[31] Because of this presumption the Master does not accept a copy or a duplicate of a will as a matter of course. The writers on the law of succession mention originals, copies, duplicates or duplicate originals without always explaining what they mean by these words. Since the various methods by which a testator executes his will play a role when the presumptions of revocation are applied by the Master, these methods will be set out in detail and the meaning of "original", "copy" and "duplicate original" as used in this paper explained.

3.40 In the discussion that follows "sign" means proper execution by the testator and witnesses. The following possibilities are set out as illustrations:

1. There is at all times only one will and that is the will which is an original and

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28 Voet 28.4.2; Van der Merwe and Rowland 192; Corbett 90; Lee and Honoré footnote 3 par 577 at 396; Isakow 86.

29 Van der Merwe and Rowland 192; Corbett 93; Bouwer 433.

30 Par 3.34 and 3.35.

31 Par 3.48 et seq below.

(a) has been signed; or
(b) has not been signed.

2. Two wills which appear to be identical and which are not on the face of it recognisable as copies are prepared on a word processor or by some other means. The testator -

(a) signs both; or

(b) (i) signs one, and
(ii) does not sign the other; or

(c) does not sign either.

3. The same as under 2 above except that the wills are on the face of it recognisable as copies.

4. The testator prepares an original and reproduces a copy with carbon paper. The testator -

(a) signs the original; and

(i) signs the carbon copy with his own hand; or
(ii) signs the carbon copy through the carbon paper; or
(iii) does not sign the carbon copy; or

(b) does not sign the original; and

(i) signs the carbon copy with his own hand; or
(ii) does not sign the carbon copy.

5. The testator prepares an original; and

(a) signs the original; and
(b) makes a photocopy of the signed original; or
(c) makes a photocopy of the original; and

(i) then signs the original but not the photocopy; or
(ii) signs the original and the photocopy; or
(iii) signs the photocopy but not the original; or
(iv) does not sign either.

3.41 If the testator signs nothing, there is no valid will but merely a draft. The documents indicated under items 1(b), 2(c), 3(c), 4(b)(ii) and 5(c)(iv) above are such drafts. If the court is given a power to condone,[32] the court will have the power to declare such a document to be the will of the deceased if the court is satisfied that the testator intended the document to be his will.

3.42 The two wills indicated under item 2(a) above are both original wills. If the two documents were reproduced from another document, that document is merely a draft and the reproductions should not be regarded as duplicates or copies.[33] The wills indicated under items 1(a), 2(a) and 2(b)(i) and the originals under items 4(a), 5(a), 5(c)(i) and 5(c)(ii), are referred to as "original wills" in this working paper.

3.43 For purposes of the law of evidence a carbon copy signed through the carbon paper is regarded as an original.[34] The same rule will probably apply if a person signs a photocopy or any other copy. Since the Master accepts only original wills out of hand, signed copies are not regarded as "originals" in this working paper, but are referred to as "duplicate original" wills.[35] The wills indicated under items 3(a), 3(b)(i), 4(a)(i), 4(a)(ii) and 4(b)(i) and the photocopies under items 5(c)(ii) and 5(c)(iii) above are "duplicate original" wills.

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32 Working Paper 14 on the formalities of a will par 7.63 at 31.

33 Da Mata v Otto 1972 3 SA 858 (A) 866G and 881F.

34 Da Mata v Otto 1972 3 SA 858 (A) 866E and 881E.

35 Ex parte Valayden 1937 1 PH G19 (C); Corbett footnote 20 at 104. J C Sonnekus "End van testament" 1986 Tydskrif vir die Suid-Afrikaanse reg 378 at 379 refers to a "kopie-oorspronklike".

3.44 If the original will or a duplicate original will has been signed, other reproductions of the will which have not been signed are referred to as "copies" of the will in this working paper. The documents indicated under items 2(b)(ii), 3(b)(ii) and 4(a)(iii) and the photocopies under items 5(b) and 5(c)(i) above are "copies" of wills. In this working paper the unsigned originals indicated under items 4(b) and 5(c)(iii) are also regarded as "copies".

(ii) Presumption of revocation in the case of destruction

3.45 If a will was destroyed by the testator there is a rebuttable presumption that he destroyed the will with the intention of revoking it.[36] If a "destroyed" will is found amongst the testator's effects, there is a rebuttable presumption that the testator destroyed the will with the intention of revoking it.[37] The presumption does not apply where the will is found in the possession of a third party.[38] In such a case there is apparently a presumption that the will has not been revoked.[39]

3.46 In Senekal v Meyer[40] a valid will was found in the possession of the testator's bank and an identical will with "cancelled" and other notes written on it by the testator was found amongst his effects. The court held that by writing "cancelled" across the will in his possession the testator intended to revoke the will.[41] The court pointed out that[42] the burden of proof was on the party who claimed that the undamaged copies

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36 Voet 28.4.4.

37 Corbett 92; Lee and Honoré footnote 1 par 577 at 396.

38 Ibid.

39 Prinsloo v Master of the Supreme Court (OFS) 1960 3 SA 882 (O) 884H.

40 1975 3 SA 372 (T) 375H.

41 At 376H.

42 According to Voet 28.4.1.

should also be regarded as revoked.[43] Although the court refers to a duplicate original ("kopie-oorspronklike")[44] both wills were originals according to the terminology used in this working paper.[45]

3.47 In Marais v The Master[46] Didcott J applied the Senekal decision to a case where a copy of the will had been "destroyed" by the testator. Although a copy of a will cannot be equated with an original the circumstances may indicate that the copy was destroyed with the intention of revoking the will.[47] Didcott J did not mention a presumption.

(iii) Presumption of revocation in the case of lost wills

3.48 Where a will which was in a testator's possession cannot be found after his death, there is a rebuttable presumption that the testator destroyed the will with the intention of revoking it.[48]

3.49 The presumption probably applies if the testator had a duplicate original[49] in his possession.[50] If two duplicate originals or one duplicate original and an original were in the testator's possession and one of the duplicate originals cannot be found, the presumption does not apply. The presumption does not arise if the will was in the possession of a third party

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43 378E.

44 375B.

45 Par 3.42 above.

46 1984 4 SA 288 (D) 294G.

47 Ibid 294E; Corbett 90; Lee and Honoré par 579 at 397.

48 Corbett 92 et seq; Van der Merwe and Rowland 191 et seq; Lee and Honoré par 580 at 397; Isakow 85 et seq; Meyerowitz par 4.22 at 32; Bouwer 431 et seq.

49 Par 3.43 above.

50 Ex parte Warren 1955 4 SA 326 (W) 326H and 327E. Although the will in this matter was apparently an "original" the courts would probably treat a "duplicate original" in the same way - see par 3.43 above.

or if only a copy[51] was in the testator's possession.[52] The presumption that the original has been revoked by the testator arises even if a third party is in possession of a duplicate original.[53]

(iv) Proof of contents of will

3.50 If a will has been lost in circumstances which do not result in revocation, the contents of the will may be proved by extrinsic evidence.[54]

(v) Application of the presumptions by the Supreme Court

3.51 The Supreme Court can consider the evidence and decide whether the factual presumptions have been rebutted. The fact that the testator's evidence is never available complicates the matter but in general there are no real problems. The mere fact that the will is not an original does not give rise to a presumption that the will has been revoked.[55]

(vi) Application of the presumptions by the Master

3.52 The following appears from a survey of the testamentary writings lodged with the Master, Pretoria, in the first 8000 deceased estates reported during 1980.[56] There were 6809 testamentary writings which had been endorsed as follows by the Master:

| | | |
|---|---|---|
| Accepted | 6374 | (93,6%) |
| Not accepted for failure to comply with formalities | 111 | ( 1,6%) |

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51 Par 3.44 above.

52 Corbett 93. Cf the last paragraph of Voet 28.4.1.

53 Corbett 92; Lee and Honoré footnote 2 par 580 at 397.

54 Van der Merwe and Rowland 192; Corbett 93; Bouwer 433.

55 Leitao v The Master 1981 1 SA 318 (W) 320A.

56 Working Paper 14 on the formalities of a will, par 3 of the Annexure at 136 et seq.

| | | |
|---|---|---|
| Revoked by later wills | 285 | ( 4,2%) |
| Copies not accepted | 39 | ( 0,6%) |
| | 6809 | |

3.53 The reason why the Master does not as a rule accept copies of wills[57] is probably the presumption that a lost will has been destroyed with the intention of revoking it.

3.54 In certain cases, however, the Master does accept copies of wills. First, section 14(2) of the Administration of Estates Act 66 of 1965 provides that the Master may accept a copy of a will if the original is held by a public authority outside the Republic or by another Master. Second, the Master accepts a copy which has been validly executed if the original which has not been validly executed is lodged with him.[58] Lastly, some of the Masters accept a copy or a duplicate original if they are satisfied by means of affidavits that the presumption of revocation has been rebutted. However, the other Masters maintain the practice of accepting a copy or a duplicate original in these cases only if they are authorised to do so by the Supreme Court.[59]

3.55 If an original will has been completely destroyed, the Master will deal with the matter in the same way as where the original has been lost. Cases where the original has not been completely destroyed but torn or crossed through, or the signature deleted, are rare. These cases are probably also dealt with by the Master as if the original had been lost.[60]

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57 Cf Gantsho v Gantsho 1986 2 SA 321 (Tk) 322H.

58 Cf Corbett footnote 20 at 104.

59 Bouwer 433.

60 See, however, Marais v The Master 1984 4 SA 288 (D) 290H where the Master refused to accept an undamaged original because lines with "cancelled" between them appeared on a copy.

3.56 It was submitted above[61] that it is not desirable for the Master to consider questions of fact. If this view is accepted the Master will not accept affidavits as proof that the presumption of revocation has been rebutted. The Master's present practice of applying the presumption of revocation whenever only a copy or a duplicate original is lodged cannot be justified. Certain facts must be established before the presumption arises. For instance, the presumption does not arise if the original will was in the possession of a third party.[62] On the other hand it cannot be accepted that the presumption does not arise merely because an original will has been lodged with the Master. Where the testator had only a duplicate original in his possession and this cannot be traced after his death, the presumption that the will has been revoked would probably arise.[63] In such a case the Master would probably accept the will even if he was aware of the facts. If more than one original had been prepared[64] the Master would not always be aware of this. Even if the Master found this out he would apparently ignore the loss of the other original will.

3.57 In addition to the above-mentioned theoretical objections against the Master's application of the presumptions it is sometimes difficult to determine whether the will lodged with the Master is an original or a duplicate original. This happens when the copy is not on the face of it clearly identifiable as a copy.

(vii) Evaluation of the presumptions and the application thereof by the Master

3.58 The presumptions may be summed up as follows:

If -

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61 Par 2.44.

62 Par 3.49 above.

63 Ibid.

64 Item 2 in par 3.40 above.

- the testator has destroyed his will; or

- a "destroyed will" is found amongst the testator's effects; or

- the original will was in the testator's possession and it cannot be found after his death;

it is rebuttably presumed that the testator destroyed the will with the intention of revoking it.[65]

3.59 Around these basic presumptions an array of presumptions have developed for cases where a will was in the possession of a third party or where there was more than one copy of the will.[66]

3.60 The presumption in the case of lost wills is in effect the same as the presumption which applies in Scotland.[67] The Scotland Memorandum[68] concludes that this part of the present law is sensible and satisfactory.

3.61 Basically the presumptions in England[69] also correspond with the presumptions in South Africa. The great majority of the submissions received by the Law Reform Committee in England recommended that the presumptions should be retained. The Committee accepts that it is necessary to have a presumption one way or the other, if only to determine where the onus of proof should lie and to cater for cases where there is no evidence.[70]

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65 Par 3.45 and 3.48 above.

66 Par 3.46 to 3.47 and 3.49 above.

67 Par 3.18 above.

68 Par 6.8 at 55.

69 Par 3.12 above.

70 England Report par 3.42 at 23.

3.62 At the stage when it has to be decided whether the will has been revoked or not the testator is not available to give evidence. Cases where no evidence on the intention of the testator is available are not rare. Presumptions are necessary to ensure that things run smoothly. Because acceptable evidence of the testator's intention is difficult to obtain, the presumptions are often decisive. It is therefore important that the presumptions should be realistic and fair.

3.63 In Ex parte Warren[71] Marais A J commented as follows on the basis of the presumption:

> It is based on a broad generalisation of the probability that a testator would usually take proper steps to preserve his last will and that, if it is lost or accidentally destroyed, he would become aware of it and take the necessary steps to have his disposition restated in a new will.

3.64 If this basis is correct, the present presumption may be questioned. The presumption usually arises when there is no later valid will. Mr Justice Marais said that it was probable that a testator would become aware of the fact that his will was lost or had been destroyed and would make a new will. If that is so, there should rather be a presumption that the old will remains in force until it has been replaced by a new will.

3.65 Because the presumption usually arises when there is no later will, the presumption results in intestacy. However, there is another presumption that a deceased did not wish to die intestate or partially intestate. (Van der Merwe and Rowland[72] question the desirability of this presumption.)

3.66 In Prinsloo v Master of the Supreme Court (OFS)[73] Smit J said that the burden of proof was on those who contended that the will had been revoked. This statement is contrary to the well-established presumption that a will has been revoked in the circumstances set out in paragraph 3.58

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71 1955 4 SA 326 (W) 327B.

72 At 562.

73 1960 3 SA 882 (O) 884A.

above. In the Prinsloo case the will was not in the testator's possession. The assertion made by Smit J should probably be limited to such cases.

3.67 There is a difference between the presumption in the case of destruction and the presumption in the case of a lost will which appears to be illogical. If one or more than one copy of a will was in the testator's possession and it has been "destroyed", those who contend that the other copies have also been revoked must prove it.[74] If one or more than one copy of a will was in a testator's possession and it cannot be found after his death, the presumption that the will has been revoked probably still applies.[75]

3.68 The essential questions may be formulated as follows: What is the most probable explanation if a will was in a testator's possession and it cannot be found after his death? Does it make any difference if the will has not been lost but merely torn or damaged in some other way? Are the probabilities influenced by the fact that the testator did not make another will?

3.69 It is submitted that the fact that a testator did not make a later will does indeed influence the probabilities. If a testator already has a will with which he is no longer satisfied he will be more likely to make a new will than to decide to die intestate. Revocation by a later will is the most common and also the best way of revoking a will.

3.70 When a will was in a testator's possession and it is found to be torn or otherwise damaged after his death, it is probable that the will was torn or damaged by the testator with the intention of revoking it, irrespective of whether he made a later will or not.

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74 Par 3.46 above.

75 Par 3.49 above.

3.71 A more difficult question is what the most probable explanation is when a will which was in the testator's possession cannot be found after his death without his having made a later will.

3.72 It may be argued that testators are aware that wills are important documents and that it is more probable that the testator destroyed the will with the intention of revoking it than that the will was destroyed by some other person or was merely lost. This conclusion is in line with the presumption which has applied for centuries.

3.73 On the other hand it may be argued that it should be borne in mind that it is easy for some other person, especially after the death of the testator, to destroy the will without any real danger that anyone would be any the wiser.[76] Although a will is an important document, it is only human for a testator to forget after a number of years that his will should be in safekeeping. Because revocation by a later will is the usual method of revoking a will, revocation by destruction is improbable. Circumstances have changed a great deal since the origination of the presumptions. It is much easier today to make a new will than it was then. The apparently illogical difference between the presumptions in the case of destruction and those in the case of lost wills, noted in paragraph 3.67 above, should also be borne in mind.

3.74 It is submitted that there are not sufficient grounds for changing the present presumptions. This proposal is in line with the conclusion of other law reform bodies. Cases such as those referred to in paragraph 3.67 above are so rare that a statutory reformulation of the rules is not justified. Comments on this matter would, nevertheless, be appreciated.

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76 In the United States of America it is not presumed that any other person destroyed a will without the authority of the testator, since this would be presuming a crime - Lewis C Warden J D "Wills" in American Jurisprudence 2d Vol 79 par 606 at 704.

3.75 If the present presumptions are retained and the view that the Master should not consider questions of fact[77] is accepted, it must be considered whether the Master's application of the presumptions should be changed. It was submitted above[78] that the Master's application of the presumptions is not satisfactory. This unsatisfactory position results from the irreconcilability between the Master's practice of considering a will on the face of it and the factual nature of the presumptions that arise in the case of lost or destroyed wills.

3.76 A possible solution is that the Master should ignore the presumptions of revocation because he does not have the machinery to assess the factual basis of the presumptions. Such an approach would drastically limit the effect of the presumptions because they would apply only in the few cases that come before the court. The Master would adopt the following approach (similar to the approach of Smit J in the Prinsloo case above):[79] if an original will has on the face of it been validly executed the Master will accept the will; where it is apparent from a copy[80] of the will that the original had been validly executed, the Master will also accept the will; the Master will accept a duplicate original[81] if it has been duly executed; the Master will ignore acts of destruction if it is apparent on the face of the will that it has been validly executed previously; the Master will continue to take note of the revocation of a will by a later will.

3.77 Another possible solution is to formulate statutory presumptions for the purpose of consideration of wills by the Master which take into

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77 Par 2.44 above.

78 Par 3.56 and 3.57.

79 Par 3.66.

80 Par 3.44 above.

81 Par 3.43 above.

account that the Master considers a will on the face of it. The following example of such rules is submitted for consideration:[82]

- The Master shall not accept a duplicate original or a copy of a will unless -

  (a) he has been authorised to do so by the Supreme Court; or

  (b) the original has been accepted by a public authority outside the Republic of South Africa or another Master within the Republic,

  provided that the Master may accept a duplicate original which has been duly executed if the original lodged with him has not been duly executed.

- The Master shall not accept an original or a duplicate original of a will if it appears on the face of it that some person has performed an act of destruction in connection with the will.

These rules are based on the following "presumptions". If the original will is not lodged with the Master it is accepted that the will has been revoked irrespective of the question in whose possession the will has been. This "presumption" does not apply if an invalid original will and a validly executed duplicate original have been lodged with the Master or if some other authority has accepted the will. This "presumption" does not influence acceptance by the Supreme Court either. If an act of destruction is performed in connection with an original or duplicate original will, it is presumed that the will has been destroyed by the testator with the intention of revoking it irrespective of the question in whose possession the will has been. It is clear that these "presumptions" differ markedly from the presumptions which apply in general and it may be argued that such a

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82 Such a provision might fit into section 14 of the Administration of Estates Act of 1965.

big difference between the preliminary consideration by the Master and the final consideration by the Supreme Court cannot be justified.

3.78 Another possible solution is to retain the present position[83] despite the objections levelled against it. Nothing can in any case be done about the problems sometimes experienced by the Master in distinguishing between originals and reproductions, unless no distinction is made between an original on the one hand and a copy or duplicate original on the other.

3.79 The Commission invites comments on the present application of the presumptions by the Master and possible improvements. In particular comments by the Masters themselves would be invaluable. It is suggested that the Master should ignore the presumptions regarding revocation because he does not have the machinery to evaluate the factual basis of the presumptions.[84] It is recommended that the following subsection be inserted after section 8(4) of the Administration of Estates Act 66 of 1965:

> (4a) In considering the validity of a will the Master shall take account of the revocation of a will by a later will but shall not take account of the presumptions regarding revocation of a will and shall accept an original or a duplicate original or a copy of a will if it appears on the face of the document that the original has been validly executed.

It is submitted that no adjustment is required to avoid a conflict between this provision and the provisions of section 14(2) of the Administration of Estates Act.[85]

(h) Other methods of revocation and the statutory formulation thereof

3.80 The following exposition by Didcott J in Marais v The Master[86] may be used as a starting point (Didcott J has already dealt with revocation by a later will):

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83 Par 3.54 to 3.57 above.

84 Par 3.76 above.

85 Par 3.54 above.

86 1984 4 SA 288 (D) 291G.

> Revocation can be accomplished by the testator's destruction of the will, provided that he destroys it deliberately and with the intention of revoking it. The document does not have to perish physically, although the destruction envisaged is assuredly achieved once that happens. It also occurs, however, when the document survives but is defaced, or when the writing on it is erased or obliterated. So much is certain.
>
> What is not is whether our common law allows a will to be revoked in any other manner.

3.81 Statutory formulation of the methods of revocation has the advantage that there can be no doubt about the methods of revocation which are clear from the formulation. A statutory formulation has the disadvantage that it may lead to inflexibility and interpretation problems.[87]

3.82 Revocation by a later valid will has already been discussed above.[88] Destruction of a will, also discussed above,[89] includes cases where the testator draws lines through the will, strikes out his signature or draws lines across the cover. The question here is whether other acts of revocation are recognised or ought to be recognised. The most common cases are oral revocation and written revocation which does not comply with the formalities of a will. Ademption of legacies (the voluntary alienation of specially bequeathed assets) is dealt with below.[90]

3.83 Oral revocation is not recognised at present.[91] It is suggested that if oral revocation were to be recognised it ought to be allowed only after a court has considered all the evidence. Oral revocation is therefore discussed below when the possibility of giving the court a power to condone is discussed.

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87 Cf England Report par 3.40 and 3.41 at 22 et seq; Tasmania Report par 2 at 13; Western Australia Report par 8.8 at 53; British Columbia Report 66 et seq; Manitoba Report par (c) at 11.

88 Par 3.21 et seq.

89 Par 3.35.

90 Par 3.113 et seq.

91 Par 3.92 to 3.95 below.

3.84 As regards written revocation which does not comply with the will formalities, the decisions indicate that such revocation is not recognised.[92]

3.85 It was submitted in Working Paper 14 on the formalities of a will[93] that the power to accept a will which does not comply with the formalities (power to condone) should vest in the Supreme Court and not in the Master. The same approach is suggested here. Therefore, recognition of a written revocation which does not comply with the will formalities is also discussed below when the desirability of a power to condone is discussed.

(i) Power to condone

3.86 In Working Paper 14 on the formalities of a will the tentative approach was adopted that there was still a need to retain a legal requirement for will formalities.[94] In that working paper it was proposed[95] that the court should declare a document to be the valid will of a deceased, notwithstanding that it did not comply with the formalities of a will, if the court was satisfied that the document was intended by the person who had since died to be his will. The advantages and disadvantages of a "power to condone" were discussed in detail in the working paper.[96] The following questions were also discussed in Working Paper 14:[97]

1. Should the power be given to the Supreme Court or to the Master? The tentative view was that the power should be given to the Supreme Court.

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92 Par 3.102 below.

93 Par 7.35 et seq at 22 et seq.

94 Par 4.2 at 5.

95 Par 7.63 at 31.

96 Par 7.17 to 7.30 at 17 et seq.

97 Par 7.35 to 7.60 at 22 et seq.

2. Should substantial compliance with the formalities be required or was a broad power desirable? A broad power was recommended.

3. Should threshold requirements be laid down? The tentative view was that a written document should be the only other requirement if the testator's wishes were adequately proved.

4. What standard of proof should apply? The usual civil standard was suggested.

5. Should amending legislation be retrospective? It was suggested that amendments should apply to the will of a person who died after the commencement of the amendments.[98]

Although the execution of a will cannot be placed on an equal footing with the revocation of a will, the same considerations apply to both to a large degree. In both cases the testator is never available to give evidence on his intention. While a testator usually disposes of all his worldly goods in his will,[99] he may change these dispositions drastically by revoking the will. If a testator prefers to die intestate he need not do anything. If a testator has made a will and he subsequently decides to die intestate, the law does not require him to make a will to do so. It appears that the less formalistic requirement of destruction of the will can be justified.

3.87 It is submitted that if a power to condone is given regarding will formalities it should also be given in respect of the revocation of a will. In the case of the power to condone for execution the threshold requirement of a written document was recommended. This threshold requirement is not appropriate for revocation because a document is not required for revocation. Except for the threshold requirement of a written document it is suggested that the answers to the questions raised in paragraph 3.86 above should be the same for revocation as for execution.

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98 The transition clause at 132.

99 Working Paper 14 on the formalities of a will par 4.2 at 5.

3.88 The Law Reform Committee in England was opposed to a power to condone in the case of execution. The Committee was consistent with regard to revocation and did not recommend a power to condone in the case of revocation either.[1] Although the power to condone in South Australia makes no specific reference to revocation it is clear that the power would at least cover revocation by another will or codicil which does not comply with the formalities.[2] The power to condone recommended by other law reform bodies in the case of revocation varies from a broad power to a narrow power.

3.89 The Western Australia Report[3] recommended that the power to condone ("dispensing power") should cover revocation by a later will or "a writing declaring an intention to revoke". Section 23 of the Manitoba Wills Act quoted in paragraph 3.17 above has a similar effect.

It would appear that an act of revocation which is not a "writing" and which does not qualify as an act of destruction in terms of the relevant provisions[4] ("burning, tearing or otherwise destroying") would still be invalid.

3.90 The British Columbia Report[5] recommends that the following acts of revocation be added to the acts already recognised:

> any other act of the testator, or of a person by his direction and in his presence, if:
>
> (i) the consequence of the act is apparent on the face of the will, and
>
> (ii) the court is satisfied that the act was done with the intent of the testator to revoke all or part of the will.

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1 England Report par 3.40 and 3.41 at 22 et seq.

2 Western Australia Report par 8.10 at 54.

3 Par 8.12 at 55.

4 The provisions are similar to sec 20 of the England Wills Act 1837 quoted in par 3.9 above.

5 At 69.

This power to condone covers an act of destruction apparent on the face of the will even if it does not amount to "burning, tearing, or otherwise destroying". Apparently this power also covers writing on the will but not writing on a loose sheet of paper. For writing on a loose sheet the requirements for the execution of a will would apparently apply. The power to condone recommended by this report for execution of a will[6] is limited to cases where there is a document in writing signed by the testator.

3.91 It is submitted that a broad power as recommended in the British Columbia Report is preferable to a narrow power. The question remains which prerequisites (threshold requirements) should be required before the court should have the power to declare the revocation valid.

3.92 Van der Merwe and Rowland[7] think that even though a will can no longer be executed orally, there is no reason why it should not be revoked orally. The testator may revoke a will by a physical act (destruction). The uttering of words is after all also a physical act. Although oral revocation is not manifested on the will, this is rather a question of evidence and not of substantive law.

3.93 Van der Merwe and Rowland suggest that the logic of Voet[8] should be noted:[9]

> If in sooth a testator can by tearing his will in pieces or by other like action bring it about that he departs this life intestate, surely there appears to be no good cause why he cannot bring about the same thing by a formal declaration of his wish (solenni voluntatis testificatione).

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6 At 54.

7 190.

8 28.3.1.

9 Gane's translation.

3.94 Van der Merwe and Rowland concede[10] that the common law writers held the view that a will cannot be revoked by a testator's informal oral expression of his wishes and that the modern South African writers do not favour oral revocation. Van der Merwe and Rowland mention Steyn and Maasdorp. To them may be added Corbett,[11] Lee and Honoré,[12] Isakow[13] and Sonnekus.[14]

3.95 In Louw v Engelbrecht[15] Flemming J held that oral revocation was invalid, certainly within ten years from execution.[16]

3.96 The British Columbia Report[17] acknowledges that it is logical to permit oral revocation but thinks that it is impractical to go so far.

3.97 Working Paper 14 on the formalities of a will[18] concluded that, although it might be logical that a power to condone should apply to any expression of a person's testamentary intentions, it would be inviting chaos and uncertainty to grant a power to condone without requiring a written document. The view was expressed above[19] that, although the execution of a will cannot be placed on an equal footing with the revocation of a will, the same considerations apply to both to a large degree. It is suggested that, as for execution, a power to condone in the case of revocation should not cover oral revocation as such.

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10 189.

11 88.

12 Footnote 2 par 574 at 395.

13 85.

14 1982 TSAR 241.

15 1979 4 SA 841 (O) 848F to 850F.

16 Codex 6.23.27.2.

17 At 69.

18 Par 7.47 at 26.

19 Par 3.86.

3.98 The next question is whether revocation by a writing which does not comply with the formalities of a will ought to be recognised.

3.99 Professor J C Sonnekus[20] concludes that there is no good authority for the view that a written declaration of revocation is valid in South African law only if it is attested according to the formalities for execution. He contends that the Wills Act 7 of 1953 covers the execution of wills and not a declaration of revocation which contains no testamentary provisions (in the sense of bequests). He mentions the case where a testator merely declares that he is revoking a previous will without making new testamentary dispositions. If it is sufficient to write "cancelled" or "revoked" on the front of a will[21] it should also be sufficient to write it on the back of the will. According to Professor Sonnekus the only requirement which should be laid down is that the testator's intention to revoke should appear clearly in writing and that the testator should be identifiable from the document.

3.100 Corbett thinks[22] that an informal expression of the intention to revoke which is not contained in a testamentary instrument or which is not accompanied by an act of destruction or ademption[23] does not constitute an effective revocation. Corbett[24] refers to the view that to allow an act of testation to be undone in too informal a manner would militate against certainty and encourage fraud.

3.101 A written revocation which did not comply with the formalities was considered in Marais v The Master.[25] Didcott J preferred not to decide

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20 1982 TSAR 241 et seq.

21 The Senekal case in par 3.46 above.

22 86.

23 Par 3.113 below.

24 Footnote 63 at 88.

25 1984 4 SA 288 (D).

this question but followed the "less adventurous and thus safer"[26] route in deciding that the will was revoked by destruction. Didcott J, nevertheless, remarked as follows:[27]

> It is difficult to see any reason in principle why effect should not be given to a document signed by the testator in which he revokes his will, even if the document is not otherwise executed in testamentary form and the written revocation is, in that sense, informal.

3.102 In Narshi v Ranchod[28] Friedman J held that an agreement of settlement did not revoke the will because there was no intention to revoke and the agreement did not comply with the will formalities. It may be argued that the dictum that the will formalities were required was unnecessary for the decision and that this part of the decision is therefore not binding. The court did not consider this question fully by going into the common law.[29]

3.103 The British Columbia Report[30] quotes the view of a correspondent that virtually all the permitted modes of revocation by physical act are intrinsically more ambiguous than revocation by writing, even when the writing lacks Wills Act formality.

3.104 It is submitted that this view is correct. It is recommended that a power to condone should cover cases where the testator revoked a will in a document which does not comply with the formalities for a valid will.

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26 293F.

27 292 I.

28 1984 3 SA 926 (C) 931B.

29 Sonnekus 1982 TSAR 239 discusses the similar decisions in Horak's Heirs v The Widow Horak (1833) 2 Menz 402 and Ludwig v Ludwig's Executors (1848) 2 Menz 449.

30 At 67.

3.105 Any act which logically qualifies as an act of destruction would most probably be accepted by the courts. It is nevertheless submitted that the power to condone should not concentrate on the question whether an act is a recognised act of destruction but on the essential question whether the testator intended to revoke his will. The only prerequisite suggested is that the act of revocation should appear from a document or be apparent on the face of the will.

3.106 If the court is given authority to accept a will which does not comply with the formalities, it is suggested that the following power be granted for revocation which does not comply with the formal requirements:

If a court is satisfied -

(a) that the testator or an authorised person on his behalf before the death of the testator executed a document, or made a writing on a document, or performed an act which is apparent on the face of the will; and

(b) that the testator intended to revoke the will or a part of the will,

the court shall declare the will or part of the will to be revoked.

3.107 If a power to condone is not granted it must be considered whether the present position regarding the revocation of a will by destruction or other physical acts should be amended. It is submitted that the basic rules on revocation by destruction are satisfactory. If a power to condone is not justified, it is submitted that statutory provisions regarding oral revocation or revocation by a document which does not comply with the will formalities are not justified either.

(j) Doctrine of dependent relative revocation

3.108 Revocation of a will may be conditional or subject to a supposition. The revocation may be conditional upon an uncertain event in the future (for instance the execution of a later will) or on the supposition that a certain state of affairs exists (for instance the existence of a valid subsequent will). The factual question is whether or not there was an intention to revoke. If conditional is understood to include a supposition, the principle may be stated to be that conditional revocation is effective

only if the condition is fulfilled or the supposition is correct. Under the influence of English law this principle has been adopted as a special "doctrine" namely the doctrine of dependent relative revocation.[31]

3.109 The "doctrine" is applied mostly in cases where the testator mistakenly thought that he had executed a valid later will. Le Roux v Le Roux[32] is an example of the application of the doctrine to a case where the testator mistakenly thought that the revocation of a later will revived a previous will. (This decision refers to the presumption that a testator does not intend to die intestate.) The application of the doctrine is not limited to any particular type of case. In England, too, the doctrine is no longer limited to the original case where the same beneficiaries were appointed in a later invalid will.

3.110 The name "dependent relative revocation" has been criticised as follows:[33]

> The name of this doctrine seems to me somewhat overloaded with unnecessary polysyllables. The resounding adjectives add very little, it seems to me, to any clear idea of what is meant. The whole matter can be simply expressed by the word "conditional" ...

3.111 The only objection by overseas law reform bodies against the rules of conditional revocation is the possible application of the rules to cases where it has not been proved that the testator intended the revocation to be conditional.[34] The approach suggested by Trengove J in

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31 Van der Merwe and Rowland 195 et seq; Lee and Honoré par 583 at 398. Cf Corbett 96 et seq; Isakow 88; Sonnekus 1982 TSAR 238 et seq.

32 1963 4 SA 273 (C).

33 In the Goods of Hope Browne 1942 P at 138 quoted in Davis v Steel and Eriksen 1949 3 SA 177 (W) 188. Cf England Report par 3.46 at 24.

34 England Report par 3.47 at 24; Tasmania Report par 5 at 15; Scotland Memorandum par 6.22 at 64 and 6.25 at 66.

Raabe v The Master[35] reduces the danger of a mechanical application of the rules:

> The authorities to which I have referred show that, however useful the doctrine of dependent relative revocation may be in an enquiry of this nature, it is not a magic formula. This doctrine, as I understand it, is not a statement of legal rules and principles. It is simply a convenient method of reasoning to be applied in cases where the true intention of a testator, who has performed what appears to be an act of revocation, has to be determined.

3.112 If a power to condone were given to the court many of the cases where the testator mistakenly thought that he had executed a later valid will could be avoided if the court declared the document to be the testator's will. Whether or not a power to condone is granted, it is submitted that an amendment of the rules regarding conditional revocation is not justified.

(k) Ademption of legacies[36]

3.113 Tacit revocation takes place when the testator voluntarily alienates assets specially bequeathed to a person (a legacy). In such cases the legacy is said to be adeemed. An alienation is not voluntary if the testator has been forced to dispose of the assets to meet his debts or otherwise as a matter of necessity. The question whether ademption took place is purely a question of the intention of the testator. Evidence is admissible on the surrounding circumstances and declarations by the testator. A legacy that has been adeemed is not revived automatically if the testator retrieves his assets.

3.114 Although the position regarding presumptions is not clear it would appear that a person who asserts that a legacy has been adeemed must prove it. When it is proved that a testator alienated assets voluntarily in his lifetime it is apparently presumed that the testator intended to revoke the legacy.

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35 1971 1 SA 780 (T) 785H.

36 Van der Merwe and Rowland 193; Corbett 94 et seq; Lee and Honoré par 582 at 398; Isakow 87.

3.115 Apparently executors do not in practice give effect to the presumptions as set out above. If specially bequeathed assets do not form part of the testator's estate at his death, executors apparently accept that the legacy has been revoked.[37] Although the Master occasionally questions the executor's view that a legacy has lapsed, he usually accepts the executor's handling of the matter subject to the right of interested parties to lodge objections to the executor's distribution account. Cases where interested parties ask the court to vary an executor's decision that a legacy has lapsed occur rarely, if ever. If it is found that the legacy has not been adeemed by the alienation the executor is obliged to acquire the assets bequeathed or pay their value to the legatee.[38]

3.116 It is evident from the discussion above that there is some uncertainty regarding the presumptions which apply in the case of ademption and that the presumptions are apparently not applied by executors in practice. It may be argued that if oral revocation is not allowed[39] ademption of legacies should not be allowed either. Ademption is also the result of a physical act by the testator which is not manifested on the will.

3.117 Problems regarding ademption are so rare that it is submitted that an amendment of the present position or a statutory formulation of the common law rules is not justified.

(l) Revocation as a result of changed circumstances

(i) Introduction

3.118 In terms of Roman-Dutch law a will was deemed to be tacitly revoked if the testator married and procreated children after the execution

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37 This practice is in line with the remark by Corbett opposite footnote 121 at 96. However, in footnote 113 at 95 Corbett submits that the person who asserts that a legacy has been revoked must prove it.

38 Corbett 96; Isakow 87.

39 Par 3.97 above.

of the will. This rule has not been received in South African law.[40] Several legal systems provide for the tacit revocation of a will when a testator marries or is divorced from his spouse. There are no such rules in South African law at present. For ease of reference it is assumed that the husband died first. All the rules recommended also apply where the wife dies first.

(ii) Revocation by marriage

3.119 A sample taken in the office of the Master, Pretoria, revealed that testators survived by a spouse bequeathed the whole estate to the surviving spouse in 82 % of these cases.[41] If a testator who has a will which benefits someone else than his intended wife gets married one would expect him to change his will to provide for his spouse. The question is whether the law should interfere if the testator fails to do this.

3.120 Section 8 of Law 2 of 1868 (Natal) provided as follows:[42]

> Every will or codicil shall be tacitly revoked by the subsequent marriage of the testator, unless such will or codicil shall expressly refer to such then future marriage, in manner showing an intention that such will or codicil shall not be thereby revoked; and save in so far as such will or codicil shall dispose of property which would not, if such testator should die intestate, go to the wife or husband or issue of such marriage: Provided, no joint will shall be revoked by the marriage of the surviving spouse.

3.121 The express reference need not be to a marriage as being then future. An express reference to a particular marriage is sufficient if the marriage takes place later. An express reference in the will to an intention that the will is not to be revoked by marriage is not necessary. The Wills

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40 Van der Merwe and Rowland 194.

41 South African Law Commission Working Paper 2 Law of Succession: Intestate succession 1983 par 3.3 at 21.

42 See Van der Merwe and Rowland 194; Corbett 93.

Act 7 of 1953 repealed section 8 but the section continues to apply to wills executed prior to 1 January 1954.[43]

3.122 The Wills Act 7 of 1953 was a product of the Law Revision Committee.[44] The Committee was not in favour of the inclusion of a provision such as section 8 of the Natal Law in the Wills Act. The Committee reconsidered the matter at the request of the Minister of Justice on two occasions. On the first occasion the Committee reaffirmed its previous decision. On the second occasion in January 1973 the Committee decided by eight votes to seven in favour of legislation providing for the revocation by a subsequent marriage of an earlier will which had not been made in contemplation of such marriage.[45]

3.123 Before 1837 there was a great deal of confusion in England as to how far a court would reach to prevent a will which did not take changed circumstances into account from taking effect. The will of a woman was revoked by marriage. The will of a man was revoked by marriage and the subsequent birth of a child. The fourth report of the Commissioners on the Law of Real Property 1833 proposed that the will of a woman should continue to be revoked by her marriage but that the will of a man should not be revoked by his marriage and the birth of a child. The Wills Act 1837 provided that the wills of both men and women were revoked on marriage. All other revocations on the ground of a change in circumstances were done away with.[46] The provisions in force in England and other countries will be discussed below after the question whether, in principle, such revocation should apply has been discussed.

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43 Corbett 94.

44 The Law Revision Committee was the predecessor of the South African Law Commission.

45 Law Revision Committee Twenty-third report 5 et seq.

46 Law Reform Commission of British Columbia Report on statutory succession rights LRC 70 1983, hereinafter "British Columbia Report on statutory succession rights" at 130 et seq.

3.124 The advantages and disadvantages of the revocation of a will by a subsequent marriage may be summed up as follows.[47]

3.125 The following quotation[48] indicates the basis of the objections against revocation by marriage:

> It appears to us, that the Law having entrusted to every man a power of Testamentary disposition over his property, must rely upon its being exercised according to the Testator's intentions; and that no Will ought to be set aside on conjectures respecting what the Testator's intentions may have been in consequence of a change in circumstances.

3.126 Revocation by a subsequent marriage is an inflexible rule which cannot make provision for all circumstances. Automatic revocation is not well-known. It may be that the testator considered his will before the marriage and was satisfied with it. Revocation may nullify careful estate planning and for instance severely prejudice children born of a previous marriage. The revocation operates without regard to the provisions of the will. A destitute sister may for instance be disinherited in favour of a spouse who is already a millionaire. The revocation also affects well-merited legacies to friends and relatives or charity, the appointment of an executor and provisions regarding the deceased's funeral and the disposal of his organs. Is a joint will under which the surviving spouse has accepted benefits also revoked by marriage? The exceptions to the rule[49] suggest that it is sometimes better for the will to remain valid.

3.127 If provision is made for a marriage, why not for other changed circumstances as well? Why should there be a distinction between a will which has not been adapted after a marriage and another will which does not provide adequately for dependants? If a will is revoked by marriage

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47 See British Columbia Report on statutory succession rights 129 et seq; England Report 11 et seq; Scotland Memorandum 35 et seq; Law Revision Committee Twenty-third report 6 et seq; Tasmania Report par 3 at 13.

48 At 32 of the fourth report in par 1.123 above quoted at 131 of the British Columbia Report on statutory succession rights.

49 See the discussion of these provisions in par 1.133 et seq below.

why not the designation of beneficiaries for pension benefits or the proceeds of life insurance policies as well?

3.128 Before entering into marriage, proper provision for the spouses can be made by the parties in an antenuptial contract. If proper provision for a spouse has not been made such spouse can claim proper provision at the time of the dissolution of the marriage.

3.129 South African law has done without such a rule for decades and no need for one has been identified. The introduction of such a rule might create so many problems that its disadvantages would outweigh the possible advantages.

3.130 The following arguments may be advanced in favour of revocation by marriage:

- A testator normally benefits his spouse in a will.[50] The spouse and children are prima facie entitled to an intestate inheritance. Marriage is such an important event that a testator would probably prefer to die intestate rather than have his assets disposed of under an earlier will. Failure to change a will after marriage is probably due to negligence and not to an intentional act of the testator. If a testator wishes to disinherit his wife and children he must do it intentionally. It is a gross injustice to the surviving spouse to receive no benefit on her husband's death merely because he omitted to alter an earlier will. The need to protect the spouse justifies possible prejudice to beneficiaries under the will.

- A claim in terms of matrimonial property law or a maintenance claim is not a satisfactory substitute for the intestate inheritance to which a spouse is entitled. It is still too early to judge

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50 Par 3.119 above.

whether the new matrimonial property regime[51] will result in proper provision for spouses in antenuptial contracts.

3.131 The England Report,[52] the Tasmania Report[53] and a majority of the signatories to the British Columbia Report on statutory succession rights[54] recommended that a rule of revocation by marriage be retained. Such a rule applies in several other legal systems. In Scotland, where there is no such rule, views were invited on the desirability of such a rule.[55] Reasons which justify the retention of such a rule would not necessarily justify the introduction of the same rule in a legal system where such a rule does not exist. The disruption and uncertainty caused by a new rule may be a decisive consideration. The rules applicable in certain other legal systems and problems experienced with these rules will be discussed next.

3.132 In England the old common law rule[56] was replaced by section 19 of the Wills Act 1837 which provided that a testator's will was revoked by his marriage.

3.133 Section 18 itself recognised the first exception. The wording of this exception has been amended by the Administration of Justice Act 1982 which reads as follows:

> 18(2) A disposition in a will in exercise of a power of appointment shall take effect notwithstanding the testator's subsequent marriage unless the property so appointed would in default of appointment pass to his personal representatives.

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51 Act 88 of 1984.

52 Par 3.7 at 12.

53 Par 3 at 13.

54 Par 2 at 132.

55 Scotland Memorandum par 5.4 at 39.

56 Par 3.123 above.

The reason for this exception is that the testator's new family can derive no benefit from the revocation of such a provision in a will. If a "default of appointment" will cause the property to pass to the testator's estate, the provision in the will is in fact revoked.[57] A similar exception applies in Canada[58] and Australia.[59]

3.134 A "power of appointment" formed part of Roman-Dutch law.[60] This power comes into being when a testator confers upon another the power to designate his heirs. Initially a power of appointment was recognised in South African law only in cases of bequests for charitable purposes or where the power was conferred on a fiduciary heir. It was later held that the power may be conferred upon a usufructuary.[61] In Braun v Blann and Botha[62] Joubert J A recognised the validity of a power of appointment conferred on a trustee for the purposes of selecting income or capital beneficiaries from a group of persons designated by the testator. Joubert J A did not go into "the technicalities and complexities of English case law which draws a distinction between a power of appointment as such and a power given under a trust".

3.135 The second exception was introduced in England by section 177 of the Law of Property Act 1925 which provided as follows:

> A will expressed to be made in contemplation of marriage shall ... not be revoked by the solemnisation of the marriage contemplated.

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57 England Report par 3.9 at 13.

58 Eg Wills Act British Columbia sec 15(b); Manitoba sec 17(b). Cf Uniform Wills Act sec 16(b).

59 Cf Queensland Report par 17 at 11 and clause 17(2) at 8 of the Draft Bill.

60 Braun v Blann and Botha 1984 2 SA 850 (A) 857H.

61 Van der Merwe and Rowland 212 et seq; Corbett 368 et seq.

62 1984 2 SA 850 (A) 867A.

This provision and the similar provision in other legal systems resulted in uncertainty.

3.136 The England Report[63] concludes that the requirement that the will be "expressed to be" in contemplation of marriage is too strict. Extrinsic evidence that the will was made in contemplation of marriage should be admissible. However, direct evidence of dispositive intention would result in undesirable uncertainty and should not be admitted. The courts treat the words "contemplation of marriage" as equivalent to "with the intention that the will should survive the impending marriage".[64] The England Report recommended[65] that the "contemplation of marriage" test be replaced by a presumption that the whole will survived if a will or any part of a will was shown by its language to be intended to survive a particular marriage. The following provisions have been inserted in section 18 of the Wills Act 1837:

> (3) Where it appears from a will that at the time it was made the testator was expecting to be married to a particular person and that he intended that the will should not be revoked by the marriage, the will shall not be revoked by his marriage to that person.
>
> (4) Where it appears from a will that at the time it was made the testator was expecting to be married to a particular person and that he intended that a disposition in the will should not be revoked by his marriage to that person -
>
> (a) that disposition shall take effect notwithstanding the marriage; and
>
> (b) any other disposition in the will shall take effect also, unless it appears from the will that the testator intended the disposition to be revoked by the marriage.

Subsection (4) was included to reverse Re Coleman.[66] It was held in this case that it was the will and not merely some gift in it which had to be

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63 Par 3.15 et seq at 15.

64 Par 3.17 at 16.

65 Par 3.18 at 16.

66 (1976) Ch 1.

expressed to be made in contemplation of marriage.[67] The England Report[68] rejected a proposal that a will should be revoked by a first marriage only and not by a second or subsequent marriage.

3.137 Under section 15 of the British Columbia Wills Act, a will is not revoked by marriage where "there is a declaration in the will that it is made in contemplation of the marriage". In Re Pluto the testator left "all to my wife" naming her. The testator married the woman named the very next day. It was held that the will was revoked by the marriage because the use of the word "wife" does not suggest that a marriage is contemplated but that it has already taken place. The British Columbia Report on statutory succession rights[69] recommended that a will should not be revoked by marriage "where the will as a whole, or any term of the will, indicates an intention that the will be effective notwithstanding the marriage". It should also be possible to indicate in a will that it must survive any marriage. Such wills ought not to be revoked by marriage unless the testator intended to marry a specific person when making a will and subsequently married someone else.

3.138 The Tasmania Report[70] recommended that only an expression in a will of contemplation of marriage to a particular person should exclude revocation of the will but that extrinsic evidence should be admissible to prove whether marriage was contemplated where on the face of the will there is some indication that it might have been made in contemplation of marriage. Such an impression may be gained from the use of phrases such as "my wife" or "my fiancée". This report is opposed to a provision such as the one applicable in Victoria which saves gifts from revocation just because that gift is to a person whom the testator later marries.

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67 England Report par 3.14 at 14.

68 Par 3.5 at 12.

69 133 et seq.

70 Par 3 at 13.

3.139 The Queensland Report[71] recommended that "the will is revoked by the marriage unless it contains an expression of contemplation of that marriage: and extrinsic evidence, including evidence of statements made by the testator, is admissible to establish that an expression contained in the will is an expression of contemplation of that marriage."

3.140 The Scotland Memorandum[72] expresses the view that section 18(3) of the English Wills Act[73] is too narrowly expressed because it does not permit a testator to indicate that his will must survive any marriage. The Memorandum also states that section 18(4) was inserted to overrule Re Coleman and that there is no need for such a rather cumbersome provision for Scottish purposes. The Memorandum invites views on a proposal that a will should be revoked by the subsequent marriage of the testator but that any such revocation would be only to the extent that the will as a whole or any term of the will did not indicate a contrary intention. The Memorandum also invites views on the question whether a will revoked by marriage should revive on dissolution of the marriage before the testator's death.

3.141 The England Report[74] notes that the operation of the rules of private international law may result in a will not being revoked by marriage. (The rules of private international law may for instance lay down that the position is governed by the present South African law.)[75]

3.142 The England Report[76] referred to the possibility that the will should not be revoked by marriage but that the spouse and, possibly children as well, should be entitled to a statutory legacy. This solution is rejected in the England Report. The British Columbia Report on statutory

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71 Clause 17 at 7 of the Draft Bill.

72 Par 5.4 at 36 et seq.

73 Par 3.136 above.

74 Par 3.8 at 12.

75 Cf Corbett 618 et seq.

76 Par 3.5 at 12.

succession rights[77] notes that in Nova Scotia and Ontario the spouse may elect to take under the revoked will. The remainder of the estate will still pass on intestacy. Section 8 of Law 2 of 1868 (Natal)[78] provided that the revocation by marriage applied only in so far as the property would not have gone to the spouse or issue on intestacy.

3.143 The question to be considered now is whether a subsequent marriage should revoke a will in terms of South African law and, if so, the wording of the provision introducing the rule.

3.144 Cases certainly do occur where it is desirable for a will to be revoked by a subsequent marriage. The Defence Force encourages national servicemen to make a will. (At one stage there was criticism that servicemen were practically forced to draw up a will.)[79] Servicemen are usually unmarried and appoint their parents as heirs. When a serviceman subsequently gets married he is very likely to forget about the will drawn up during his training. In such cases there can be little doubt that revocation of the will is desirable.

3.145 There are other cases where revocation of the will by marriage is not desirable. A will made in contemplation of a particular marriage is the best example of such a case but it is not the only example. It is debatable whether bequests by a testator to his children born of a previous marriage should be revoked by a later marriage. Other legal systems allow an exception for the exercise of a power of appointment which does not affect the testator's estate. Should exceptions not be allowed as well for other provisions which do not affect the distribution of the deceased's estate as such? For example the appointment of an executor or a guardian of children from a previous marriage or directions regarding the disposal of the deceased's organs.

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77 At 135.

78 Par 3.120 above.

79 Working Paper 14 on formalities of a will par 10.17 at 109.

3.146 The fundamental objection against revocation by marriage is that it is "an extremely blunt instrument"[80] which operates without regard to all the circumstances. Revocation by marriage is a poor substitute for revocation by the testator himself in a later will. Attempts to formulate exceptions to the rule can hardly cover all suitable cases and the exceptions give rise to uncertainty.

3.147 No stand will be taken at this stage on the question whether revocation by marriage is desirable. Comments on this question would be appreciated.

3.148 If revocation of a will by a subsequent marriage is desirable it is suggested that the rule should be as flexible as possible without being too vague. The proposal in the Scotland Memorandum[81] seems to be a good one:

> A will is revoked by the subsequent marriage of the testator to the extent that the will as a whole or part of the will does not indicate a contrary intention.

This provision does not contain the technical exception that provides for the exercise of a power of appointment. A provision similar to section 18(2) of the Wills Act 1837 (quoted in paragraph 3.133 above) might be considered. Views on a more general provision such as the following would be appreciated:

> Provided that the marriage shall not revoke the provisions of a will if such provisions do not influence the devolution of assets or the distribution of the testator's estate in terms of the law of intestate succession.

The following are examples of provisions which do not influence the devolution of property or the distribution in terms of the law of intestate succession:

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80 British Columbia Report on statutory succession rights 129.

81 Par 3.140 above.

- The exercise of a power of appointment if failure to exercise the power would not result in assets passing to the testator's estate.

- The appointment of an executor and his powers.

- Directions concerning the testator's funeral and the disposal of his organs.

3.149 It is suggested that a will revoked by marriage should not revive if the marriage is dissolved before the testator's death.[82] In South Africa revival will not occur unless this is provided for by statute. It is also suggested that it is not necessary to provide expressly for cases of massing where the survivor has accepted benefits. In such cases even express revocation will not be effective.

3.150 The last question to be considered is whether revocation by marriage should apply to the designation of beneficiaries for pension benefits or the proceeds of life insurance policies as well. It may be argued that such a designation is similar to dispositions in a will and that any rule for revocation by marriage should apply to such a designation too.[83] In South African law the designation of beneficiaries for life insurance policies is done by means of a contract for the benefit of a third party (stipulatio alteri). In principle a person may deal in a contract for the benefit of a third party with any benefit payable at his death, if that benefit is not an asset in his estate. The fact that the designation of beneficiaries is done by means of contract distinguishes these cases from wills. Although comments on this question would be appreciated it is suggested that revocation by marriage should not apply to the designation of beneficiaries for pension benefits or the proceeds of life insurance policies.[84]

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82 Cf par 3.140 above.

83 British Columbia Report on statutory succession rights 136 et seq.

84 See Working Paper 14 on the formalities of a will par 11.23 et seq at 118 et seq for a discussion of the designation of beneficiaries for pension benefits or the proceeds of life insurance policies.

(iii) Revocation by divorce or annulment of the marriage

3.151 While revocation of a will by the testator's marriage has long existed, a rule that testamentary provisions are affected by the testator's divorce only began to appear in legislation in 1977.[85] The explanation for the recent appearance of this rule is that divorce is nowadays much more common than formerly. Such a rule has been introduced into several legal systems since 1977.

3.152 The advantages and disadvantages of a rule that a testator's divorce affects his testamentary provisions will be discussed first,[86] after which specific provisions will be discussed.

3.153 The arguments in favour of a rule that a testator's divorce should affect earlier testamentary provisions may be summed up as follows:

- At the time of divorce a final distribution of assets is made and if the divorced spouse receives a testamentary benefit as well there is an over-provision not intended by the testator.

- Although it is not unknown for a man to continue to have an affection for his divorced spouse and a concern for her comfort[87] it is most unlikely that a testator would leave intact a will which benefits his former spouse if he considered the matter. A layman would probably think that a divorce revoked bequests to his

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85 New Zealand Will Amendment Act 1977; Ontario Succession Law Reform Act 1977.

86 H R Hahlo "Revocation of wills by divorce" 1964 South African Law Journal 381; England Report par 3.26 et seq at 19 et seq; British Columbia Report on statutory succession rights 104 et seq; Law Reform Committee of South Australia Forty-fourth report relating to the effect of divorce upon wills 1977, hereinafter the "South Australia Report"; Scotland Memorandum par 3.5 et seq at 39 et seq; Tasmania Report par 4 at 14 et seq; Queensland Report par 18 at 12; Ontario Law Reform Commission Report on the impact of divorce on existing wills 1977, hereinafter the "Ontario Report".

87 Ex parte Macintosh: In re estate Barton 1963 3 SA 51 (N) 57G.

spouse in an earlier will. The divorced spouse would often be the last person the testator would have wished to benefit.

- Under the emotional stress accompanying a divorce a testator might easily forget about a previous will. This argument carries particular weight where the divorce is finalised without legal advice.

- Although it is easy to make a new will after a divorce it is difficult to educate the general public to adjust their wills to changed circumstances.

- Since the law clearly does not recognise revocation of testamentary provisions by divorce the absence of litigation on this matter is not an indication that there is not really a problem. The problem is exacerbated by the increase in divorce.

3.154 The arguments against a rule that divorce should affect testamentary provisions may be summed up as follows:

- Revocation of testamentary provisions by divorce is a poor substitute for the adjustment of his position by the testator himself in a will. Revocation by operation of law cannot make satisfactory provision for all circumstances.

- A change in the present position might cause more problems than it would solve.

- At the time of divorce the arrangement of financial matters looms large. Legal advice is usually taken. It is unlikely that a testator would through negligence leave his will as it is. The euphoria of an impending marriage which hampers the consideration of worldly matters is absent during a divorce.

- It is commendable if a divorce is not accompanied by bitterness. The law ought not to promote a feeling of bitterness by providing

that a divorce revokes all testamentary gifts in favour of a spouse.

. A divorce does not bring about such a major change in a party's responsibilities as does a marriage. If marriage revokes a will it does not follow that divorce should revoke a will too. (On the other hand the Scotland Memorandum[88] expresses the view that the case for revocation by divorce is stronger than the case for revocation by marriage.) A divorced person is likely to remarry and the marriage will then revoke the previous wills if there is such a rule.

3.155 All the law reform bodies whose reports have been considered[89] were in favour of a rule that divorce should affect testamentary provisions.[90] Although statutory rules cannot make provision for all circumstances it is easier to devise such rules for revocation by divorce than for revocation by marriage. In the case of marriage the testator usually did not have a spouse in mind when he made his will previously. It is difficult to predict what he would have provided in his will if he intended to provide for a spouse. In the case of divorce the testator usually has a will which provides for his former spouse. If it is accepted that the testator no longer intends to benefit the spouse it is not too difficult to determine the changes which he would probably have made to his will.

3.156 It is submitted that a change to testamentary benefits conferred on a spouse is desirable after divorce. The methods employed in different legal systems to make this change will be discussed next.

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88 At 39.

89 Footnote opposite par 3.152 above.

90 In the case of the England Report a minority opposed such a rule while a "substantial majority" supported such a rule.

3.157 The first possible solution is to revert to the position in England before the Wills Act 1837 - changed circumstances may revoke a will by implication.[91] According to the England Report[92] ten States in the United States of America have such a rule. A variation of this solution is to empower the court to modify the will or declare the will revoked.[93] It is submitted that such a solution would create too much uncertainty.

3.158 A second possible solution is to provide, as is done in certain States in the United States of America,[94] that a will is revoked by divorce in the same way that a will is revoked by marriage. The Tasmania Report, which recommended such a solution,[95] recognised that it would result in the revocation of gifts to persons other than the divorced spouse and the appointment of executors, etc. Considering that significant property settlements are usually made on divorce, this report expresses the view that the testator ought to make a new will. It is submitted that revocation of the whole will is too severe.[96] Revocation by operation of law arises for the very reason that the testator has failed to make a new will.

3.159 A third possible solution is to provide that all dispositions in favour of the divorced spouse are revoked by divorce. This solution has the disadvantage that often gifts that are linked to gifts to the divorced spouse are revoked as well. The England Report[97] accepts that this is a disadvantage but argues that this criticism applies equally to revocation by marriage. In principle section 18A of the Wills Act 1837 adopts this

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91 Par 3.123 above.

92 Footnote 13 at 19.

93 Cf South Australia Report 6; Ontario Report 5.

94 Ontario Report 5; England Report footnote 13 at 19.

95 Par 4 at 14.

96 Cf South Australia Report 5; Queensland Report par 18 at 12; Ontario Report 5 et seq.

97 Par 3.34 at 21.

solution. The South Australia Report[98] recommended this solution but also recommended exceptions to provide for gifts linked to gifts to the divorced spouse or the life of the divorced spouse, substitutions in the will, etc. The Scotland Memorandum[99] states that the wording of section 18A of the Wills Act "has proved to be unfortunate". The Memorandum refers to a case where it was held that an estate fell into intestacy although the will provided for another beneficiary if the spouse (who was later divorced) failed to survive the testator for a certain period.[1]

3.160 The last possibility is to link the revocation of provisions in favour of the divorced spouse to a fiction that the divorced spouse is predeceased. Fictions should to be avoided, if possible, because they are artificial and give rise to problems. In this case such a fiction nevertheless appears to be an acceptable solution. It is not unusual for wills to make express provision for the predecease of a person. Where the will does not provide expressly for the predecease of a person the will often has to be interpreted to determine the effect of the predecease of a certain person. There are therefore rules which can be applied to provisions referring to a former spouse.[2] The effect of the fiction that the spouse is predeceased will usually accord with the provisions which the testator would probably have preferred if he had applied his mind to the matter. In cases where the fiction results in intestacy it should be borne in mind that the rules of intestate succession are supposed to reflect what the community regards as an equitable distribution.[3] In extreme cases the fiction that the divorced spouse is dead will accord exactly with the wishes of the testator.

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98 At 6 et seq.

99 Par 5.6 at 40 et seq.

1 Cf Ontario Report par 4 at 6 et seq.

2 Cf Ontario Report 7 et seq.

3 South African Law Commission Report on the review of the law of succession: Intestate succession 1985 par 3.3 at 4.

3.161 The South Australia Report[4] foresees difficulties in connection with a fiction that the divorced spouse is predeceased. "Secret trusts" do not exist in South African law. Difficulties with the "rule against perpetuities" do not arise in South African law because no such rule applies here. Another case which may present difficulties is where a life interest given to a spouse is linked to an obligation to make payments to other persons. The South Australia Report also mentions problems with substitutions in the will and the acceleration of dependent or subsequent gifts. In all these cases it appears that a fiction that the spouse is predeceased would not give rise to problems which would not have arisen if the spouse were in fact predeceased.

3.162 The fiction that the divorced spouse is predeceased applies in New Zealand, Ontario, Manitoba, British Columbia and section 2-508 of the Uniform Probate Code in the United States of America.[5]

3.163 It is submitted that a fiction that the divorced spouse is predeceased would do more good than harm.

3.164 Section 2-508 of the Uniform Probate Code[6] provides as follows:

> If after executing a will the testator is divorced or his marriage annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse, any provision conferring a general or special power of appointment on the former spouse, and any nomination of the former spouse as executor, trustee, conservator, or guardian, unless the will expressly provides otherwise. Property prevented from passing to a former spouse because of revocation by divorce or annulment passes as if the former spouse failed to survive the decedent, and other provisions conferring some power or office on the former spouse are interpreted as if the spouse failed to survive the decedent. If provisions are revoked solely by this section, they are revived by the testator's remarriage to the former spouse ...

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4 At 6.

5 See par 3.164 below.

6 As quoted at 42 of the Scotland Memorandum.

3.165 This provision applies if the testator is divorced or his marriage annulled. These preconditions for the operation of the section ("triggering events") appear to be acceptable. Judicial separation (if this still occurs) should not result in the application of the section.[7] The British Columbia Report on statutory succession rights[8] recommended a provision which operates if a property division has been made or the other spouse has become entitled to an interest in the family assets under their Family Relations Act. The Scotland Memorandum[9] expresses the view that the making of a property division on the breakdown of the marriage is an uncertain criterion. This view is certainly correct for a system such as South African law which has no legislation on settlements without a divorce. It is suggested that the provision on revocation of the former spouse's benefits should apply on divorce or annulment of the marriage. It is also submitted that it is not necessary to provide expressly that a divorce or annulment outside the Republic results in the application of the section if the court order is recognised in the Republic.

3.166 In section 2-508 above it is first provided that certain particular provisions are revoked. Secondly it is provided that property prevented from passing to the former spouse because of revocation passes as if the spouse failed to survive. Thirdly it is provided that the conferment of a power or office on the spouse is interpreted as if the spouse failed to survive. The provision recommended by the British Columbia Report on statutory succession rights[10] does not provide for revocation but directs that the will takes effect as if the spouse had predeceased if the will gave an interest in property to the spouse, or appointed the spouse executor or trustee, or conferred a power of appointment on the spouse.

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7 Cf England Report par 3.31 at 20; South Australia Report at 5; Queensland Report par 18 at 12.

8 At 111.

9 Par 5.7 at 42.

10 At 111.

3.167 If the spouse has not survived the testator she can take no benefit under the will and her appointment as executor or trustee will not have any effect. If it is merely provided that the spouse is deemed to be predeceased it is not necessary to provide that she cannot take any benefit or occupy any office. Where the will does not refer to the spouse at all it can do not harm[11] if the spouse is deemed to be predeceased. The spouse will, however, be able to exercise a power of appointment until the moment when she is deemed to be deceased.

3.168 Is there any essential objection to a provision that the will of a testator who is later divorced or whose marriage is annulled, takes effect as if the spouse died on the date of the divorce or annulment?

3.169 A possible objection is that it is not desirable that a divorced spouse's appointment as guardian does not take effect. This objection does not carry much weight. If the spouse is already the natural guardian of the children she will remain so. In South African law a natural guardian is in a stronger position than an appointed guardian. If she is not the natural guardian the probable intention of the testator is surely that the appointment should lapse. Section 72 of the Administration of Estates Act 66 of 1965 takes account of cases where a person who has been deprived of guardianship or parental powers purports to appoint a guardian in a will.

3.170 It was considered whether a fiction that the spouse died on the date of divorce or annulment might not perhaps give rise to difficulties if a child of the testator and the former spouse is born after the divorce or annulment. It is submitted that the rule that the will takes effect as if the spouse were dead will not result in such a child's not receiving a benefit. It is accordingly not necessary to make express provision for these cases.

3.171 A general provision has the disadvantage that it might affect cases which have not been foreseen. However, it obviates the problem with an express provision listing specific cases that certain cases may be overlooked or that a particular instance which should have been regulated

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11 Cf, however, par 3.170 below.

is not covered clearly by the express provision. It is submitted that a general provision that the spouse is deemed to have died on the date of the divorce or annulment has more advantages than disadvantages. Comments on cases not covered satisfactorily by such a rule or the exceptions discussed in the following paragraphs would be appreciated.

3.172 Possible exceptions to the rule are cases where the testator and his spouse remarry and where the will reveals an intention that testamentary provisions are not to be affected by divorce.

3.173 Where the divorced spouse remarries the testator any previous wills will in any case be revoked by the marriage if such a rule exists. If a rule that marriage revokes a will is introduced the question arises whether an exception ought to be made for cases where the testator remarries his former spouse.[12] It is submitted that such a provision would create more problems than it would solve. If there is no rule that marriage revokes a will the question arises whether provisions in a will which have been nullified by divorce should revive if the testator remarries the divorced spouse. It is submitted that in this case, too, no exception should be made for remarriage to a former spouse. If the law provides that marriage has no effect on a will this principle should be applied consistently.

3.174 An exception usually made in similar legislation is that the position is affected by divorce only where a contrary intention does not appear from the will. A similar exception applies to revocation of a will by marriage.[13] If an intention that provisions in the will are not to be affected by divorce appears from a will effect should be given to this intention. This intention may also appear from a will or codicil made after the divorce. It is submitted that effect should not be given to an intention appearing from a document which is not a will. The exception should apply

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12 Cf the provision in par 3.164 above and par 5.7 at 43 of the Scotland Memorandum.

13 Par 3.135 et seq.

only if an intention that divorce must not affect the will appears from the will or a later will.

3.175 A last question is whether divorce or annulment should affect the designation of beneficiaries for pension benefits or the proceeds of life insurance policies. The British Columbia Report on statutory succession rights[14] recommended that such designations should be revoked as well in circumstances where testamentary provisions are revoked by divorce. In accordance with the recommendation above[15] that designation of beneficiaries should not be revoked by marriage it is suggested that divorce should not influence such designation either.

3.176 The following provision is recommended:

> The will of a testator who is divorced after execution of the will or whose marriage is annulled after the execution shall take effect as if the former spouse had died on the date of divorce or annulment except in so far as an intention to benefit the former spouse notwithstanding the divorce or annulment appears from the will or a later will.

(iv) Revocation by birth of a child or other changed circumstances

3.177 Under Roman law a testator's will lapsed on the birth of his child.[16] Traces of this rule are to be found in certain legal systems.[17]

3.178 The rule in the old English common law that a will could be prevented from taking effect if the will did not take changed circumstances

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14 At 140 et seq.

15 Par 3.150.

16 Sonnekus 1982 TSAR III.

17 Par 3.123 above; Scotland Memorandum par 5.9 at 44; Lewis C Warden J D "Wills" in American Jurisprudence 2d Vol 79 par 632 et seq at 725 et seq.

into account was referred to above.[18] In England section 19 of the Wills Act 1837 provided that no will was revoked by any presumption on the ground of a change in circumstances. A similar provision appears in the legislation of other "common law" systems.

3.179 Automatic revocation by changed circumstances causes uncertainty. At most provision should be made for the particular circumstances of marriage, divorce or annulment of a marriage. Although the birth of a child is an important event in the life of a testator, bequests to a spouse are much more common than bequests to children during the life of a spouse.[19] If marriage revokes a will there is little chance that testamentary heirs other than the surviving spouse will be benefited at the expense of children.

3.180 It is suggested that the birth of children or other changed circumstances should not revoke a will.

(m) Summary of provisional recommendations regarding revocation of wills

3.181 If the court is given the power to accept a will which does not comply with the formalities, such a power should also be given for the revocation of a will which does not comply with the formal requirements. A power to condone should not cover oral revocation as such but should not be limited to revocation in a document either. Except for the requirement that there shall be a document or an act apparent on the face of the will, the power to condone in the case of revocation should correspond with the power to condone given in the case of the execution of a will.[20]

3.182 The presumptions regarding the revocation of a will which has been lost or destroyed are essential and there are not sufficient grounds

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18 Par 3.123.

19 Par 3.119 above.

20 Par 3.86 to 3.107 above.

for changing the present presumptions.[21] The Master's application of the presumptions is not satisfactory because the Master's practice of considering a will on the face of it is not reconcilable with the factual nature of the presumptions. It is proposed that the Master should ignore the presumptions regarding revocation because he does not have the machinery to evaluate the factual basis of the presumptions.[22]

3.183 Comments on the question whether a will ought to be revoked by marriage would be appreciated.[23] If revocation by marriage is desirable the following wording of such a rule is suggested:

> A will shall be revoked by the subsequent marriage of the testator to the extent that the will as a whole or part of the will does not indicate a contrary intention: Provided that marriage shall not revoke the provisions of a will if such provisions do not affect the devolution of assets or the distribution of the testator's estate in terms of the law of intestate succession.

3.184 It is suggested that divorce or annulment of a marriage should affect an earlier will.[24]

3.185 Although the above are the only amendments recommended by the Commission, all matters which in the opinion of the Commission have a bearing on the revocation of wills have been dealt with in the working paper. Comments on these matters[25] and any other matter having a bearing on the revocation of wills would be appreciated.

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21 Par 3.58 to 3.74 above.

22 Par 3.75 to 3.79 above.

23 Par 3.119 to 3.150 above.

24 Par 3.151 to 3.176 above.

25 See the table of contents on page (iii) above.

## 4. CLOSING OBSERVATIONS

4.1 This working paper has been approved by the working committee of the Commission to serve as a basis for further deliberations. In view of the close connection between this working paper and Working Paper 14 on the formalities of a will the working committee has decided to extend the closing date for comments on Working Paper 14 to the closing date for this working paper.[26] After considering the comments on the working papers the Commission will formulate its final recommendations.

4.2 The following subjects will be dealt with in a subsequent working paper of the Commission:

- Disqualifications from inheriting.
- Succession rights of adopted children.
- Substitution in the law of succession.

Reasoned proposals for the review of other subjects related to the law of succession should be submitted to the Commission as soon as possible.

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26 See the preface on page (iii) above.

ANNEXURE

SECTIONS 2(1)(b) AND 2(2) OF THE WILLS ACT 7 OF 1953

(1) Subject to the provisions of sections three and three bis[1] -

(b) no deletion, addition, alteration or interlineation made in a will executed on or after the said date (1 January 1954) and made after the execution thereof shall be valid unless -

(i) the deletion, addition, alteration or interlineation is identified by the signature of the testator or by the signature of some other person made in his presence and by his direction; and

(ii) such signature is made by the testator or by such other person or is acknowledged by the testator and, if made by such other person, also by such other person, in the presence of two or more competent witnesses present at the same time; and

(iii) the deletion, addition, alteration or interlineation is further identified by the signatures of such witnesses made in the presence of the testator and of each other and, if the deletion, addition, alteration or interlineation has been identified by the signature of such other person, in the presence also of such other person; and

(iv) if the deletion, addition, alteration or interlineation is identified by the mark of the testator or the signature of some other person made in his presence and by his direction, a magistrate, justice of the peace, commissioner of oaths or notary public certifies on the will that he has satisfied himself as to the identity of the testator and that the deletion, addition, alteration or interlineation has been made by or at the request of the testator.

(2) Any deletion, addition, alteration or interlineation made in a will executed after the said date (1 January 1954) shall for the purposes of sub-section (1) be presumed, unless the contrary is proved, to have been made after the will was executed.

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1 Section 3 contains the requirements for a soldier's will and section 3bis provides for the validity of certain wills executed in accordance with the law of certain other states.

This working paper is published for comment and does not represent the final views of the South African Law Commission. The closing date for comments is 20 November 1987 or a later date arranged with the researcher (see page (iii)). The closing date for comments on Working Paper 14 on formalities of a will has been extended to 20 November 1987.