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THE NOTION OF CODICIL. ORIGINS AND CONTEMPORARY SOLUTIONS

1. Codicil in Roman Law

Legal systems of countries in Continental Europe are based, to a significant measure, on solutions taken from Roman law. It is especially noticeable in the sphere of private law. The force of effect of Roman law did not reside only in the power of ancient Rome and the power of enforcement of its laws but in the rationality of legal construction which managed to satisfy, to a large degree, the needs of Europe at that time. Many of them are still valid. One of the institutions drawn from Roman law is that of the 'codicil'. The concept of a codicil has undergone many changes in the space of hundreds of years, adjusting to the legal orders in which it has functioned.

A codicil is related to the notion of a will. The ancient Romans started to differentiate very early between inheritance based on the will of a testator from not testamentary, statutory succession. It is worth underlining that archaic Roman law preferred succession based on the will of a testator.[1] In Roman law a will was a unilateral, formal, revocable and personally made declaration of will in the event of death which comprised the appointment of an heir. According to the principle *heredis institutio caput testamenti*, the appointment of an heir was a necessary prerequisite for the validity of a will. Inadmissibility of conjunction of testamentary succession (with a few exceptions) and statutory succession should be included among the characteristic traits of Roman law. A will should have contained clear indication of an heir or heirs of the entire property of a testator. There was no legal possibility of constituting an heir in relation to a defined object. Only in the west Roman vulgar law was the inheritance of a specific object

[1] After W. Wołodkiewicz, *Europa i prawo rzymskie: szkice z historii europejskiej kultury prawnej*, Warsaw 2009, p. 568.

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– *heredis ex re certa*[2] permitted. Later, with regard to the principle of *favor testamenti*, a testator's will was maintained so that an heir to a specified object or objects was treated as a universal heir.[3] In the case of multiple heirs to particular objects, succession in parts was adopted, correspondingly to the value of the objects received.

A codicil (*codicili*) appeared with the beginning of the Roman Empire under Augustus. It was a very comfortable and useful institution in legal practice, established by virtue of a custom rather than a legislative act. Originally, a codicil was a written demand (*codicillus*) submitted by a testator to his heir or a person vested in the will to execute specific testamentary dispositions.[4] A codicil was treated exclusively as an informal disposition, not including *heredis institutio*. Only the after-classical Roman law allowed the possibility to disinherit and constitute heirs also within codicil.[5]

The essence of a codicil is described by Gaius who stated that what is specific of the law of a codicil is the fact that everything which was written in it is treated as if it was written in a will (*codicillorum ius singulare est, ut, quaecumque in his scribentur, perinde haberentur, ac si in testamento scprita essent* – D. 29, 7, 2, 2).

The institution of a codicil in Roman law undermined the basis of formalised Roman will favouring an informal disposal of the last will of an administer. The later possibility of coexistence of two wills originated from a codicil. A codicil copied a will in some points, its essence and nature, however, were different from the will.[6] A codicil required a written form (even though later nuncapative oral form sufficed). Justinian required the presence of five witnesses for a codicil. The aim of a codicil was not the disposal of entire property; which constituted the essence of this legal action as opposed to a will.

It is impossible to appoint an heir through a codicil.[7] A codicil might have been left by an intestate person, the so-called *codicilli ab intestato*, which aimed at complementing intestacy. It could have also complemented testamentary succession, in the case of the so-called *codicilli testamentarii*.[8]

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[2] W. Litewski, *Podstawowe wartości prawa rzymskiego*, Cracow 2001, p. 134.

[3] R. Taubenschlag, *Rzymskie prawo prywatne na tle praw antycznych*, Warsaw 1955, p. 285.

[4] R. Taubenschlag, *op. cit.*, p. 291.

[5] W. Litewski, *op. cit.*, p. 135.

[6] W. Bojarski, *Prawo rzymskie*, Toruń 1999, p. 257.

[7] L. Piętak, *Prawo spadkowe rzymskie*, Lwów 1882, p. 140.

[8] R. Taubenschlag, *op. cit.*, p. 291.

In principle a will could not be subject to conversion; however, putting a codicillary clause resulted that an invalid will – according to a testator's will – should have been treated as a codicil. This clause resulted in the fact that appointing heirs in a codicil was treated as universal fidei-commissum[9] (*fideicommissum hereditatis*) that is, an informal legacy on the basis of which a testator instructed an heir (a trustee, namely an intestate as a rule) to bequeath the entire estate to an indicated third person (that is a fidei-commissum) as if the entire inheritance was a fidei-comissum. Such a situation was disadvantageous for an intestate heir since in reality it caused consequences of appointment of a testamentary beneficiary.

Maintaining the validity of a will as a codicil depended from fulfilment of criteria indispensable for the validity of a codicil. Later, formalism required for a codicil was withdrawn and special importance was attached to clear manifestation of the intention of a testator.

Since the times of Constantine (326 B.C.) the so-called *divisio parentum inter liberos*, namely decisions of a testator determining the division of an inheritance between heirs was also subject to codicil forms. It was not about appointing somebody an heir or assigning a part of inheritance to heirs but only about determining a method of distribution of pieces of property to testamentary heirs or *ab intestato* during partition of inheritance. Since Justinian, such dispositions could be included in a will or a codicil.[10] The difference between a will and a codicil blurred gradually but finally, in Justinian legislation, codicil was maintained as a distinct institution.[11]

2. Codicil in Medieval Europe

In Medieval Europe the inheritance on the basis of a will was initially unacceptable since it had been thought for a long time that inheritance of e.g. a family property should in an unchanged state become the property of the closest relatives of the deceased, who had the right to expect due inheritance. Therefore, inheritance served, above all, to increase patrimony. The function of concentrating the property goods of patrimony was of fundamental importance. It is worth pointing out here that medieval law, in

[9] It was conferred a meaning which converted legal action, *ibidem*, p. 292.

[10] L. Piętak, *op. cit.*, p. 241.

[11] K. Kolańczyk, *Prawo rzymskie*, Warsaw 2000, p. 475.

principle, did not consider legal action related to the disposal of property, the results of which would occur in the event of the death of a testator. It was explained that, as a consequence of the death of the testator, his or her will expired and could not *eo ipso* have legal consequence.[12]

The development of the individualisation of property and the influence of the Church which struggled for liberty to bequeath at least part of a property, counting on its own property benefits, resulted that at the turn of the 20th century (in Poland and in Russia even earlier) wills and testamentary succession started to appear.[13]

A medieval will, at first, could only include the disposals of movables and of goods acquired from immovables.[14] The Roman understanding of a will as an action of which an indispensable element was the appointment of an heir survived in the south of France from where in the 15th century it was introduced to German legislation. In central and southern France (the so-called common-law countries) it was not allowed to appoint an heir in a will, but only to dispose of a specific part of an inheritance, the rest belonging to testamentary heirs.[15] This Roman construction of a will was formally introduced in the German Empire by notarial act (1512); however, in the first half of the 16th century it did not have a widespread application. Other European countries still used a construction of a will understood as any disposal of the last will.[16] Gradually a will could, but did not have to, appoint a general heir and what is more, could be limited to the disposition of specified objects or a part of the property.

Testamentary inheritance in Poland was not of such importance as in the western Europe, which was related to domination of family interests.[17] Roman law did not function within Polish legal order in a direct way but solely influenced formulation of laws and forming of legal practice through institutions.

Testamentary inheritance appeared in the 12th century along with the stronger influence of Roman law and, indirectly, of canon law. A medieval Polish will did not have to include the appointment of an heir and to a con-

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[12] See more: J. Hube, *Wywód praw spadkowych słowiańskich*, Warsaw 1832, p. 17.

[13] After S. Płaza, *Historia prawa w Polsce na tle porównawczym Part 1 – X–XVIII century*, Cracow 1997, p. 302.

[14] R. Dembska, *O testamencie w polskim prawie średniowiecznym*, [in:] (ed.) H. Olszewski, *Studia z historii i ustroju prawa*, Poznań 2002, p. 59.

[15] S. Płaza, *op. cit.*, p. 304.

[16] *Ibidem.*

[17] O. Balzer, *O zadrudze słowiańskiej, Uwagi i polemika*, Lwów 1899, p. 7.

siderable degree resembled a codicil in its form; it could especially contain the so-called legacies for different purposes such as the salvation of one's soul, merciful deeds, or the Church.[18] Thus the Church influenced the content and functions of dispositions in the event of death. Moreover, the object of a legacy could be movable articles, sums of money and rights. Polish law thus, as opposed to Roman law, did not recognise the difference between an inheritance and a legacy, nor between a will and a codicil.

The influence of the legislation of neighbouring countries did not instil the institution of a codicil in Poland even though this law, at first partly taken over, was imposed on Poland at the end of the 18th century. This concept was not known by the Civil Code in force in the lands of the Kingdom of Poland, since it defined solely the possibility of disposing the property in the event of death in the form of a will.[19] Appointment to inheritance could concern the entirety, part or some objects of a testator's property. The Napoleonic Code did not differentiate between a will and an heir from the legacy and the legatee, since all dispositions in the event of death were called legacies. A particular form of legacy was a general legacy described in Article 1003 of the Code which corresponded to the notion of a will. Under the Prussian partition, the Domestic Law Landrecht from 1721 did not envisage the notion of a codicil. Moreover, the law was unrestricted in indicating the method of selection of an heir, for he or she could be indicated clearly or implied.[20]

A will, apart from appointing an heir, could only contain legacies, that is claims on an heir. On the other hand, in accordance with the German Civil Code (BGB) in force from January 1st 1900, a will was any unilateral last will disposition of the testator, no matter if it contained an appointment of the heir or not. The code did not introduce the distinction between a codicil and a will.[21] In the eastern districts a will was a rarely applied institution considering the low community awareness of peasants in this area. Farms with plot division were transferred during the parents' lifetime on a large scale.[22] According to the Collection of Laws it was possible to dispose of acquired goods since patrimony goods should have been vested

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[18] R. Dembska, *op. cit.*, p. 65.

[19] D. Makiłła, Z. Jaworski, *Historia prawa na ziemiach polskich: zarys wykładu 2, Polska pod zaborami*, "II Rzeczpospolita", p. 44.

[20] *Ibidem*, p. 45.

[21] (Ed.) F. Zoll, J. Wasilkowski, *Encyklopedia Podręczna Prawa Prywatnego*, Warsaw, p. 2156.

[22] D. Makiłła, Z. Jaworski, *op. cit.*, p. 71.

in the so-called necessary heir.[23] In relation to the poor development of the law of succession, it is not surprising that in these regions the institution of a codicil was not adopted.

3. Codicil in selected legal systems

Austrian legislation as one of the few introduced the institution of a codicil in its legal system. This institution, according to practice developed in ancient Rome, determines the division of last will dispositions into wills and codicils. According to the Art. 553 of the Austrian Civil Code (hereafter: ABGB[24]) only a disposition of the last will of a testator, by force of which the heir was appointed, might be called a will.[25] Whereas dispositions comprising other dispositions not consisting in appointing an heir are called a codicil.[26] Confirmation of the above distinction results also from the concept of declaration of the last will elaborated in Austrian law which according to the Art. 552 of ABGB[27] is a disposition in which the testator irrevocably transfers his or her property or a part of it to one or more people in the event of death. Expressing the last will is not tantamount to making a will. What is more, making a codicil in Austrian law requires keeping all formalities indispensable for making a will, thus from formal point of view the difference between the two acts is inexistent. However, when a codicil and not a will is left, heirs are those indicated by the law.[28] Therefore, appointing an heir is in Austrian law a necessary element of the will (there is not a will without an appointment of an heir).

In relation to the above-mentioned, a codicil in Austria does not constitute an alternative for a will since it does not comprise the appointment

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[23] S. Płaza, *Historia prawa w Polsce na tle porównawczym Part 2, Polska pod zaborami*, Cracow 1998.

[24] Stand BGBl. No 118/2002, source: http://www.ibiblio.org/ais/abgb1.htm z dnia 14 kwietnia 2011 r. along with translation, source: http://upload.wikimedia.org/wikipedia/commons/9/9d/ABGB_%C2%A7%C2%A7_551–603.pdf from April 14th 2011, original regulations of ABGB quoted below originate from the source indicated in this footnote.

[25] *Wird in einer letzten Anordnung ein Erbe eingesetzt, so heißt sie Testament; enthält sie aber nur andere Verfügungen, so heißt sie Kodizill.*

[26] After: J. St. Piątowski, *System Prawa Cywilnego*, vol. IV, Wrocław – Warszawa – Kraków – Gdańsk – Łódź 1986, p. 178.

[27] *Die Anordnung, wodurch ein Erblasser sein Vermögen, oder einen Theil desselben Einer oder mehreren Personen widerruflich auf den Todesfall überläßt, heißt eine Erklärung des letzten Willens.*

[28] After: K. Osajda, *Ustanowienie spadkobiercy w testamencie w systemach prawnych common law i civil law*, Warsaw 2009, p. 52.

of an heir, and it is not its part, it only complements or modifies a will to a certain degree. Differences between a codicil and a will are also visible in the context of the Art. 713 ABGB[29], according to which a valid subsequent will revokes an earlier will not only in terms of appointing an heir but also in terms of the rest of dispositions, as far as the testator in the last of the wills did not give to understand that the earlier will had to be maintained in whole or in part. This regulation is also important if in a subsequent will an heir was appointed only to a part of inheritance. The remaining part is not vested in heirs appointed in the earlier will or in statutory heirs. However, the Art. 714 ABGB[30] institutes that a subsequent codicil revokes all the earlier legacies and codicils only if they are contradictory. According to this principle several codicils should be interpreted together. A newly added codicil does not have any influence on the validity of a will made earlier. A will and a codicil are two institutions treated separately. A will is something more than a codicil, thus making a new will cancels all previous dispositions, both testamentary and codicillary. On the other hand, a new codicil might only modify a will, it cannot cancel it. Its power and importance are thus limited.

The remaining European systems in principle do not know the distinction between a will and a codicil. Today, apart from Austria, codicils survived solely in Catalonia and Navarra. It is not possible solely to appoint an heir within them thus similarly to Austrian law they are not a method of appointing an heir. Codicils cannot be at variance with wills and changes in specific testamentary provisions are only possible in form of a will.

The difference between codicils and wills is visible in *common law* system. The name 'will' is polisemantic depending on what meaning is conferred to it by a given legal system. The Anglo-Saxon system uses the name 'a will' to define a testament. This notion is formulated as broader from the notion of 'testament' in *civil law* systems. The fundamental difference lies in the fact that in *civil law* countries a will is one document drawn up in accordance with requirements of one of the acceptable forms of will (hence one

[29] *Ein früheres Testament wird durch ein späteres gültiges Testament nicht nur in Rücksicht der Erbseinsetzung, sondern auch in Rücksicht der übrigen Anordnungen aufgehoben; dafern der Erblasser in dem letztern nicht deutlich zu erkennen gibt, daß das frühere ganz oder zum Teil bestehen solle. Diese Vorschrift gilt auch dann, wenn in dem spätern Testamente der Erbe nur zu einem Teile der Erbschaft berufen wird. Der übrig bleibende Teil fällt nicht den in dem frühern Testamente eingesetzten, sondern den gesetzlichen Erben zu.*

[30] *Durch ein späteres Kodizill, deren mehrere nebeneinander bestehen können, werden frühere Vermächtnisse oder Kodizille nur insofern aufgehoben, als sie mit demselben im Widerspruche stehen.*

person might leave several valid wills). Whereas in Anglo-Saxon culture *will* concerns all documents revealing the last will of the deceased that is all of them are treated as one will.[31] It is clearly presented for example in a definition of a will from the Art. 1 Succession Law Reform Act[32] (SLRAO) in force in Ontario according to which a will includes: (a) a testament, (b) a codicil, (c) an appointment by will or by writing in the nature of a will in exercise of a power, and (d) any other testamentary disposition.

In the Anglo-Saxon system a necessary element of the content of a testament is the appointment of an heir and the minimum content of a testament is at least a minor disposal of property that is an appointment of an heir or an executor of a testament. In the *common law* system everyone who obtains anything on the basis of a will is treated as an heir and is denominated as *beneficiary*.

A codicil is an institution applied in case of testamentary inheritance to explain, make amendments or add new provisions to a will and therefore should be considered as part of a testament. Thus, it does not exclude appointing an heir also in a codicil. Codicil constitutes a part of the proper will, it should be drafted in compliance with requirements for a will. All elements of testator's last will constituting a testament in the full sense of the word – accepted in Anglo-Saxon system – that is main document of a testament and all drawn up codicils and other dispositions should be interpreted and analysed at the same time during inheritance proceedings.[33]

On the one hand, a codicil is a separate document to a will – a will as a document, on the other hand, it constitutes its non-obligatory element – a will as a declaration of the last will. The concept of a codicil was elaborated by the Anglo-Saxon system especially because one person can leave exclusively one testament which includes the entirety of wishes of that person *mortis causa*. The construction of a codicil allowing to uphold both new dispositions *mortis causa* as well as previous dispositions resulting directly from the will was an optimum solution to avoid disagreements if a given disposition constituted a will and made it possible to fully interpret the testator's will. According to a definition of last will accepted in Anglo-Saxon law a codicil is a part of a testament, its element, supplement.

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[31] After: K. Osajda, *op. cit.*, p. 37.

[32] *Will includes (a) a testament, (b) a codicil, (c) an appointment by will or by writing in the nature of awill in exercise of apower, and (d) any other testamentary disposition*, quoted after: K. Osajda, *op. cit.*, p. 37.

[33] Decision *Re Wilcock* of 4.12.1897, Ch. 1898, p. 95.

Apparently, the notion of codicil in Anglo-Saxon system is not equivalent to the notion elaborated in Austria where every act of last will which does not contain the appointment of an heir is a codicil.

The meaning of codicil accepted in *common law* system is more broad and more liberal than Austrian since it considers a codicil every amendment made to a testament (regardless of its content) thus also a modification concerning a previously appointed heir.[34] In this sense a codicil is a new will which does not however, revoke the previous one, solely modifies it. A codicil should start with reference to a definite will which it modifies, however, if the will is not found it does not question the validity of provisions of codicil.[35]

A stand similar to the one in force in Austria was adopted by legislation of the United States (except for Louisiana where application of a codicil is inadmissible). In case when a testator wants to modify specified testamentary legacies by adding new heirs or to remove previous heirs because of e.g. their death, all of these should be made in a will, not in a codicil.[36] Similarly to Austrian legislation successive codicil does not revoke the previous ones except for its specific decisions unless a will to revoke previous dispositions in the event of death results from it. If a document does not revoke the previous will or if it does not involve full power of disposal of testator's property it is presumably treated as a codicil. Today, in principle, conditions which a codicil has to fulfil correspond to conditions provided for wills. A codicil may be added to a will directly below its content. In certain states it is required that it is drawn up in print writing not handwriting. A codicil may also be attached to a will on a separate sheet of paper, however, it always has to indicate the will to which it is related.[37]

In all of the *common law* systems codicil in principle has to satisfy all requirements of a will from the formal point of view. Drawing up a valid codicil does not cause validation of an invalid will and decisions included in it may be affirmed no matter if a will to which it refers was declared invalid.

When a codicil is drawn up, it comes to inheritance on the grounds of one will modified by a codicil. It seems that in case of unification of law of succession such a concept would correspond to all legal systems considering

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[34] K. Osajda, *op. cit.*, p. 18.

[35] Decision *Gardiner v. Courthope* from 25.10.1886, L.R.P. & D. 1887, no 12, p. 14.

[36] Codicil to Last Will and Testament, Global Wills 2007, p. 3–5, source: http://books.google.pl/books?id=0n43KdCn8GkC&pg=PT2&dq=codicil&hl=pl&ei=Z5umTco9jew5tZzlwAk&sa=X&oi=book_result&ct=result&resnum=2&ved=0CCwQ6AEwAQ#v=onepage&q&f=false z dnia 14 kwietnia 2011 r.

[37] See more: D. Clifford, *Quick & Legal Will Book*, 5th edition, USA 2008, p. 97.

that some of them do not provide for inheritance on the grounds of several wills together. A codicil would be then treated – following the Anglo-Saxon concept – as an element (a part, a surrogate) of a will and thus appointing an heir within a codicil should be treated as appointing an heir in a will.

Two factors are suggestive of maintaining the institution of codicil in different legal systems. Firstly, it was adopted in Austrian and *common law* systems because of the impossibility to leave more than one will by one testator. In this aspect a codicil modifies the last will of a testator keeping at the same time original dispositions *mortis causa*. Secondly, treating a codicil as a correction to a will argues for maintaining this institution in force. Thus its function is to make the formalised principles of dispositions in the event of death more flexible. Thus, it should be considered separately from a will but as part of testator's last will – its modification concerning a specified field.

4. Conclusion

A codicil in Roman law was an extremely important element of the law of succession, serving to complement or modify a will. Its popularity originated from restrictions related to the form of a will. Such strict formal requirements resulted in recognising many wills as invalid. The restrictions were eased by codicillary clause construction. Liberalisation of requirements concerning the form of a will along with the possibility to inherit on the grounds of any number of valid documents caused an almost complete disappearance of the institution of a codicil. However, in certain legal systems it is still permitted to leave only one will; whether it be in relation to rigorous regulations as in Austria or with regard to the global understanding of a testament as a last will in Anglo-Saxon systems.

The existence of a codicil in contemporary circumstances is conditioned by various factors. Firstly, it results from different definitions of the notion of a codicil. On the one hand, language shapes our perception of the world; on the other, social reality influences the language and the significance conferred to its content. Every language contains some specific presentation of the world and its structures as well as its proper ontology.[38] People using different languages perceive the reality in different ways and define their experiences differently. This definition corresponds to the notion of lin-

[38] W. von Kutschera, *Sprachphilosophie*, Munich 1975, p. 289.

guistic relativism according to which lexis and syntax have an unquestionable influence on the image of the world.[39] Legal language is also subject to linguistic relativism.

From the perspective of the history of the transformation of codicils presented here, it transpires that Anglo-Saxon systems conferred a different significance on it than in continental systems. Certainly adopting a *favor testamenti* principle was highly important for the final form of the notion of a codicil. In my opinion it was the definition of a testament in *common law* systems which had a decisive influence on the significance conferred to a codicil. A broad understanding of the notion of a codicil, along with a recommendation to interpret the last will of a testator in connection with all his testamentary dispositions did not allow the codicil to be maintained in such a strict form as in ancient Rome.

Initially the introduction of a codicil abolished numerous rigorous rules and contributed to softening the law of succession. Changes occurring subsequently manifested in particular an abandoning of excessive formalism. It was a consequence of the influence of Roman law and also the Church on making dispositions in the event of death. The importance of the institution of the law of succession remained unchanged for a long time and became consolidated with the beginning of the Renaissance. In the majority of normative systems the institution of a codicil did not stand the test of time and the notion became blurred definitively in social consciousness. A codicil proved to be a needles legal instrument and was quickly absorbed by more flexible rules in the law of succession. The codicil survived only in Austrian legislation in a slightly archaic form. It is hard to give a simple justification for this phenomenon. It seems that we should look for it in relations between the language and especially between legal language and the needs in the practice of law, with a vision of the world being its point of reference. In my opinion a certain strictness and rigidity in Austrian law, its model of obedience and subordination decides the preservation of the institution of the codicil. In practice there are voices promulgating a view of giving up the notion of a codicil in the Austrian system, especially from the perspective of unification of the regulations of European Civil Law.

Summing up, it should be stated that significance conferred by a given legal system to other institutions undoubtedly had a considerable influence on the notion of a codicil immanently related to a codicil, namely a will. From this point of view the importance of a codicil depended on a discourse

[39] See more: T. Gizbert-Studnicki, *Język prawny a obraz świata*, [in:] ed. G. Skąpska, *Prawo w zmieniającym się społeczeństwie*, Cracow 1992, p. 150.

comprising the significance of a will. The relations between a codicil and a will functioning on the basis of feedback could lead to giving a codicil the significance of an element or amendment to a will, or could lead to complete elimination of a codicil in the practice of the law of succession.

S U M M A R Y

The notion of a codicil is immanently related to the notion of testament and is origins date back to ancient Rome. At that time deformalisation of inflexible principles of testamentary succession was the determinant of formation of a codicil. The definition and significance of a codicil has changed over the centuries adapting to legal orders within which it has functioned. Today the institution of a codicil has survived only in common law system countries and in Austria. As far as the principle is concerned, a codicil became a redundant legal instrument and was quickly absorbed by flexible regulations of the law of succession. Nowadays, depending on the conception of the last will statement, a testament and a codicil are treated separately (Austria) or globally, as forms of liability for expression of such a will by a testator (common law system). It appears that the significance of a codicil depends to a large extent from conducting a discourse including the meaning of a testament. Relations between a codicil and a testament functioning on the basis of feedback have lead to giving to a codicil a meaning of an element or an amendment, a modification of a testament or have caused elimination of a codicil in the law of succession practice.