men. It is submitted that the *Altemeier* decision in refusing to allow the settlement agreement represents the better view.

The doctrine of virtual representation is very useful in preventing useless and expensive delay in the adjudication of rights of parties when they are affected by the interests of persons unborn or unascertained. But such a doctrine is fraught with danger when it is not carefully exercised. If laxity or naivete permit the doctrine to be applied in situations such as the *Altemeier case*, the result can be nothing more than the defeat of the testator's intent, and a depletion of the contingent remainderman's interests under the trust. Unless it can be demonstrated that a serious threat to those interests exists, a family settlement agreement in which they are bound by the doctrine of virtual representation should not be allowed. There should be no deviation from the expressed intent of the testator, unless that deviation can be justified as the only measure which will prevent a substantial defeat of his scheme of distribution.

HILMER C. LANDHOLT.

WILLS— *Revocation of Duplicate Wills.* (Illinois)

In 1941, deceased duly executed two copies of her will—the typewritten original and a carbon copy. Deceased retained the executed carbon. The "original" was delivered to a friend for safekeeping. On her death in 1946, the friend to whom she had entrusted the typewritten original filed the instrument for probate. A few days later, the carbon impression was found in a pocketbook in decedent's home with the word "Void" written across both pages followed by the signature of the decedent. The fact that this word was written by decedent was not in dispute. The probate and circuit courts denied probate to the original impression. On appeal, *held*: Order affirmed. The words "Void" and the name of testatrix across both pages of the duly executed carbon impression were effective to revoke both copies of the will. *In re Holmberg's Estate. Wiersema et al. v. People,* 400 Ill. 366, 81 N.E.2d 188 (1948).

The question of the revocation of one of duplicate wills has not before been considered by the Illinois court, although there are numerous decisions upon the point in other jurisdictions.

The pertinent Illinois statute reads: "A will may be revoked only (a) by burning, cancelling, tearing or obliterating it by the testator himself or by some person in his presence and by his direction and consent . . ." [1] When a will is traced into the possession of the testator and last seen there, and is not forthcoming at his death, there is a prima facie presumption that the testator destroyed the will with the intention of

[1] ILL. REV. STAT., c. 3, § 197 (1947).

revoking it.[2] In the principal case, the presumption does not have to be invoked because, as the court pointed out, there was "actual and definite evidence of the testator's intent." [3] It is universally held that the revocation of one of duplicate or triplicate wills operates as a revocation of the other or others.[4] This rule applies whether the revoked instrument is one of duplicate typewritten "originals" or whether it is only a carbon impression. If the latter is duly executed, it stands on the same plane as the "original." [5] In the instant case, the court experienced little difficulty in concluding that the acts of revocation upon the carbon impression operated to revoke the entire will.

The *Holmberg* case is a clear illustration of the dubious precaution of executing duplicate wills. Apparently, those who take such a "precaution" do so in order to insure against the loss or destruction of one of the instruments.[6] The cases on the subject indicate the doubtful practicality of this procedure, because if the duplicate retained by the testator is not produced, or its absence is not satisfactorily accounted for, the other copy will not be admitted to probate.[7] The same burden is placed on the proponent of the single duplicate as is placed upon the proponent of a lost will. In both cases, the proponent must show that the testator did not revoke the will [8]—that is, there must be sufficient evidence to rebut the presumption that the testator revoked. Therefore, as to the matter of the rebuttal of this presumption, no advantage is gained from the duly executed copy.

In the probate of a lost will it is necessary to prove the will was

[2] Koester v. Jennings, 334 Ill. 107, 165 N.E. 650 (1929); Griffith v. Higginbotom, 262 Ill. 126, 104 N.E. 233 (1914); St. Mary's Home v. Dodge, 257 Ill. 518, 101 N.E. 46 (1913); Stetson v. Stetson, 200 Ill. 601, 66 N.E. 262 (1903); Boyle v. Boyle, 158 Ill. 228, 42 N.E. 140 (1895).

[3] 400 Ill. 366, 371, 81 N.E.2d 188, 191 (1948).

[4] In re Lawrence's Will, 138 N.J.Eq. 134, 47 A.2d 322 (1946); In re Wall's Will, 223 N.C. 591, 27 S.E.2d 728 (1943); Crossman v. Crossman, 95 N.Y. 145 (1884); In re Estate of Bates, 286 Pa. 583, 134 A. 513 (1926), 48 A.L.R. 294; In re Flynn's Estate, 174 Misc. 565, 21 N.Y.S.2d 496 (1940).

[5] In re Robinson's Will, 257 App. Div. 405, 13 N.Y.S. 324 (1939); In re Estate of Bates, *supra* note 4.

[6] See Scoggins v. Turner, 98 N.C. 135, 3 S.E. 719 (1887).

[7] In re Branagan's Will, 180 Misc. 209, 40 N.Y.S.2d 932 (1943); In re Pattison's Will, 78 Misc. 699, 140 N.Y.S. 478 (1912); *In re* Wall's Will, *supra* note 4; 68 C.J. § 613a states: "Probate of a copy or duplicate of a will, as a general rule is neither necessary nor permissible unless the other is produced or its absence is satisfactorily explained." It cites *In re Field's Will*, 109 Misc. 409, 178 N.Y.S. 778 (1919) and *In re Schofield's Will*, 72 Misc. 281, 129 N.Y.S. 190 (1911). The cases, however, are not authority for the situation where the copy left with a depository is not found, and the duplicate which was in the testator's possession is offered for probate. It would seem that the only "accounting for" necessary for the absent duplicate in that case would be to show that it never came into the hands of the testator, so that the presumption of revocation would not arise. See *In re Pattison's Will*, *supra* above.

[8] St. Mary's Home v. Dodge, *supra* note 2; Leemon v. Leighton, 314 Ill. 407, 145 N.E. 631 (1924); Koester v. Jennings, *supra* note 2.

duly executed by a competent testator.[9] It seems that herein an executed copy of the will would be advantageous because a presumption of due execution arises. This single advantage is not sufficient, however, to counteract the accompanying disadvantages of duplicate wills.

To probate a lost will, it is also necessary to determine the contents of the instrument. Where there are no copies of the contents, this, admittedly, is a very difficult procedure. A duplicate of the will would provide this information, but an *unexecuted* carbon would provide as clear and satisfactory evidence as would the executed copy.[10]

An executed duplicate of the will, outside of giving a presumption of due execution, has no more efficacy than an unexecuted copy which contains the same information in regard to attestation and contents. The other advantages gained by the execution of duplicates are equalled by the preparation of an unexecuted copy. On the other hand, there are certain disadvantages accompanying duplicate wills. "One who makes a will in duplicate subjects it to a double hazard of loss or accidental destruction, which cannot be accounted for; and this may defeat the testator's intention by mere accident, or by the carelessness of a custodian of one of the duplicates or even by the deliberate fraud of one having an interest in defeating the will." [11]

If a testator has executed only one will, and it cannot be found at his death, unless the proponents have clear evidence that the will was not revoked, probably no attempt will be made to probate it. However, if one has a duly executed duplicate of the will, there will be a strong inclination to attempt the probate of it, although the evidence of non-revocation may not be clear. In the event of a missing duplicate, litigation apparently follows as a matter of course. The *Holmberg* case is an excellent example. If the will in decedent's possession had been the sole will, there probably would have been no attempt at probate.

Duplicate wills with the purpose of doubling the chances of dying testate fail in their purpose, and, in effect, double one's chances of dying intestate. An unexecuted copy of the will provides a better means of guaranty, without the attendant disadvantages.

VINCENT T. WASILEWSKI.

[9] Bley v. Luebeck, 377 Ill. 50, 35 N.E.2d 334 (1941).

[10] In re Zell's Estate, 329 Pa. 312, 198 A. 76 (1938); In re Estate of Bates, *supra* note 4.

[11] In re Robinson's Will, 257 App. Div. 405, at 408, 13 N.Y.S. 324, at 326 (1939).