MARY E. BENSON, Executrix of the Estate of the Late THOMAS J. R. FAULKNER, Appellant, v. **THELMA JONES CLARKE**, Legatee under the Will of THOMAS J. R. FAULKNER, and **D. C. CARANDA**, Respondents.

APPEAL FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued October 10, 11, 15, 1956. Decided February *22,* 1957.

1. The primary purpose of the probation of a will is to establish the validity of the instrument rather than to settle issues of title to property purportedly disposed of thereunder.

2. A Probate Court has power, upon petition, notice and hearing, to revoke the probate of a will, as a step incidental to the granting of probate to a subsequent will of the same testator, at any time within twenty years after the original probate was granted.

3. The functions of probate proceedings are limited to determining the validity of the instrument presented for probate.

4. Since construction of the terms of a will is not a proper function of probate proceedings, the mere probate of a will is not conclusive as to property rights arising therefrom.

5. Execution of a subsequent will containing an express clause revoking a prior will operates as an immediate revocation, and the prior will cannot thereafter be revived except by republication and cannot be revived by destruction of the later will.

6. It is of the essence of a will that it should be ambulatory and revocable until the death of the testator.

7. When objections are filed concerning the genuineness of a will the issues of fact must be referred by the Probate Court to a jury duly empanelled in the Circuit Court, and the Probate Court must dispose of the will in keeping with the verdict of the jury.

8. When allegations of fact have been substantially proved, and a jury has duly rendered a verdict thereupon, a judgment founded on such a verdict will ordinarily be

affirmed.

Appellant, executrix of a will which had been duly admitted to probate, objected to the probation of a later will by the same testator. The Commissioner of Probate overruled the objections and conducted proceedings for probation of the later will. Appellant applied to this Court for a writ of certiorari directed to the Commissioner of Probate. The application was denied by the Justice presiding in Chambers, and the Commissioner resumed jurisdiction. The latter will was admitted to probate upon a verdict of a jury empanelled in the Circuit Court of the Sixth Judicial Circuit, Montserrado County. On appeal to this Court the *judgment* revoking probation of the prior will and admitting the later will to probate was *affirmed.*

MR. CHIEF JUSTICE. RUSSELL delivered the opinion of the Court.

According to the records certified to this Court from the Circuit Court of the Sixth Judicial Circuit, Montserrado County, the following facts and circumstances have been established as the basis of this important cause.

In 1934, the late Thomas J. R. Faulkner of Monrovia, being in his sober and right mind, and being conscious of death, the inevitable, called upon and requested his personal friend and lawyer, Counsellor D. C. Caranda, to prepare his will ; but, for some reason, decedent did not sign this will.

On July 3, 1941, the said decedent Faulkner requested Mr. Caranda to prepare another will. This will having been duly prepared, the decedent signed it, and the said D. C. Caranda and one W. H. Ketter also affixed their signatures thereto in the presence of each other as attesting witnesses.

According to the testimony of D. C. Caranda, this later will, as prepared by him and signed as aforesaid, was made out in duplicate copies; both the original and the duplicate copy were signed ; the testator retained the original ; and the duplicate copy was retained by the said D. C. Caranda. He further testified that two years later, upon his return to Monrovia from Bokomu, his interior home, he was informed that another will purporting to be the last will and testament of his late friend and client, Thomas J. R. Faulkner, had been offered for proving. Thereupon the daughter of the testator, respondent in these proceedings, who had just returned from the United States of America where she had been from infancy, inquired of him whether he had made a will for her late father, Thomas J. R. Faulkner. To this question Mr. Caranda testified that he had given an affirmative answer, and that he had advised the daughter of the

testator that he also had an original copy, but suggested that she should apply to the State Department where a copy could be obtained. Accordingly she applied to the State Department and obtained a copy therefrom; which the said Caranda discovered not to be the will prepared by him upon the request of decedent.

A diligent search for the duplicate original copy commenced thereafter, predicated upon the request of the daughter of the testator, respondent in these proceedings ; and the outcome thereof was the discovery of the duplicate original copy of the said will that had been prepared by the said D. C. Caranda, signed and sealed by the testator in the presence of himself and W. H. Ketter as attesting witnesses thereto. This later will, together with documents in connection therewith were filed in the Monthly and Probate Court, Montserrado County, on January 9, 1951. Thereupon Mary Benson, the appellant herein, interposed objections after the ruling of His Honor, J. Everett Bull, ordering the usual legal preliminary of the breaking of the seal and reading of the said will, and the placarding of notices for thirty days incidental to probate.

From this ruling of the trial court the appellant in these proceedings filed an application for a writ of certiorari in the Chambers of the late Associate Justice Charles B. Reeves. The application was heard and denied, thereby upholding the ruling below. In keeping with a mandate from the justice presiding in Chambers, the Probate Court resumed jurisdiction over the matter and finally disposed of the same; from which disposition the objectant appealed to the Circuit Court of the Sixth Judicial Circuit, Montserrado County.

The salient issues which this Court is now called upon to adjudicate are as follows:

1. Whether the will of later date submitted to the Probate Court constitutes the last will and testament of the late Thomas J. R. Faulkner.

2. Whether the said will bears the genuine signatures of the late Thomas J. R. Faulkner and of the attesting witnesses thereto.

3. Whether issuance of a decree by the Commissioner of Probate ordering the said will probated and registered would be revoking the decree of his predecessor, given eight years and ten months ago.

4. Whether since, in keeping with the instructions contained in the previously issued letter testamentary, the executrix proceeded to administer the said estate and closed

same, it would follow that to reopen the estate by a subsequent decree would also constitute a review and revocation of a prior decree.

5. Whether the petitioner's having permitted eight years and ten months to have expired, in the full knowledge that the late Thomas J. R. Faulkner executed a will after the said estate had been closed, constitutes waiver or laches on petitioner's part.

Consideration will be given the above issues in reverse order; but before doing so it is necessary to note that the primary purpose for the proving of a will is to settle the issue of its execution rather than to settle issues concerning title to property sought to be disposed of thereunder.

The lapse of eight years and ten months before the later will was offered would seem to raise statutory limitation as a bar. Already in this opinion the primary purpose for the proving of a will has been stated ; hence the statute requiring the probation and registration of all instruments relating to realty within four months would not apply to the probation of a will. Recourse will therefore have to be taken to common law principles for a resolution of this issue.

"A probate court has power, upon petition, notice and hearing to vacate or annul a prior decree, probating a will clearly shown to have been without foundation in law or in fact and in derogation of legal right. Thus the probate of a will may be annulled on the ground that the will was not signed by the testator nor by any person for him or at his request, nor subscribed by him in the presence of the required number of credible witnesses. The probate of a will may also be revoked as a step incidental to the granting of probate to a later will revoking it. . . . On a proper application made, it may perhaps be set aside at any time within twenty years after the original probate is granted and the will propounded for re-probate. . . ." 28 R.C.L. 395-96 *Wills* § 404.

Coming to the issue respecting the estate having been closed and the legacies disposed of, we find the following:

"The functions of a probate court when a will is propounded for probate are limited to inquiring and determining whether or not the instrument presented to it as the last will of the decedent was executed by him in the manner prescribed by statute, and when he was legally competent to execute it, and free from duress, menace, fraud and undue influence. Questions as to the property rights of devisees, legatees, heirs and others which might arise out of a construction of the terms of a will are not to be determined in a proceeding for the probate of a will, and therefore the mere

probating of a will is not final and conclusive as to the construction of the instrument. The validity of particular testamentary gifts contained in the will are not involved in the proceedings. . . ." 28 R.C.L. 377-78 *Wills* § 379.

From the context of the foregoing the points of law relied upon by the petitioner in these proceedings are obviously unmeritorious, and therefore the trial court did not err in overruling same.

With respect to the authority of the Probate Court to decree the probation and registration of a later will, this issue is settled not only by the principle of law recited above, but also by our statute providing that the Probate Court shall have jurisdiction:

"To probate any will of real personal estate or any paper writing (72) which shall possess the general features of a will, which shall appear on its face to be intended for a will." Rev. Stat., sec. 1268.

Before referring to the will in question herein for decision on the petitioner's contention that the Probate Court should have refused probation and registration of the said will, we quote the following:

"The great weight of authority is that the execution of a subsequent will containing an express clause revoking the former will operated as a revocation at once, and that the former will thus revoked cannot be subsequently revived except by republication and is not revived by a destruction of the later will." *Cheever v. North,* 106 Mich. 390, 64 N.W. 455, 37 L.R.A. 561 (1895).

According to the records certified to this Court, Thomas J. R. Faulkner executed a will on May 30, 1941, in the presence of J. Abayomi Cole, Theophilus Cole and Regina -Williams; in which said will the present petitioner was named sole executrix. The evidence in this cause further indicates that, although this said will was duly probated and registered, it was never signed by the testator, nor did the attesting witnesses thereto sign in the presence of each other as is required by law. Let us nevertheless advance a step further.

The records certified to this Court, also show that, on July 3, 1941, the said testator, Thomas J. R. Faulkner executed another will, and that it was witnessed by D. C. Caranda and W. H. Ketter as attesting witnesses thereto.

It is against the proving of this later will that the petitioner filed objections presenting

the salient issues stated and passed upon, *supra.*

A portion of the text of this later will reads as follows:

"Being of sound mind, capable of making my will, and mindful of the uncertainty of life and the certainty of death, do make this my last will and testament, revoking all others made heretofore."

We come now to consider jointly the other two issues raised in the written pleadings. These issues are factual in nature and may be stated in the form of the following question :

Whether the latter will offered for proving by the Probate Court, constitutes the last will and testament of the late Thomas J. R. Faulkner ; as also, whether or not the slid last will and testament bears the genuine signature of the said testator and the attesting witnesses, D. C. Caranda and W. H. Ketter.

To determine these issues of fact a jury consisting of twelve persons was duly empanelled. The attesting witnesses, D. C. Caranda and W. H. Ketter, took the stand and deposed that the signature of Thomas J. R. Faulkner appearing on the will dated July 3, 1941, bears his genuine signature, and that they had affixed their signatures thereto as attesting witnesses in his presence and in the presence of each other. Witness D. C. Caranda further testified to the effect that, for some reason, the will of May 3, 1941, was not signed by the late Thomas J. R. Faulkner.

These facts and circumstances were submitted to the jury who handed down in open court a verdict stating that the will dated July 3, 1941, bears the genuine signature of the late Thomas J. R. Faulkner. Predicated upon this verdict of the jury, the court proceeded to render its final judgment; from which judgment the objectant excepted and appealed to this Court.

In *Morris v. Roberts,* 2 L.L.R. 469 (1924) this Court has held firmly to the following:

"When the allegations of a plaintiff arc substantially proved, and a verdict entered in his favor, the judgment rendered on such a verdict will ordinarily be affirmed."

It is also necessary to remember that :

"One distinguishing feature of a will is that it is not to take effect except upon the

death of the testator, and has no binding effect during the life of the testator. Until the death of the maker, it is ambulatory and revocable. It is of the essence of a will that it should be revocable. An irrevocable will would be an anomaly." 28 R.C.L. 60 *Wills* § 4.

This Court has further held that proof is the perfection of evidence; for without evidence there is no proof.

In view of the corroborating testimonies of the witnesses of record, this Court is of the considered opinion that the judgment of the lower court should be affirmed with costs against appellant. And it is hereby so ordered.

Affirmed.