Neutral Citation [2015] IEHC 460

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 2242P.]

BETWEEN

MARY K. BRENNAN

PLAINTIFF

AND

MICHAEL O'DONNELL

DEFENDANT

JUDGMENT of Ms. Justice Baker delivered on the 16th day of July, 2015

1. This case relates to the question of whether a codicil to a will has revived that will.

Facts

2. Philip Brennan, deceased, died on the 15th May, 2015 in Co. Kerry. He had lived all or most of his working life in New York, and after he retired in the mid 1980s he and his spouse returned to live in Castleisland, Co. Kerry and they, until her death in 2005, and he alone thereafter, continued to visit New York on an annual basis. The domicile of the deceased is not a factor in the question to be determined by me at this point.

3. The deceased made a will in Ireland on the 24th October, 2006 in which he named the plaintiff, his niece, his sole executor, and by which he *inter alia* devised his dwelling, his garage and lands at Castleisland, Co. Kerry, to the defendant and his spouse Irene O'Donovan jointly, bequeathed certain monies in an identified account with EBS to the plaintiff, and the residue of his estate "within the Republic of Ireland" to the said Irene O'Donovan. I will call this the "Kerry will".

4. Some two years later the deceased made a will in New York on the 23rd December, 2008. At that time his only relevant asset in New York was a small savings account, and he also had a deposit account in the joint names of the deceased and the plaintiff in respect of which no issue arose before me. By this will he disposed of the entire of his assets and his will commenced with the words:-

> "I hereby revoke all prior wills and codicils made by me."

By this will the deceased named one John Daly as his sole executor and bequeathed the bulk of his estate to him, leaving the residue to the plaintiff with certain provisions to take effect in the event, which did not transpire, of her pre-deceasing him. I will call this the "New York will".

5. Some two years after he made the New York will, the deceased executed a codicil to the Kerry will in Ireland. The codicil was hand written at the foot of the Kerry will and continues overleaf. It is useful to quote the entire codicil:-

> "I, Philip Brennan, the within testator, hereby make this as and for a codicil to my aforesaid last will and testament. I hereby cancel and revoke the fifth paragraph of my aforesaid last will and testament and substitute in its place the following paragraph:
>
> > 'I give, devise and bequeath the monies I die possessed of in my Bank of Ireland account, Castleisland to my aforesaid niece Mary Kay Brennan.'
> >
> > I hereby affirm all the other terms of my aforesaid last will and testament."

6. The codicil is duly executed and witnessed by the testator:

> "As and for a codicil to his aforesaid last will and testament".

7. At the time the Kerry will was made the deceased had three savings accounts in the EBS in Castleisland. He closed these accounts in 2007 and opened a deposit account with Bank of Ireland, Castleisland, which he had at the date of the codicil in 2010.

8. The solicitor with whom the testator made the Kerry will in 2006 and the codicil thereto in 2010, Patrick Connell, ceased to practice some years ago and no extrinsic evidence is available from him, or from any other person, as to the circumstances in which either the will or codicil were made and no instructions to or attendances with the deceased are available.

The effect of the New York will

9. Counsel disagree as to the proper law to determine the question whether the New York will revoked the Kerry will. Counsel for the defendant accepts that, were the question to be determined as a matter of Irish law, the New York will would most likely be considered to have revoked the Kerry will, and for the purpose of the running of the proceedings before me, counsel agreed that I would first deal with the question of whether the codicil of 2010 had revived the Kerry will, and it is accepted that my determination of that question may well have the effect that it is not necessary to determine whether the New York will did as a matter of law, whether that be Irish law or the law of New York, revoke the Kerry will.

10. With that mind I turn now to consider the law in relation to revival of testamentary instruments.

Revival
11. It is accepted by counsel for both parties that the question of whether the codicil made in 2010 revives the Kerry will is a matter to be determined under Irish law. Section 87 of the Succession Act 1965 provides as follows:-

> *"No will or any part thereof, which is in any manner revoked, shall be revived otherwise than by the re-execution thereof or by a codicil duly executed and showing an intention to revive it; and when any will or codicil which is partly revoked, and afterwards wholly revoked, is revived, such revival shall not extend to so much thereof as was revoked before the revocation of the whole thereof, unless an intention to the contrary is shown."*

12. At common law, the very execution of a codicil was sufficient of itself to revive a revoked will, because a codicil was seen in itself as an act of affirming a will, and such affirmation was deemed at common law to be a revival. The matter changed however with the passing of s. 22 of the Wills Act 1837 which requires, in language which finds an exact echo in the s. 87 of the Act of 1965, in that the codicil must show "*an intention to revive*".

13. Section 87, while it permits revival of an otherwise revoked will by a codicil, does not make the execution of a codicil sufficient, and for the codicil to have the effect of revival it must show an intention to revive. This differs from the common law which operated before the Act of 1837, and while no modern Irish case exists as to how a court is to approach a codicil asserting to have revived an otherwise revoked will, there is ample old authority as to s. 22 of the Wills Act 1837. It is accepted by counsel that s. 22 involved a departure from the common law and both point me to the *dicta* of Sir J.P. Wilde in *Re Steele: In the Goods of Steele, May and Wilson* (1868) L.R. 1 P&D 575 where he said that the express words of the legislation could not be:-

> *"… to leave the matter in the same state in which it would have stood if they had never been introduced."*

14. Sir J.P. Wilde expressed the matter succinctly as follows:-

> *"I conceive that it was designed by the statute to do away with the revival of wills by mere implication."*

What is required by the statutory provisions?
15. Section 22, and now s. 87 of the Act of 1965, requires that a codicil must show an intention to revive the will, and both counsel quote, and I adopt, the statement of Sir J.P. Wilde that the intention:-

> *"…should appear on the face of the codicil, either by express words referring to a will as revoked and importing an intention to revive the same, or by a disposition of the testator's property inconsistent with any other intention, or by some other expressions conveying to the mind of the Court, with reasonable certainty, the existence of the intention in question."*

16. The analysis of the Court in *Re Steele* was followed in a judgment in *Re the Goods of Davis, decd.* [1952] P.279 where Willmer J. stressed that the purpose of the court was to ascertain:-

> *"…whether it can be said that there is some expression conveying to the mind of the court with reasonable certainty the existence of an intention to revive the will."*

Does the codicil refer to the Irish or the New York will?
17. Before turning to the question of whether the codicil shows an intention to revive the Kerry will and how that intention is to be ascertained, I first turn to the question which it is accepted I must first decide, namely whether the codicil refers to or relates to the Kerry will, or whether, it may properly be said the reference in the codicil to "my last will" is in fact a reference to the New York will. I turn to consider that question.

18. Counsel for the plaintiff concedes that the codicil does appear to refer to the Kerry will, although he argues that the failure in the codicil to mention the New York will at all is fatal to the argument of revocation, and in support of that proposition he refers me to the decision of the Northern Irish High Court in *Goldie v. Adam & Ors* [1938] P. 85. The testator in that case made a will in 1929 and three codicils thereto. He then made a will in 1932 revoking the earlier will and codicils. In 1933 he executed a testamentary document expressed to be a fourth codicil to the revoked will of 1929 and ending with the words "In all other respects I confirm my said will".

19. Bucknill J. refused to accept that the codicil had the effect of reviving the earlier will of 1929 and the three codicils thereto. Indeed he took the view that there was no evidence that the draughtsman (to whom was imputed the knowledge or intention of the testator) applied his mind at all to the provisions of the will of 1929 or the three codicils thereto. Having found that the words of the fourth codicil did not, on the face of that document, or from surrounding circumstances, show an intention to revive the will of 1929 and codicils, save that the fourth codicil refers to them and purports to confirm them. He goes on to say:-

> *"But the will of 1929 was not in fact the last will of the testator, and had in fact been revoked."*

20. The court held that the 1929 will and three codicils thereto were not revived, and counsel for the plaintiff argues that a similar approach ought to be adopted by me in this case, and he contends that similar considerations are apparent in that the Kerry will was not in fact the last will of the testator, and that the failure to make reference to the New York will, or the possible ignorance of the solicitor who prepared the codicil in 2010 of the existence of that will, are facts which suggest not only that there was no intention to revive, but that the testator did not in fact apply himself to the Kerry will at all. Thus while the codicil may appear to be a codicil to the Kerry will, it cannot be said to operate as a codicil in the true sense for the purpose of s. 87.

21. I note counsel's concession that the references in the codicil to "my aforesaid last will" is a reference to the Kerry will and this appears to me to be correct, not merely because the codicil is endorsed on the will, and that this of itself gives meaning to the expression "aforesaid", and gives a direct reference point, but because the codicil refers to the terms of the Kerry will by replacing the fifth paragraph of that will, which bequeathed the EBS monies with a bequest of the monies, in Bank of Ireland. The fifth clause of the New York will appointed the executor, and cannot be understood as being the clause denoted by the reference to clause 5 in the codicil.

22. Thus I consider that the codicil does refer to the Kerry will and that it is accordingly proper for me to consider whether the codicil shows an intention to revive that will.

How is intention to be ascertained?
23. Willmer J. in *Re the Goods of Davis*, *decd.* explained that intention must appear from the codicil does not mean that evidence of "*attendant circumstances*" is not admissible. In that case the deceased had executed a will in October 1931 whereby he devised and bequeathed all his estate to Ethel Phoebe Horsely and appointed her his sole executrix. The will was not expressed to be made in contemplation of marriage, and in October 1932 he married the said Ethel Phoebe Horsely. In May 1943 he wrote on the envelope on which the will had been kept:-

> "The herein named Ethel Phoebe Horsely is now my lawful wedded wife."

Both the will of 1931 and the writing of 1943 were properly attested in accordance with the provisions of the Wills Act 1837.

24. Willmer J. held that the "*attendant circumstances*" included any evidence that was necessary to identify the lady in question, Ethel Phoebe Horsely, and the fact that a marriage had actually taken place between her and the testator, and he admitted the will of 1931 to probate.

25. Irish law accepts that extrinsic evidence may be admitted to explain a testamentary document and s. 90 of the Act of 1965 states as follows:-

> *"Extrinsic evidence shall be admissible to show the intention of the testator and to assist in the construction of, or to explain any contradiction in, a will."*

26. Judicial consideration of that section, and in particular the decision of the Supreme Court in *Rowe v. Law* [1978] I.R. 55, identifies the purpose of admitting extrinsic evidence is to explain the will, or to assist in the construction of a will, but not for the purpose of replacing the dispositive intention of the testator. Extrinsic evidence is not admissible if a will is clear, and such extrinsic evidence cannot be adduced for the purposes of contradicting or varying the terms of a will. Extrinsic evidence can include evidence to explain the terms of a will, identify a beneficiary or other circumstance that explains a testamentary provision.

27. The so-called "armchair principle" is found for example in *Re Steele* itself where Sir J.P. Wilde expressed it at p. 576 as follows:-

> *"….although evidence of the testator's intention is excluded, the Court ought always to receive such evidence of the surrounding circumstances as, by placing it in the position of the testator, will the better enable it read the true sense of the words he has used."*

28. Furthermore, there is ample judicial authority for the general proposition that, while extrinsic evidence of intention is as a general rule inadmissible, the court will admit such evidence in order to understand a will. This proposition is described in *Theobald on Wills* (15th Ed.) at p. 91 as follows:-

> "Whether a codicil shows an intention to revive is a question of construction on the normal rules as to the admission of extrinsic evidence apply. Accordingly if the testator dies before 1983 direct extrinsic evidence of the testator's intention to revive is not admissible unless there is equivocation in the codicil, but evidence of the surrounding circumstances is admissible under the armchair principle."

29. In the light of this statutory provision, and adopting the statement of Willmer J. in *Re the Goods of Davis, decd.*, I consider that intention may be inferred and I consider that certain extrinsic circumstances may be called in aid of that task. While revival by implication was abolished as a result of the Wills Act 1837, revival by intention remains, and the intention may be inferred from the codicil itself.

Intention to revive
30. The circumstances in which an inference of intention to revive can be ascertained were considered in a number of judgments referred to me in the course of argument. Both counsel referred me to the decision in *Re the Goods of Davis, decd*. where Willmer J. quoting from the headnote in *Re the Goods of Steele*, identified, three possible ways by which an intention to revive may be shown from a codicil. These are:-

> *"In order to satisfy those words [i.e., the words of section 22 of the Act] the intention must appear on the face of the codicil, either by express words referring to a will as revoked and importing an intention to revive the same, or by a disposition of the testator's property inconsistent with any other intention, or by some other expression conveying to the mind of the court with reasonable certainty the existence of the intention."*

31. Counsel for the defendant argues that there are a number of factors which ought to influence me in coming to a conclusion that the codicil does show on its face an intention to revive the Kerry will:-

> a) The codicil expressly affirmed the Kerry will
>
> b) The codicil refers to the terms of the Kerry will
>
> c) The codicil is indorsed on the will itself

I will deal with each of these in turn.

Affirmation of Kerry will: What language is required?
32. The plaintiff contends that the language used in the codicil was not an express affirmation or confirmation of the Kerry will such as to operate as evidence of an intention to revive. The defendant argues that the word "affirm" imports an affirmation and the principal authority relied on by him is the case of *McLeod v. McNab* [1891] A.C. 471 where the deceased had made a will, then executed a will revoking one of the bequests contained in that will, and thereafter a second codicil in which he confirmed the will. The Privy Council held that simple reference to the date of the earlier document was not in itself sufficient to operate as a revival and then came to look at the surrounding circumstances to ascertain whether intention was found. Lord Hannen delivering the judgment of the Court accepted that the use of the word "confirm" was evidence of intention to revive the earlier will and expressed the reasoning as follows:-

> *"…their Lordships are also of opinion that the word 'confirm' is an apt word, and expresses the meaning, and has the operation of the word 'revive', which is used in the statute."*

33. A similar view was taken by Ploughman J. in the English High Court decision of In *Re Pearson* [1963] 1 W.L.R. 1358 where again the word "confirm" was used in a codicil. Ploughman J. expressed the matter as follows:-

> *"It seems to me as a matter of construction that the effect of the words in the codicil confirming will A is to incorporate into the codicil all the provisions of will A except in so far as they are displaced by that codicil."*

34. That case is also authority for the proposition that if the revived will itself contains a revocation clause the effect of confirming that will, the revived will, can be said to revoke a second or subsequent will, and the revocation clause was effectively "*brought up to date by the codicil*" and acted as an express revocation of that second will.

35. Hannen P. in case of *Re Van Cutsem* [1890] 63 L.T. 252 also accepted the word "confirm" did show sufficient evidence of an intention to revive a will.

36. Counsel for the plaintiff points to the fact that the authorities relied on by the defendant accept that the use of the word "confirm" has been held by courts as strong persuasive authority to show evidence of an intention to revive, but that the language of the codicil of the deceased in this case is less obviously evidence of such intention, and that the testator in the codicil used the word "affirm".

37. I reject an interpretation of the case law that would result in such a formulaic approach to this question, and I am persuaded by the judgments to which I have referred and consider that the correct approach is to ascertain whether the language used in a codicil is sufficient evidence of intention to revive an earlier testamentary document. I do not consider the case law to point me to the conclusion that a particular formula of words is mandated in order to operate as evidence of intention. Indeed it seems to me that the opposite must be the case, as the purpose of the analysis is to ascertain whether the document alleged to act as a revival contains within it sufficient evidence of an intention to do so. The evidence must be gleaned from the language used, not by means of a formula of words, but by seeking to give effect to the language used and by seeking to ascertain the intention apparent from such language. I consider therefore that the English authorities correctly state the law, and identify the inquiry that must be engaged is to ascertain from a true construction of the language used whether objectively speaking the document contains evidence of an intention to revive. I consider that there is no difference in substance between the words "confirm" and "affirm", and both positively express an acknowledgment of the validity of the document or instrument to which reference is made. Accordingly I accept the argument of counsel for the defendant that the codicil contains within it, in the language used, reference to and evidence of an intention to revive the Kerry will.

38. I note also that in what must be seen as the leading old authority on the point, *Re Steele*, that the word "affirm" was found in the judgment of Sir J.P. Wilde, and he adopts the approach of the common law to written documents generally, or as he says at p. 576 of the judgment immediately after the dicta quoted at para. 27 above:-

> *"This is a doctrine constantly acted upon at common law in relation to written documents, and notably in cases of written guarantee."*

39. I consider that there is force in that approach and it is one consistent with the general approach to the construction of written instruments. At p. 577 of the judgment the learned judge made the following observation:-

> *"The theory of the law is, and always was, that a codicil forms part of a will, and consequently that to make a codicil to your will is first to affirm the existence of that will; and, secondly, to re-publish it or re-affirm its validity."*

40. The statement of the Court, of course, was *obiter* in that the argument was made from principle and from the common law before the statutory change made by the Wills Act 1837, but as that Act, which is identical in substance to s. 87 of the Act of 1965, had the effect of adding another element to the test of revival, I consider the *dicta* to be persuasive as to the purpose of the analysis of the codicil, namely to ascertain whether an inference can be drawn from it that a will was intended to be confirmed or affirmed. Sir J.P. Wilde used the language "affirm" or "reaffirm" and there is nothing in his judgment that suggests to me that he regarded another word, such as "confirm" to be more apposite, and while later in his judgment he does say that what the codicil did was "*to confirm that which exists*", there is nothing in the language of that judgment, nor in any of the other judgments opened to me in the course of argument, that would suggest that only a particular form of language may act as evidence of intention to revive. Such an approach would not be consistent with the general approach of the courts in construing documents, namely that the language used is interpreted in the context in which it is found, and that the court should insofar as is possible give effect to each such word.

41. Further, it seems to me that were the law to be that only one form of words could act as evidence of revival, one would expect such form of words to be mandated by statute.

Reference in the codicil to the terms of the Kerry will

42. The codicil expressly replaces one clause in the Kerry will with another, and extrinsic evidence, accepted by counsel as being admissible for the purposes of explaining the amendment, shows that the substitution of one clause for the other arose by virtue of the closing of the account in respect of which the bequest was made in the will. The codicil replaced the reference to that now closed account with a bequest to the same beneficiary of the money standing in the account opened in part with the money from the closed account.

43. Counsel for the defendant argues from another decision of Hannen P., in *Re: Steadham* (1881) 6 P.D. 205. In that case the Court explained the test as being whether the codicil sufficiently refers to the will argued to have been revised, and "*brings that will into existence*". In that case a solicitor was instructed to prepare a codicil but instead of making a codicil as instructed to a will of 1878, made a codicil to a will of the previous year. 1877. The court accepted that the mistake "*was not a mere mistake as to the date of a will*", and asked whether the codicil "*was actually applied to the provisions of the will of 1877*" so as to mould it into an expression of what the testators intentions and wishes were at the time of the making of the codicil.

44. It is clear that the codicil referred to the Kerry will, but it is also clear that the testator by the codicil expressly replaced a then obsolete provision of the Kerry will with an updated provision in broadly similar terms, and by which a bequest was left to the same beneficiary, albeit of funds in a different bank account. The codicil was a replacement of an identified provision in the Kerry will, and that in my view conveys, to an observer seeking to construe the codicil, an intention to affirm or revive the Kerry will.

Is endorsement of the codicil on the Kerry will sufficient?

45. It might seem at first glance that the mere writing of a codicil on a testamentary document of itself is sufficient intention to revive that document, but the case law would suggest otherwise. In *Marsh v. Marsh* (1860) 1 Sw. & Tr. 528 the deceased had

executed 37 wills and codicils, and there were also found among his papers a large number of incomplete testamentary papers. A duly executed codicil was found annexed by tape to a will and codicil and the question for the court was the effect of this form of annexation. Sir Cresswell held that the annexation of the codicil to the will was "*an act dehors*" the instrument, and that the legislation required that the intention to revive be shown on the codicil itself and not, as there, by the physical act of annexation. At p. 847 of the judgment he said as follows:

> *"It may be assumed that a codicil to a will shews an intention that some will should be operative ….But can any act dehors the instrument be resorted to for the purpose of establishing the intention? I apprehend not; it would be such act, and not the codicil, then that shewed it. It appears to have been the object of the legislature to put an end equally to implied revocations and implied revivals."*

46. I adopt that statement of principle, and indeed the reasoning behind it, namely if annexation was to have the effect contended, an immediate problem arises as to how the court is to ascertain without extrinsic evidence when and by whom it was annexed, or how a natural connection between the codicil and the document alleged to be revived could be shown. By s. 87, revival must be by the codicil, and not by the act of annexation of the codicil howsoever this is shown to have occurred.

47. Willmer J in *Re Davis* expressed himself in agreement with counsel for the applicant that the fact of executing a codicil must show an intention in itself to execute some sort of effective document as:-

> *"He cannot be credited with an intention to execute a wholly, ineffective codicil to a wholly ineffective will."*

48. He went on to point to the fact that to think otherwise would leave him in the position of being unable to ascertain what other intention could possibly be imputed to the testator in executing the codicil. There is some force to that proposition, and of course a codicil must be executed in accordance with the Succession Act, and this is to be treated with a degree of solemnity. I do not accept that this *dicta* may displace the legislative requirement in that the mere fact that a codicil is executed does not of itself mean that a will is revived, as a codicil to a will does not revive that will of itself, without the court being satisfied that the other element of the test is met.

49. However, there is some argument that writing on the will is sufficient to show intention to revive. In the 15th ed. of *Theobald on Wills* (1993, Sweet & Maxwell) the learned author states the following general proposition at page 92:

> "A testamentary disposition, written at the foot of a will revoked by marriage, and referring to a bequest contained in the will, though not referring to the will in terms or described as a codicil, is sufficient to revive the will."

The learned author refers to *Re: Terrible* (1858) 1 Sw. & T. as authority for this proposition. In that case probate was granted of a will of the deceased who had made a will giving a life interest in property to his then wife Sara. After her death he married Martha Brewer whom he left surviving, and on the day before his death he executed a memorandum to the effect that he wished the name of his former wife Sara to be erased in his will and the name of his new wife Martha be substituted. The Court accepted that the memorandum, which was duly executed as a testamentary document, was a codicil:

> *"and from its being written on the same sheet of paper, and also from its contents, it could be a codicil to no other will than that of June the 11th, 1852l. Its identification as a codicil to that will was sufficient to revive the will."*

50. I consider that the mere fact that the codicil is written on the will is not sufficient in itself to revive the will and that the writing of the codicil is a form of annexation and dehors the will. This is notwithstanding the decision of the Court in *Re Davis*, where the words comprising the codicil were written on an envelope in which was kept the will, and that is because that case dealt with the question of whether the writing on the envelope was a codicil, and the Court finding that it was, held that it contained sufficient words to convey to the mind of the Court "*with reasonable certainty the existence of an intention to revive the will*."

51. Insofar as the statement at p. 92 of *Theobald on Wills* expresses a different proposition, I do not believe it is correct law, and I note also that neither *Re Terrible* nor *Re Davis*, the two judgments relied upon in support of the proposition stated by the learned author, supports so wide a principle.

52. I prefer the statement at pp. 165 -166 of *Miller's Irish Probate Practice* (1900, Maxwell) where the author says as follows:-

> *"Nor is mere physical annexation of a codicil to a revoked will sufficient. In order that republication may be implied something must be found in the second testamentary instrument form which the inference can be drawn that when making and executing it the testator considered the will as his will."*

53. I adopt that statement as expressing the true import of s. 22 of the Wills Act 1837 and s. 87 of the Act of 1965.

Must the testator know the earlier will had been revoked?

54. This difficult question arose towards the end of argument. It was not strongly contended by counsel for the plaintiff that evidence that the testator knew that the Kerry will had, as a matter of law, been revoked by the New York will was required before the Kerry will could be revived. However, his argument is more nuanced and he contends that no revival can occur by the codicil unless it is apparent from the terms of the codicil itself that it intended to revoke the New York will. As he put it colourfully, the New York will remains "the elephant in the room", and because that will was, at the time of the codicil, the last will of the testator, it must be shown by the codicil itself that it was intended to revive the Kerry will and revoke the New York will. He says that the two stages are necessary, and are not on the facts apparent and cannot be gleaned from the codicil itself. Thus his argument is that the testator, in order to revive the Kerry will by the codicil, must have known that it had been revoked, and must further have intended in reviving it to thereby revoke the New York will.

55. The textbooks are silent on the question and few of the authorities expressly address it, but proceed mostly on an assumption, often unspoken, that such awareness is not relevant.

56. The question arose tangentially in the judgment of Willmer J. in *Re Davis* where in raising the hypothetical question that as to what precisely the testator was doing in executing the document that he did in the form of a codicil, and noting that the will to which he referred had already been revoked by marriage, "*even if he were unaware*" that the will had been revoked by marriage, he went on to point that there were easier ways to revoke a will, and never came to address the question of the testator's knowledge of the fact of revocation in his judgment.

57. Chitty J. in the case of *Re Earl of Caithness* [1891] 7 T.L.R. 354 did seem however to take the view that knowledge of the fact of revocation was not a necessary element and he said as follows:-

> *"This revocation was worked by force of the statute alone quite independently of any intention of the testator's part. But the testator might, under section 22, revive it by executing after his marriage a codicil showing an intention to revive, and it was observable that section 22 did not deal exclusively with a will revoked by marriage, but dealt with a will 'in any manner' revoked."*

58. The will in that case was held to revive the will as it had "*treated the will as subsisting*". Of note also in that case is that Chitty J. took the view that the testator's main object was to appoint additional executors, yet he had "*referred to the will in such terms as to treat it as subsisting – that was to say, subsisting in its entirety*."

59. That statement seems to accord with reason, and as the function of the court is to ascertain the intention of the person making the codicil objectively speaking, and as there is no subjective element to the test whether the revival itself has been effective, I consider that knowledge that a will has been revoked is not an essential element in the revival of that will by a codicil.

60. Furthermore, the legislation is silent on the point, and makes possible revival by a codicil of any will revoked "*in any manner*", suggesting that a revocation which had occurred as a matter of law and without any intention to revoke could come into play in considerations of revival under s. 87 of the Act of 1965.

61. Furthermore, it is unclear how a court would determine that a testator did know that a prior will had been revoked, and the evidence of that knowledge would often be extraneous evidence, and might lead to unnecessary litigation and uncertainty, as well as enabling speculative argument, or indeed evidence, to be adduced in furtherance of an argument as to the subjective state of the knowledge of the testator.

62. Accordingly, I conclude that subjective knowledge by a testator that a previous will had been revoked is not a necessary element in the application of s. 87 of the Act of 1965. That principle should be seen however in the context of the requirement of s. 87 that the codicil affirming or confirming the will should show intention to revive, and often the intention to revive will import some degree of knowledge that the prior will had been revoked. Thus perhaps a more accurate statement would be that it does not need to be shown that the testator had known that a prior will had been revoked, or how it had been revoked, but that proof of intention to revive can sometimes require consideration of this as a factor.

63. Counsel for the plaintiff makes the argument that the fact that the New York will is not referred to anywhere in the codicil is fatal to the contention of revival as the revival of the Kerry will of itself revokes the New York will. He relies on the decision of *Goldie v. Adam* referred to at para.18 above. The Court followed *Re Steele* to the effect that the Court would not conclude that a will could be revived in an "*indirect kind of way*". There was a complete absence of words of revival.

64. Counsel for the plaintiff argues that that case is authority for the proposition that there must be actual words of revival in a codicil to act as a revival of an already revoked will. I consider this cannot be a correct statement of the law in the light of s. 87 of the Act of 1965, and that the court is entitled to look to evidence that shows an intention to revive, and the legislation does not require an expression of such intention, merely that it be shown. Bucknill J. seemed to take the view that there had to be evidence that the testator knew that the 1929 wills and codicils had been revoked and it seems that the solicitor who drafted the codicil in 1933 did not know of the revocation. The absence of knowledge of revocation was an element in the Court's decision, and not the sole reason for the decision and as Bucknill J. said *"all these factors unite to convince me that Mr Tavlor did not intend to revive the 1929 will"*.

65. I do not consider that the judgment in *Goldie v. Adam* states a proposition other than the ones outlined above, and none of the authorities suggests that there needs to be express words of revival, and having regard to the fact that the provision for revival is made in a statutory scheme which does not require express words of revival, I consider that the correct analysis points me to the conclusion that express words of revival are not necessary.

Conclusion on revival

66. I consider for the reasons stated above that the codicil does contain within it, and by inference, an intention to revive the Kerry will. It clearly refers in terms to a clause in that will, and affirms or confirms it in express language that admits of no ambiguity. Certain extrinsic evidence to explain the alteration to the bequest in the Kerry will is to be admitted in aid of interpretation, and this points unequivocally to the Kerry will.

The effect of the Kerry will on the New York will

67. The Kerry will deals with the Irish estate only, and the codicil does not make any alteration to this fact. Thus, while I consider that the codicil does revive the Kerry will and the Kerry will contains a clause by which it revoked all previous wills, the codicil carries with it and updates the revocation. I consider however that the Kerry will does not revoke the New York will in its entirety, and that the New York will continues to survive insofar as it disposes of assets other than those dealt with in the Kerry will, the bank account in New York. No question of Irish law arises in the administration of that estate, which I am advised has been fully administered.