"The First Words in a Deed and the Last in a Will Prevail" or "Testamentary Revocation by Inconsistency within the Instrument"

Alvin E. Evans  
*University of Kentucky*

Follow this and additional works at: [https://uknowledge.uky.edu/klj](https://uknowledge.uky.edu/klj)  
Part of the [Estates and Trusts Commons](https://uknowledge.uky.edu/klj)  
Right click to open a feedback form in a new tab to let us know how this document benefits you.

**Recommended Citation**  
Evans, Alvin E. (1939) ""The First Words in a Deed and the Last in a Will Prevail" or "Testamentary Revocation by Inconsistency within the Instrument," *Kentucky Law Journal* Vol. 28 : Iss. 1 , Article 5.  
Available at: [https://uknowledge.uky.edu/klj/vol28/iss1/5](https://uknowledge.uky.edu/klj/vol28/iss1/5)

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledges@lsv.uky.edu.
NOTES

"THE FIRST WORDS IN A DEED AND THE LAST IN A WILL PREVAIL"

or

"TESTAMENTARY REVOCATION BY INCONSISTENCY WITHIN THE INSTRUMENT"

From the time of Lord Coke the maxim has had wide circulation that the first words in a deed and the last words in a will prevail where they are repugnant to each other. No modern court has indicated in its opinion that this is based upon reason and (in most cases) the maxim has been unreflectingly repeated. Where the provisions of a will conflict inter se so that the thing given to A is by a later clause given to B, there are, of course, three alternatives: (1) The last declaration prevails; (2) the legatees take jointly or in common; (3) the resulting uncertainty leaves the subject matter undisposed of and there is a failure of the gift. The fourth alternative that the first clause should prevail is suggested in a Kentucky case, and the first clause prevailed.2

(a) Revocation. When it is stated that in a will the last words prevail, it is not clear whether the writer intends this as a matter of construction, or a rule of law or whether he means that there is a revocation. Surely this cannot amount to a revocation. It is absurd to assume that a man writes a will or a portion of it and then intentionally revokes the act while in the doing, as if a testator should say, "I hereby devise Blackacre to A. I revoke that devise and give it instead to B." A will may be revoked by (a) certain circumstances; (b) by burning, tearing, canceling

1 Coke on Littleton, 112b. Coke, commenting on "divers testaments" and "divers devises," terms used by Littleton, said under the former, "The first grant and the last will is of greatest force." This recognizes the ambulatory character of a will contrasted with a grant. Under the latter he said: "... Also that in one will when there be divers devises of one thing the last devise taketh place." This is, of course, a misinterpretation of Littleton.

2 Watkins v. Bennett, 170 Ky. 464, 186 S. W. 182 (1916) ("The very order in which one writes is most frequently indicative of his intention").
or obliterating; or (c) by later writing in the proper form. The statute does not contemplate revocation by writing as such within the instrument. Any writing within the will operative as a revocation takes the form of cancellation or obliteration, i.e., an act to the document other than a writing. A will consisting of a single instrument is an integer and the courts will construe its conflicting parts and give effect to all of them so far as it is possible to do so.\(^3\) In a deed, on the other hand, it is said that the first words prevail and there is no revocation unless it is possible that the earlier words revoke the later words. Even in a will a fee estate or an absolute interest once devised will not be cut down by doubtful subsequent expressions.\(^4\) If, then, the last words prevail, it should be a matter of construction rather than of revocation.\(^5\)

The theory that a later expression may revoke a former one

\(^2\)Day v. Wallace, 144 Ill. 256, 33 N. E. 185 (1893); Heidelbaugh v. Wagner, 72 Iowa 601, 34 N. W. 439 (1887); re Freeman's Estate, 148 Iowa 58, 124 N. W. 304 (1910); Windt's Estate, 110 Pa. Sup. 124, 187 A. 467 (1933); re Fisher, 19 R. I. 53, 31 A. 579 (1895).

\(^4\)Griffin v. Pringle, 56 Ala. 486 (1876) (The residuary clause was put early in the will but was given same effect as if it had appeared last); Hays v. Martz, 173 Ind. 279, 288, 39 N. E. 303, 90 N. E. 309 (1909) (Fee cut down here by later clause); Curry v. Curry, 105 N. E. 951 (Ind. App. 1914) (Court discusses the general rules of construction); Rona v. Meier, 47 Iowa 607 (1878) (Gift over after an absolute interest fails). Cf. Porter v. Union Trust Co., 182 Ind. 637, 108 N. E. 117 (1915); Bradford v. Martin, 199 Iowa 250, 201 N. W. 574 (1925) (Similar): ("Where the gift to the first taker is absolute the estate is exhausted and nothing remains of which disposition may be made"); Utley v. Roark, 3 Ky. Op. 391 (1859); Martin v. Palmer, 192 Ky. 25, 234 S. W. 742 (1921) (Gift over of remainder after a fee is void); Paster v. Catlett, 260 Ky. 826, 88 S. W. (2d) 1028 (1935) (same); Davis v. Bogg, 20 Ohio St. 550, 565 (1870) (Gift in trust and no beneficiaries named, constituting an effort to give an absolute interest with remainder over). Cf. Smith v. Bell, 31 U. S. 68 (6 Pet. 1832) (Fee cut down), and Lightfoot v. Beard, 230 Ky. 488, 29 S. W. (2d) 90 (1929) (same). See Utley v. Roark, 3 Ky. Op. 391 (1859).

\(^5\)Being similar in effect to a revocation, such a construction is frequently called a revocation: Ridout v. Pain, 3 Atk. 486, 493 (Ch. 1747) ("Suppose a man gives a farm in Dale to A in one part of his will and in another to B, it has been held in the old books to be a revocation"); Paramour v. Yardley, 2 Plow. 539, 541 (K. B. 1879); Sims v. Doughty, 5 Ves. 243 (Ch. 1800); Kerr v. Clinton, L. R. 8 Eq. Cas. 462 (1869) (Rule not applied where second gift is by implication); Estate of Burdin, 232 Ill. App. 511 (1935) (Court failed to reconcile the provisions, which might well have been done here); Covert v. Seburn, 73 Iowa 564, 55 N. W. 336 (1887) (Alleged conflicting residuary clauses); Rowland v. Miller, 51 Fla. 408, 88 So. 263 (1921) (Repugnancy in the same clause); Hollins v. Coonan, 9 Gill. 62 (Md. 1850).
puts on a par (a) a revocation by later will or codicil with (b) an inconsistent provision in the later clause or paragraph\(^7\) and (c) a repugnancy in the very same clause.\(^7\) In (b) and (c) there is a question whether there is any significance in the order and whether the same result should not be reached whatever the order of words.

Surely no one will argue that the last words of a self-contradictory clause are to be given additional weight simply because of their position. In much the same way there is no sufficient reason to say that contradictory words in a later clause are better. The will being a whole, the conflict is rather one of inadvertence than of intent. The purpose of a codicil, however, is to modify, add to or confirm a will and there is no difficulty in finding that where it contradicts the will, the testator has experienced a change of purpose. The fact that a codicil is to be construed as a part of the will does not eliminate the truth that it is later in time. But the entire language of a single instrument speaks as of the same time, one part with another.

(b) Construction. That the problem is one of construction seems evident by the fact that not infrequently the first words are given effect. This is true not merely when the courts refuse to cut down a fee or absolute interest by subsequent doubtful expressions or gifts over of the remainder but also where the subsequent inconsistent gift is one by implication.\(^8\) So a partic-

---

\(^6\) In Wells v. Fuchs, 226 Mo. 87, 104, 125 S. W. 1137, 1139 (1910) it is declared that a codicil is to be interpreted the same as if it were in subsequent clause in the same will. See also Kemp v. Hutchinson, 110 S. W. (2d) 1126 (Mo. App. 1937).

\(^7\) Leicester v. Biggs, 2 Taunt. 109 (C. P. 1809) (Devise to trustees in trust to pay unto or else permit or suffer T's niece to receive the rents. "To pay" makes the trust active, but "to suffer or permit" makes it passive, hence the niece took a legal and not an equitable fee); Morrall v. Sutton, 1 Phil. 533, 537 (Ch. 1845) (Gift to A, her administrators, executors, and assigns during the term of her natural life. She takes a life estate); Luitjens v. Larson, 222 Iowa 1320, 271 N. W. 239 (1937) (Residue to wife for and during the term of her natural life in fee simple. She takes the property absolutely); Morgan v. Meacham, 279 Ky. —, 130 S. W. (2d) 992 ("To be his absolutely for his lifetime").

\(^8\) Kerr v. Clinton, L. R. 8 Eq. Cas. 462 (1869) (T gave the surplus after payment of his debts and funeral expenses to his wife. There were two mortgages on his lands which were not created by himself and so were not his debts. By later clause he devised the lands to his sons and directed his trustees to raise out of his real property such sums as should be necessary to pay his debts, funeral expenses, and mortgages, which his personal estate should not suffice to pay. This
ular gift will not be affected by an inconsistent subsequent general gift. When one considers the very infinite variety of irregularities of testamentary expression, it is not surprising that this type of irregularity should occur occasionally. In addition to the case where the same property once given to A is subsequently given to B, there are three situations where later words conflict with prior expressions:

1. The gift is to A and is followed by a clause cutting down or enlarging or repeating A's interest. Such a modification or tautology is not infrequent in wills. Many of the cases where it is held that words of doubtful import will not cut down a fee once given are of this type.

2. The repugnancy does not affect the particular interests of any beneficiaries so as to cause a conflict of interests as in the case where the inconsistency involves management and method of disposition of the estate. In Armstrong v. Crapo, however, the court was led astray by the maxim that the last words prevail and treated the matter as one of revocation rather than one of construction. The testator had given plaintiff an annuity for life explicitly. In a later clause he directed that final distribution should be made after ten years. Thus, the court awarded to plaintiff an annuity for ten years only, which could not have been the testator's intent.

was held to be an implied gift to his sons of the sums necessary to pay off the mortgages and the gift to the wife was not disturbed). In Hunt v. Johnson, 49 Ky. 342 (10 B. Mon. 1850) and Watkins v. Bennett, 170 Ky. 464, 136 S. W. 182 (1916) the first clause prevaled by construction.

Young v. M'Intire, 3 Ohio 498, 502 (1828) ("All my personal property to A, all my stocks to B." This is the converse of the rule stated).

Sternberg v. Florida Nat. Bank, 114 Fla. 580, 154 So. 844 (1934) (First clause gave to A the residue of the personalty. The later clause gave A the residue of all his property, real, personal and mixed in trust. He left nothing save personal property and it was held not subject to the trust. Rowland v. Miller, 51 Fla. 408, 88 So. 263 (1921) (T devised to A a certain lot. In the next sentence he declared that it was to be held in trust for A. The court's analysis that this latter declaration was a revocation seems untenable. T had not yet completed the terms of the devise); re Buechley's Estate, 28 Pa. 107, 128 A. 730 (1925) (T, in the same paragraph, gave (a) "all the remainder of my estate to my son William" . . . "Item. I will all my property, real estate, to my son William." It was argued by the other heirs that the last revoked the first provision, but it was held merely that a portion was given twice). Cf. Mayo v. Cooksey, 148 Ky. 43, 145 S. W. 1135 (1912).

Cf. cases in note 3.


72 Iowa 604, 34 N. W. 437 (1887).
3. There may be two residuary clauses in the same will, one favoring A, the other B. Generally the second clause receives only that which falls out of the first, and there should be no room for the application of the "last words" rule. It is possible that circumstances such as relationship as well as the presence or absence of other provisions, may give rise to a different inference. This being an ambiguity, evidence should be admitted to show the real intent if it is available.

In England some time after Coke, a strong line of authority developed which held that the beneficiaries took as joint tenants or possibly as tenants in common. Such a construction was said to be equitable. Equality is equity and it avoids intestacy caused by uncertainty. Apart from the matter of double residuary clauses, the weight of authority in this country is that the first words are revoked in case the same gift is made successively to two beneficiaries. This is a tribute to the great influence of

---


15 Covert v. Seburn, 73 Iowa 564, 35 N. W. 636 (1887) (Earlier clause gives residue to T's brothers and sisters, later clause gives residue to dearly beloved adopted son. The latter prevails). Fane v. Fane, 1 Vern. 30 (Ch. 1881) (Residue given to executors in earlier clause, later they were given $100 for their trouble. In a still later clause residue was given to the children of F. This clause prevails because of the uncertainty arising out of the two provisions for the executors). In Sternberg v. Florida National Bank, 114 Fla. 580, 154 So. 844 (1934) are two residuary clauses favoring the same beneficiary.

16 See Evans, Irregularities of Testamentary Expression (1939) 27 Ky. L. J. 211, 244-247, on latent and patent ambiguities and admissibility of external evidence.

17 So held in Rowland v. Miller, 81 Fla. 408, 88 So. 263 (1921); Estate of Burdin, 283 Ill. App. 511 (1935); Fraser v. Boone, 1 Hill Eq. 360 (S. C. 1833) and dicta to same effect in Griffin v. Pringle, 56 Ala. 486 (1876); Oliphant v. Pumphrey, 193 Ind. 656, 141 N. E. 517 (1923); Johnson v. Mayne, 4 Iowa 180, 193 (1856); Heidlebaugh v. Wagner, 72 Iowa 601, 34 N. W. 439 (1887); re Freeman's Estate, 146 Iowa 38, 124 N. W. 804 (1910); Hollins v. Coonan, 9 Gill. 62 (Md. 1850); Hendershot
Coke and to the fact that his institutes and commentaries were available for study. Some American cases follow the other tradition of joint tenancy.\(^1\)

No case has been found by this writer where the conflicting gifts were held to create an unsurmountable ambiguity, although in *Boone v. Fraser*\(^2\) the court states that this is the reasonable result. The potent influence of Lord Coke led the court to the other determination. It is believed that where there is no basis for a construction favoring either the earlier or the later beneficiary, a failure of the gift is the only appropriate result. Where an unresolvable uncertainty appears on the face of the will (sometimes called a patent ambiguity) the judge must surely say that he does not know the intent of the testator. In appropriate situations extrinsic evidence may be admitted.

That part of the rule formalized by Lord Coke, that the first words in a deed of conveyance prevail is not without merit. The early deed did not require a signature. As soon as it was sealed and delivered it was binding as a conveyance. It became effective in the order in which it was written, not because that order was in itself an indication of the intent of the grantor, for intent was comparatively unimportant. It was only when the law grew away from formalism and equitable considerations were introduced that the intent of the grantor became significant. But the order of expression had become important because a grant once made could not be unmade. This latter rule lingered long after the canon of interpretation according to the intent had been


\(^2\) *Freilinghausen v. New York Life Insurance Company*, 31 R. I. 150, 77 Atl. 98 (1910) (Apparently a dictum only). See also *Day v. Wallace*, 144 Ill. 256, 33 N. E. 185 (1893). *Whitlock v. Wardlaw*, 7 Rich. L. 453 (S. C. 1854) (Instruction to the jury by the trial judge that if a slave were twice given in a will it did not invalidate it and the legatee might take as joint tenants sustained). But see *Fraser v. Boone*, 1 Hills Eq. 360 (S. C. 1833) (Lower court holding that they took as joint tenants overruled because of the influence of Lord Coke). North Carolina holds that they take as joint tenants. See *Field v. Eaton*, 16 N. C. 283 (1 Dev. Eq. 1828); *McGuire v. Evans*, 40 N. C. 258, 273 (5 Ired. Eq. 1846).

\(^\text{Supra}, \text{n. 17.} \) In *Carter v. Kinstead*, Owen 84, 85 (C. B. 1592) Perlam, J., was of the opinion that both gifts were void.
adopted. There is a reason that such should be the case. If in a deed the question of the identity of the grantee is raised, one being named in the premises and a different one named in the \textit{habendum} clause, the first will be interpreted as the proper grantee because the premises contain the names of the parties to the deed. Hence the fact that a different person is named in the \textit{habendum} would be disregarded as a matter of construction as well as a matter of law. In fact, the \textit{habendum} has come to be regarded as unnecessary and largely superfluous.\footnote{Tiedeman, infra note 23, \textit{ibid.}} The conflict as to identity of grantee is comparatively rare,\footnote{See Hafner v. Irwin, 20 N. C. 433, Reprint, p. 570 (4 D. & B. 1839) (Grantor bargains and sells to A. H to have and to hold unto the M. W. C. Clear case of mistake); Blackwell v. Blackwell, 124 N. C. 269, 32 S. E. 797 (1899) (similar).} the most common repugnancy arising where an attempt is made to cut down an earlier fee or absolute interest by the gift over of a remainder.\footnote{Wilkins v. Norman, 139 N. C. 40, 51 S. E. 797 (1905) (Later clause granting a remainder over does not cut down a previous fee. But see, e.g., McWilliams v. Ramsey, 23 Ala. 513 (1853), where an absolute gift was cut down by a later clause. Tiffany says such a rule is of doubtful utility, 2 Tiffany on Real Property (Enlarged ed. 1929), p. 1619. See 2 Devlin on Deeds (3d. ed. 1911) secs. 838c, 843a; Tiedeman on Real Property (3rd. ed. 1906) sec. 609.}

In the case of wills, moreover, the formalization of Lord Coke might well have been accepted as appropriate for his time. Unlike a deed, no further formalities were required for a will until under the Statute of Frauds it was required to be signed. Thus, it was effective as a draft will as it was written. Any subsequent alterations would be in the nature of revocations and thus the last words would prevail. When, however, the Statute of Frauds became effective, there could no longer be any basis for a distinction between wills and deeds. The signing of a will, was the exact equivalent of sealing and delivery of a deed and a will, instead of consisting of parts, became an integer. Though the old formalism still lingers and it is constantly being repeated that the last words prevail, this is merely an historical survival. There is no room for it after the adoption of the precept that the intent should prevail. There is no division of a will into parts corresponding to the premises and \textit{habendum} of a deed, and no intrinsic reason why one part of a will should prevail over another part save as it appears more clearly to express the testator's intent. There is now no more room for the theory of
revocation within the single testamentary instrument than there is for such a theory in a deed or other writing. Blackstone,\textsuperscript{24} evidently puzzled by this contrast between deeds and wills, said simply that the first words in a deed and the last in a will prevail because they are more available. The writer of a note to \textit{Aspinwall v. Andus}\textsuperscript{25} seems to agree in part with the explanation suggested above. He argues that the statute of wills required no signature and therefore each clause operated from the moment it was written. We may infer that he means that a repugnant later clause is revocatory. He further says that where there are “contraries” in the several parts of a deed the first part shall stand, and the last part in a will shall stand, but that the maxim has been continued after the foundation has failed.

One concludes that the rule as to deeds still prevails because the first words are found in the premises and are construed to express the true intent. But in the case of wills, if the clauses cannot be construed or explained so as to avoid a square conflict, such repugnancy must cause the will or that portion of it to fail. This is another example of irregularity of testamentary expression which Bacon might well have termed a patent ambiguity. Equity does not reform wills. If it is impossible to determine what testator means by construction or by extrinsic evidence where that is available, all the analogies point to the failure of the testamentary purpose. In the great majority of states the matter is as yet unsettled by judicial decision and the courts are free to take the view here suggested.

\textbf{Alvin E. Evans}

\textsuperscript{24}Note 2, Blackstone’s Commentaries 379, 381 (Sharswood’s Edition, 1872).