DEPARTMENT OF WILLS, EXECUTORS AND ADMINISTRATORS.

EDITOR-IN-CHIEF,
HON. WILLIAM N. ASHMAN,
Assisted by
HOWARD W. PAGE, CHARLES WILFRED CONARD,
JOSEPH HOWARD RHOADS, WILLIAM HENRY LLOYD, Jr.,
EDWARD BROOKS, Jr.

HATTERSLY ET AL. *v.* BISSETT ET AL.[1] NEW JERSEY COURT OF ERRORS AND APPEALS.

The testator by his will devised a portion of his real estate to his son, and other portions to his daughter. After the execution of his will he conveyed to his daughter part of the real estate he had devised to his son. On bill filed by the son to compel the daughter to elect whether she would take under the deed or under the will; *Held* (1), That the conveyance by the testator, after the execution of his will, of the lands devised to the son, operated as a revocation of the devise to the son. (2) That the daughter was not under an obligation to make an election between the conveyance to her by deed, and the benefits to be derived under the will.

SUBSEQUENT DEALINGS, BY THE TESTATOR, WITH DEVISED PROPERTY.

While this case presents no very difficult or novel question, it contrasts clearly the two doctrines, of equitable election and what is known as the "revocation" of a devise, by the subsequent alienation of the property devised; and illustrates happily the nature of each of these doctrines.

The object of this annotation will be to examine into the present state of the law in America, as regards the effect produced upon devises by subsequent dealings, on the part of the testator, with the devised property.

[1] Reported in 29 Atl. Rep. 187.

The precise point of the principal case was decided, in South Carolina, as long ago as 1847, in the case of *Thompson* v. *Thompson*, 2 Strob. 48. There, the testator, long after the date of his will, conveyed land therein devised to A, to B, who was also a devisee under the will; and it was held that the testator thereby gave to B the land in addition to that given by the will, and that the doctrine of election did not apply. As quoted in the principal case (p. 190) the court there said, "When the testator gives his own estate to one person, and the estate of that person to another, the intention is manifest that the second devisee shall have the estate of the first, and that intention creates a condition that the first devisee shall not take the estate given to him unless he relinquish his own estate to the person to whom the testator has devised it. If, in this case, the testator had first conveyed the plantation to the defendant, and afterwards devised it to the plaintiff, the defendant could not take by the conveyance without defeating the devise to the plaintiff. To take his own estate by the deed, and, in addition, claim what was given by the will, would be against the intention of the testator; and the defendant would be put to an election, either to take under the deed, and relinquish his claim under the will, or to take under the will, and relinquish to the devisee the plantation claimed by the deed. But the conveyance to the defendant was made after the date of the will. By it the devise to the plaintiff was revoked, with the same effect as if the plantation had been devised to the defendant by a codicil. It was the intention of the testator that the defendant should take both under the deed and under the will, and there is no subject for election."

At the outset it seems imperative, in the cause of clearness and consistency, to quarrel with the common nomenclature of the doctrine which is to be considered.

The error, if error it be, dates far back; for, in the earliest reported decisions, there are numerous loose expressions to the effect that alienation or other dealing with the property devised effected a *revocation of the will:* Powell, 377; *Dister* v. *Dister*, 3 Lev. 108; *Cotter* v. *Layer*, 2 P. Wms. 623;

Sparrow v. *Hardcastle*, 3 Atk. 798; *Marwood* v. *Turner*, 3 P. Wms. 163; *Walton* v. *Walton*, 7 Johns. Ch. 258. When this rule came to be practically applied, it was soon made obvious that a literal interpretation would lead to undesirable results; and the phrase was modified by saying that the revocation would be *pro tanto* only; that, so far as other property was concerned, the will would continue to operate. And a still nearer approach to accuracy was made, when the revocation was said to be, not of the will, but of the *devise*. Yet, the courts have adhered to the traditional term "revocation," and this in spite of frequent animadversions from judges and text writers to the effect that the word should never have been dragged into this connection at all. Even, with its later qualifications, although it may lead to no serious mistakes, it offends against that accuracy and nicety of expression which ought ever to characterize legal language.

One does not find decisions to the effect that when a testator parts with the subject-matter of a specific legacy, the will, or the legacy either, is "*revoked*." The phrase used is "ademption." The will remains as valid as ever; it is not revoked in whole or in part; but a portion of it is deprived of effect, merely because there is nothing for it to operate upon. How is the case altered by the substitution of real property for personal?

The technical limitation of the word "ademption," to personal property, might be an objection to its use here; but surely it would be better to stretch that meaning, or to employ a circumlocution, than to use a word, which, though sanctioned by tradition, is worse than meaningless.

The whole matter was very well stated by Weston, J., in *Carter* v. *Thomas* (4 Greenl. 341), decided in 1826. He says: "By the *revocation* of a will we generally understand an act by which the will ceases to have any effect. And this may be considered the meaning of the term, strictly and accurately speaking. It is not, however, uniformly used in this sense by legal writers, or in English judicial opinions; but it is frequently applied to cases where the will operates upon some estate, but not upon others, by reason of some conveyance or modi-

fication, made therein by the testator in his lifetime. When therefore, this position is laid down generally, that an alteration made in the estate devised, amounts to a revocation of the will, we must understand the meaning to be, so far as such alteration is inconsistent therewith. When a portion only of that which is the subject-matter of the will is parted with by the testator in his lifetime, the will cannot have the effect originally intended; and whether the whole will remains, but partially defeated in its operation, or such alteration is regarded as a revocation *pro tanto*, the will has its effect upon the estate which is left unaltered."

While the courts have clung to the traditional expression, they have not allowed it to lead them astray.

No reported case actually holds that any dealing with part of the devised property works a revocation of the entire will. The revocation is only *pro tanto*, and the remainder of the instrument stands unaffected: *Harkness* v. *Bayley*, Prec. Ch. 575; *Tucker* v. *Thurston*, 17 Ves. 134; *Clark* v. *Bukeley*, 2 Vern. 720; *Coke* v. *Bullock*, Cro. Jac. 49; *Livingston* v. *Livingston*, 3 Johns. Ch. 155; *Adams* v. *Winne*, 7 Paige, 97; *Vandemark* v. *Vandemark*, 26 Barb. 416; *Coulson* v. *Holmes*, 5 Sawy. C. C. 279; *Hawes* v. *Humphrey*, 9 Pick. 350; *Floyd* v. *Floyd*, 7 B. Mon. 290; *Clingan* v. *Mitchtree*, 31 Pa. 25; *In re Tillman's Estate*, 31 Pac. 563 (Cal.).

In Massachusetts it has been held that where a testator disposed by will of his entire estate, and subsequently sold all of his real estate, and died possessed of personalty alone, the will stood as a will of personalty, and was, accordingly, revocable by any writing sufficient to revoke a will of personal estate: *Brown* v. *Thorndike*, 15 Pick. 388.

Although the point has often been made in argument, that, if the alienation or alteration of part of the property devised, operates a revocation of the will, then such revocation ought to be a bar to the probate of the will, the courts have always steered clear of this dangerous doctrine.

So, in South Carolina, where a testator sold all his lands and part of his personalty after the date of his will, this was held no obstacle to the probate: *Prater* v. *Whittle*, 16 S.

Car. 40 (1881); also, *Balliet's Appeal*, 14 Pa. 451 (1850); *Harris* v. *Humphrey*, 9 Pick. 350 (1830); *Coulson* v. *Holmes*, 5 Sawy C. C. 279 (1878). In *McRainy* v. *Clarke*, 2 Taylor, 278 (N. C. 1816), it was said that by the sale of certain lands, subsequent to the making of a will devising them, "the will would not have been revoked, properly speaking, so as to prevent its probate; but the only effect would be an *ademption* of the devise of the particular lands conveyed." See also *Hoitt* v. *Hoitt*, 63 N. H. 475 (1884).

Cases where the testator had parted with his whole estate, so that he died possessed of nothing upon which the will could operate, seem to have presented somewhat more difficulty, though it is obvious that they differ from the former class only in degree. But, although these are loose expressions here and there, the actual decisions are consistent and reasonable.

In a recent New Hampshire case, the court came to the conclusion that, in that State, at least, the common law has been so modified "as to raise the question whether a case can now arise of a total revocation by implication of law, when there is any estate upon which the will can operate." "And a case is possible," said they, "where a will may operate to control the appointment of an administrator or guardian, even if there is *no estate* to be transmitted by it. . . . A will may be a mere appointment under a power. The question whether a will is entitled to probate does not depend upon the question whether, at the time of the testator's death, or at any previous or subsequent time, there was any property which it could dispose of:" *Morey* v. *Sohier*, 2 N. Eng. 269 (N. H. 1886). See also, *In re Tillman's Estate*, 31 Pac. 563 (Cal. 1892).

So far as appears, in only one reported case in America, has the court, through too close a dependence upon the letter of authority, made the error,—which might be a serious one,—of holding, that where a testator makes a deed to all the property which he has devised by his will, the act amounts to a revocation of the will, and may be pleaded in bar to its probate: *Epps* v. *Dean*, 26 Ga. 533 (1859). See *Graves* v. *Sheldon*, 2 D. Chip. 71 (Vt. 1824).

The Pennsylvania Supreme Court has trenched upon somewhat doubtful ground, having enunciated the doctrine that if a testator, after making his will, sell so great a part of the real estate devised as to render it impossible to give effect to the dispositions of his will, it amounts to a revocation of the will. The testator, seized of Whiteacre and Blackacre, directed his executors to sell the former for the payment of his debts, and certain legacies, and gave the residue of his property of all kinds, after the payment of said legacies, to certain other legatees. Afterwards he sold Whiteacre, and received the purchase money, and, dying, his personal property barely sufficed to pay his debts, leaving nothing for the legacies first named. *Held*, under the circumstances, the testator intended by the sale of Whiteacre to revoke his will as to everything but the appointment of executors. *In re Cooper's Estate*, 4 Barr. 88 (1846).

In a later case the court said, "There seems to be no reasonable doubt that in this State, under the Act of 1833, implied revocations by operation of law, in cases of alienation by deed, still exist. The rule is, that the revocation is, according to the common phrase, *pro tanto.* The question is to what extent these words are to be carried. The spirit and reason of the rule seems to embrace all that part of the will, the execution of which is either totally destroyed and prevented by the alienation, or is *so far mutilated and impaired as to remove from the remnant the trace or impress of the testator's intent.* It is revoked because it no longer is the will or intent of the testator. There have been cases, and will be again, where it is impossible to define with mathematical precision the exact line where the intention to revoke ceases. These must be left to the judgment of the courts." The principle of *In re Cooper* was affirmed, but held not to apply in this case: COULTER, J., in *Marshall* v. *Marshall*, 11 Pa. 430 (1849).

These cases virtually add to the statutory modes of revocation; another, *i. e.*, by so large an ademption as to indicate a change of the testator's intention.

The body of the modern English law on the subject under

consideration dates back no further than 1838, and may, therefore, be regarded as beyond the present purpose; while, in America, the matter is so largely regulated by enactment in the various States as to render the older English cases of relatively small importance in a general discussion.

Yet, there are some States in which no statutory regulations have been made; the acts in existence are not always all-comprehensive, and in many instances a knowledge of the common law doctrines is essential to an understanding of the very statutes themselves. Therefore, a brief review of the English law, prior to the statute of 1 Victoria, seems to be necessary.

At the basis of all the decisions lies the fundamental doctrine of the common law that a will was an appointment of real estate, and operated only upon such real estate as the testator had at the time of making it. (See *Spong* v. *Spong*, 1 Y. and J. 300; *How* v. *Dartmouth*, 7 Ves. 147; *Arthur* v. *Arthur*, 10 Barb. 9). Accompanying these rules were the corollaries: first, that any real estate acquired subsequently to the date of the will could not pass thereunder without a republication; and, second, that if, subsequently to the date of the will, the testator aliened real estate devised therein, or the form of his interest in such real estate became materially altered, this would be construed as a revocation of the devise.

Thus far, although there is room for difference of opinion as to the wisdom of the theory, there is nothing in it which is obviously unjust or repugnant to common sense. Yet, from this apparently innocent starting-point, the courts proceeded, by gradual stages, each step seeming the inevitable consequence of its predecessor, until a position of injustice, and even of absurdity, was reached, from which there was no rescue but by the intervention of the Legislature.

Losing sight of the original rule that, in order for an alteration in the estate to effect a revocation of the devise, it must be a material alteration, it was held that, a devise could not take effect unless the interest of the testator as devised remained identically the same from the date of the will down to the testator's death: See Lord Hardwicke in *Sparrow* v. *Hardcastle*,

3 Atk. 798. From this rule the conclusion seemed irresistible that if a testator aliened real estate previously devised in his will, the devise was thereby revoked, and that, even though he subsequently had the land reconveyed to him, for, looking at it technically, there was an "alteration" or "new modelling" of the estate.

And it was even more evident that this land reconveyed to the testator was, legally speaking, an estate newly acquired subsequent to the making of the will, and could not pass under it.

So far, the only obvious falsity was the confusion between material and immaterial alterations in the estate; but that was enough. For when the doctrine was pushed to its limits, the result was a high degree of artificiality, and, in many instances, the defeat of the testator's intention.

In the great case of *Cave* v. *Holford* (3 Ves. 650), in 1798, where the matter was thoroughly investigated and the rule declared to be firmly established, Mr. Justice Rooke, in delivering the opinion of the majority, remarked: "It is often contrary to the intention of the testator that the will should be annulled; it often bears hard upon individuals to enforce the rule strictly; but the rule is so; and if it produces more mischief than good, the Legislature in its wisdom may alter it; but we are bound as judges to declare and abide by it." And Chief Justice Eyre, though he considered himself bound to recognize the authorities, dissented vigorously from the extension of the rule to any new set of facts, saying that "the doctrine of revocation has been carried to a very inconvenient extent, in consequence of which many wills have been cruelly disappointed, and many families greatly distressed."

And, in a later case, Vice-Chancellor Wood characterized the former state of the law as "that law by which, with a species of remorseless logic, any person who had once made a will, and afterwards disposed of his interest for any purposes whatever, even although he might get back the identical estate which he parted with, was held to have revoked his will. This mode of entirely defeating a testator's intention by the magic of a conveyance is a logical application of the doc-

trine that a will is an appointment of real estate. Being an actual appointment of a specific thing, and that specific thing being otherwise dealt with, although immediately taken back again into the same hand which dealt it out, it was considered to have been destroyed and gone:" *Grant* v. *Bridges*, L. R. 3 Eq. 347 (1866).

Bad, indeed, must have been the state of the law to have elicited such censure; and bad, indeed, it was. On one side, the doctrine of effectuating the testator's intention was pushed so far that an instrument incapable of taking effect as a conveyance of real estate was, nevertheless, construed to be a revocation of the will, in spite of the Statute of Frauds: *Montague* v. *Jefferies*, 7 Ves. 370; *Doe* v. *Llandaff*, 2 Bos. and P. N. R. 491; *Ex parte Earl of Ilchester*, 7 Ves. 348; *Shrove* v. *Pinke*, 5 T. R. 124, 310; *Simpson* v. *Walker*, 5 Sim. 1.

That such cases as these should have been linked with cases of ademption, as by ROOKE, J., in *Cave* v. *Holford*, 7 T. R. 399 (*et infra*), and by Lord Hardwicke in *Sparrow* v. *Hardcastle*, 3 Atk. 798 (*et infra*), marks the confusion which had crept into the law. In reality, revocation is always dependent upon the testator's intention, either expressed, or necessarily inferred from his actions, as in the case of a subsequent marriage and the birth of issue. Ademption, on the other hand, is entirely independent of intention, and amounts simply to this, that a man's will cannot pass what he no longer has, or, under the artificial rulings, what he no longer has in precisely the same form in which he devised it. The two doctrines have nothing in common. Suppose a man devised, aliened, and took back the same estate; he might *intend* that the devise should stand unrevoked, but under the old law it was void because a will could not pass subsequently acquired property. And the injustice of this conclusion arose from the artificiality of this rule of law, and not from the fact that the court disregarded the desires of the testator.

The devise was void because the property had been alienated, no matter what was the purpose of the testator in so alienating.

Any, the slightest, alteration in the form of the testator's interest in the devised property, was held to work, what was inaccurately called a revocation of the devise, or what was really an ademption. The estate was, legally speaking, altered, or had lost its identity. Therefore, it could not pass by the devise.

Thus, a devise was held revoked by a recovery to the uses of the devisor, because the estate was altered, though the devisor took back the old use: *Dister* v. *Dister*, 3 Lev. 108; *Dailey* v. *Dailey*, 3 Wils. 6; *Arthur* v. *Bockenham*, Fitz. 240; *Marwood* v. *Turner*, 3 P. Wms. 163.

Where a man made a marriage settlement on a person whom he never married or asked to marry him, this was determined to be a revocation of a prior will, although the conveyance was for a special purpose, which failed, and he was in of the old use: *Lord Lincoln* v. *Rolls*, Eq. Cas. Abr. 409.

Lord Mansfield, in *Doe* v. *Potts*, 1 Doug. 709, observed: "All revocations which are not agreeable to the intention of the testator are founded upon artificial and absurd reasoning. The absurdity of Lord Lincoln's case is shocking. However, it is now law." This remark, though deserved, will be seen to be directed rather at the effect than at the cause. The root of the evil was not the disregard of the testator's intention, but the carrying to the point of absurdity, the rule that an alteration in devised property would render the devise void. And the *result* of this artificiality was to defeat intentions.

In *Sparrow* v. *Hardcastle*, 3 Atk. 798, Lord Hardwicke said: "If a man make a will devising land, and after execute a feoffment to his own use, it is a revocation of the will, notwithstanding it is in point of law the old use. So, likewise, a feoffment without livery, a bargain and sale not enrolled, or any other imperfect conveyance will be a revocation, because the estate is gone, and the will has lost the subject of its operation."

In the leading case of *Cave* v. *Holford* (7 T. R. 399; 3 Ves. 650), it was settled that where a testator, after the will, conveyed the estate to trustees, in trust for himself in fee till marriage, and for default of issue, to the use of himself in fee, and then married and died without issue, the conveyance was

held a revocation of a devise in fee to take effect only in case he had no issue. The conveyance, in this case, it will be observed, "so far from being inconsistent with the will, respects nothing but what is expressly reserved out of the will." Rooke, J., said: "There is a revocation which does not depend upon the intention of the testator; as where he takes back the very same estate. The consequence of law is, that the will is revoked, whether he intended to revoke it or not. There are other cases where, intending to revoke, a man has made use of a mode of conveyance, which is never completed. As where a man grants a reversion upon an estate for life which he has devised, and the tenant never attorns. So in the case of a bargain and sale without enrollment. But the revocation applicable to this case is, where the testator alters his legal interest without any intention to revoke the will. As to that, if the whole fee is conveyed, it annuls entirely the effect of the will, unless the testator republishes it:" See also *Goodtitle* v. *Otway*, 7 T. R. 399 (1797).

In short the doctrine of these cases was "that by a conveyance of the estate devised the will was revoked, because the estate was altered, though the testator took back the same estate, and by the same instrument or by a declaration of uses, and though he did not intend to revoke. It was revoked upon technical grounds, because the estate had been altered:" *Walton* v. *Walton*, 7 Johns. Ch. 273.

A parting with anything less than the testator's entire interest would work a revocation of the devise *pro tanto* only.

Thus, if a devise was made, and subsequently the testator leased the land for any term less than the whole estate devised, there was a revocation only *pro tanto*; the land passed to the devisee, subject to the term, and to the devisee the rent would be paid: *Gardner* v. *Sheldon*, Vaughan, 259; *Lamb* v. *Parker*, 2 Vern. 495; *Coke* v. *Bullock*, Cro. Jac. 49.

A devise was held revoked by an exchange of the land, although after the testator's death it was discovered that title had never been perfected in the other party to the exchange, and the land was, in consequence, restored to the heir: *Attorney-General* v. *Vigors*, 8 Ves. 256.

It was uniformly held that a valid agreement to sell and convey lands revoked a previous devise as well as an actual conveyance: *Cotter* v. *Layer*, 2 P. Wms. 623; *Rider* v. *Wager*, Ibid. 332; *Mayer* v. *Gowland*, Dick. 563; *Knollys* v. *Alcock*, 5 Ves. 648; *Vawser* v. *Jeffrey*, 16 Ves. 519.

There were certain exceptions to the rigor of the common law rule. In *Cave* v. *Holford*, Rooke, J., said: "Parceners and tenants in common, being seized only of an undivided portion in the whole, would retain the same estate and interest after partition; and if it is done by deed and fine, instead of by writ, the court has so far indulged them as to say the prior devise is not revoked:" *Risley* v. *Baltinglass*, Sir T. Raym. 240; *Knollys* v. *Alcock*, 5 Ves. 648, 655.

In certain instances equity intervened, as where, having the complete legal and beneficial estate at the date of the will, the testator divested himself of the legal estate, but remained owner of the equitable interest, as in the case of a mortgage or a conveyance for payment of debts, by which a devise was not revoked in equity, though after the debts were paid the devisor took a conveyance to him and his heirs: *Harmood* v. *Oglander*, 6 Ves. 199 (1801).

A mortgage in fee after a devise was held a revocation *pro tanto* only, or *quo ad* the special purpose: *Tucker* v. *Thurstan*, 17 Ves. 161 (1810); *Brydges* v. *Duchess of Chandos*, 2 Ves. Jr. 417; *Perkins* v. *Walker*, 1 Vern. 97; *Hall* v. *Dench*, 1 Vern. 329; *Temple* v. *Chandos*, 3 Ves. 685; *Cave* v. *Holford*, 3 Ves. 650. It was held that the devisee should be admitted to the redemption, "for the intent of the mortgagor, making the mortgage, could be no other than only to serve his special purpose of borrowing money to supply his present occasions:" *Hall* v. *Dench* (*supra*).

The statute of 1 Vict. Cap. 26, § 19, *et seq.*, enacts that no wills made on or after January 1, 1838, "shall be revoked by any presumption of an intention on the ground of an alteration in circumstances;" and that no conveyance of real estate made after the execution of a will, or other act in relation to such estate, shall prevent the operation of the will upon such portion of the estate as the testator may have power to dis-

pose of at his death. Thus, after two and a half centuries, the *quære* of Brooke, in his *Abridgment* (tit. Devise, pl. 8), where he suggests that "an alienation and taking back ought not to defeat a will made before, because it is no will till death," became the established law of England. (See opinion of Rooke, J., in *Cave* v. *Holford.*)

Turning to the American cases, we find that they may be divided into two general classes: (1) Decisions based upon State statutes, and (2) Decisions made in States prior to the passage of any statutes, or in States where, down to the present time, no statute has been enacted.

This second class, is based, in the main, directly upon the English common law doctrines, and presents some interesting developments and deductions therefrom.

Any detailed catalogue of the various State enactments would be misplaced here.

It is sufficient to say that, in the main, where such statutes exist they are substantially similar to the English statute, and provide that "no conveyance or alteration of estate which does not wholly divest the testator of all interest in the property mentioned in the will, shall prevent the operation of the instrument with respect to that which the testator may have power to dispose of at the time of his death:" *Beach on Wills*, § 67.

Such statutes are in force in California, Dakota, Indiana, Kansas, Kentucky, Maryland, New York, North Carolina, Ohio, Virginia, Pennsylvania, South Carolina and some other States: *Stinson's Amer. St. Law* (Jan. 1, 1886), § 2810; Code Maryland, Art. 93, § 309; Penna., Act Apr. 8, 1833, § 10; South Carolina, Act 1858, 12 Stat. 700; New York, 2 R. S. 57, § 5-64, § 42-48.

In Alabama and Indiana the statutes provide expressly that the conveyance of previously devised property and taking back a new estate therein, will not effect a revocation unless the will or conveyance show an intention on the testator's part so to do: Ala. Code, § 2289; Ind. Rev. Stat., § 2565. So, in Louisiana, where it is clearly proved that the testator did not intend to revoke: *Blakemore's Succession*, 9 So. 496.

But, under the statutes of most of the above mentioned States, where, in such a conveyance, the intention to revoke is expressed, or where the provisions of the conveyance are totally inconsistent with the devise, a revocation will be implied: *Beach on Wills*, § 67; *Stinson's Amer. Stat. L.*, § 2810-A.

Such statutes as these, introducing the element of *intention*, really do nothing more or less than constitute a new method of revoking a will, or part thereof.

In Kentucky, by statute, where the devisee is also the heir of the testator, the mere sale of land devised will not raise a presumption of revocation. It must be shown that the testator so intended: Gen. Stat. Ky., Art. 3, § 1; *Hazelwood* v. *Webster*, 82 Ky. 409 (1884).

In Alabama, it is provided by statute, that a subsequent sale and conveyance of the lands devised does not operate a revocation of the devise when any part of the purchase money remains unpaid at the death of the testator, unless the intention that it shall so operate clearly appears by some instrument in writing: Code, § 2287; *Slaughter* v. *Stevens*, 81 Ala. 418 (1886).

The question is also affected by another set of statutory considerations.

In all the States "Wills Acts" are in force, in which are enumerated the various legal methods by which the will may be revoked. In some instances, revocations by implication are saved by express provision (*e.g.*, Mass. Stats. 1882, p. 748, § 8; N. Hamp. Gen. Laws, Cap. 193, § 14); in others, no reference is made to such cases, and the statutes declare that no will or part thereof can be revoked save in some one of the ways named in an almost literal transcript of the statute of 29 Car. II.

Consequently, we find numerous decisions, where certain dealings with previously devised property, by the testator, are held not to constitute revocations of the devise, because no such method of revocation is contemplated by the local statute: *Woolery* v. *Woolery*, 48 Md. 523; *Prater* v. *Whittle*, 16 S. Car. 40; *Spoonemore* v. *Cables*, 66 Mo. 579. When we reflect

that the term *revocation* is a misnomer in such cases, these decisions, though correct in their conclusions, seem a trifle flimsy in their reasoning.

Of course, no court has gone to the length of holding that when a testator has sold and conveyed property, and has no interest in it at his death, the will is not thereby "revoked" so far as that property is concerned, even though no such method of "revocation" be contemplated by the statute. But the courts have been driven to far-fetched reasoning in their desire to render common-sense decisions, and not a little confusion has arisen, through the persistent and unreflecting employment of the term *revocation*. See *Adams* v. *Winne*, 7 Paige, 97 (N. Y.); *In re Dowd's Estate*, 58 How. Pr. 107 (N. Y.). In *Cozzens* v. *Jamison*, 12 Mo. Ap. 452—the court, referring to the local statute, said: "The Legislature, in speaking of a revocation, must have intended to use the word in the sense in which it was used in the English statute, and did not mean to include the case of ademption, by parting during the lifetime of the testator, with the land devised, nor to change the rule applicable to a devise of lands, that, where the testator sells the land devised, that provision of his will becomes at once inoperative."

Aside from statute, the English common law rules have generally been adopted in America. The leading case is *Walton* v. *Walton*, 7 Johns. Ch. 258 (1823), where it was held that a devise of land, once revoked, expressly or by implication, cannot be restored without a republication of the will. If a testator conveys the estate devised, though he takes it back again by the same instrument, or otherwise, it is a revocation at law and in equity, even though he did not intend to revoke his will.

This may, perhaps, be regarded as authoritative in such States as have not statutory provisions regulating the matter. See *Brown* v. *Brown*, 16 Barb. 569 (1852).

Where a testator sells devised property, and then makes a contract with the purchaser for the reconveyance of the property, and dies before this contract is performed, he dies possessed of no interest which can pass by his will, unless it is

capable of operating upon subsequently acquired property: *Lanning* v. *Cole*, 2 Halst. Ch. 102 (1847).

Contracts to Sell and Convey.

At a very early date it was decided, in New Jersey, that whatever might be the rule in equity, an agreement by a testator, after the execution of his will, to sell lands therein devised, was not a revocation at law, the court saying: "An intention to sell does not revoke a will by which the property is devised." *Hall* v. *Bray*, Coxe, 212 (1794).

But, in New York, in the leading case of *Walton* v. *Walton*, 7 Johns. Ch. 258, it was held that, in equity, such a contract was a revocation of the devise; and this even though the contract had been rescinded by the mutual consent of the parties, so that the testator was restored to his former estate and died seised thereof. In a later case it was said, more accurately, that the will remained in force as to the legal estate, which passed to the devisee, who became a trustee for the purchaser and would be compelled to convey: *Gaines* v. *Winthrop*, 2 Edw. Ch. 571 (1835).

These principles are reaffirmed in the case of *Donohoo* v. *Lea*, 1 Swan. 119 (Tenn. 1851), which may be taken as expressing the American law in all States where the matter is not regulated by statute.

And in many of the States, including Arkansas, California, Kansas, Missouri, Nevada, New York, Ohio, Oregon, Washington, and some others, the statutes expressly provide that "an agreement to convey property previously devised does not revoke the gift, but that the property shall pass to the devisees, subject to such remedies for enforcement of specific performance as might have been law against the heirs or next of kin:" *Beach on Wills*, § 57; *Stinson's Am. Stat. L.*, § 2810.

Partition.

The English doctrine as to partitions has been followed in America. In *Duffel's Lessee* v. *Burton*, 4 Harr. 290 (Del. 1843), it was held that a will of lands held in common, is not revoked by proceedings for partition under which the testator accepts and becomes seized of the whole in severalty. But

such devise does not pass the after-acquired portion of the lands, even though it be expressed to be of "my part" of the lands: *Scaife* v. *Thompson*, 15 S. Car. 337 (1880).

In *Duffel* v. *Burton*, the court examined into the subject, saying: "The case of partition seems to be an excepted case, even where, to effect the partition a conveyance is necessary. . . . The reason of this seems to be that the object of the conveyance is really not to pass title, but to effect a severance of the manner of holding, and the estate to which the will applies being liable to this change without enlargement or restriction, the will is reasonably to be regarded as applying to it in its severed form of holding as well as when it was held in common."

Mortgage of Devised Land.

In *McTaggart* v. *Thompson*, 14 Pa. 149, it was held that mortgages are only a revocation in equity, *pro tanto* or *quo ad* their special purpose. Though in form purporting to be conveyances of the estate, yet in equity always, and now at law, they are regarded but as securities for debts. They are not to be viewed as alterations or changes of the estate, but are merely revocations *pro tanto*, or ademptions, rather than revocations of the will.

Any interest or right of redemption, or other right remaining in the testator at his death would fall within the operation of the devise: *Stubbs* v. *Houston*, 33 Ala. 555. The fact that the mortgage was made to the devisor, even under the belief that the will was invalid, and with the intention that it should be substituted for the will, would make no difference: *McTaggart* v. *Thompson*; *Stubbs* v. *Houston*.

Sale of Devised Land with Purchase Money-Mortgage.

If a testator sells land previously devised, and takes back a mortgage for all or part of the purchase money, the devise is nevertheless adeemed. The mortgage will pass under the residuary clause. The mortgage passes no title, but simply creates a lien upon the property for security of a part of the purchase money: *Adams* v. *Winne*, 7 Paige, 97; *Beck* v. *McGillis*, 9 Barb. 35; *Brown* v. *Brown*, 16 Barb. 569;

McNaughton v. *McNaughton*, 34 N. Y. 201; *Emery* v. *Union Society*, 79 Me. 334 (1887).

Conversion of Real Estate into Personalty.

Of course, whenever real estate devised, is sold, this amounts to an ademption; the devisee has no claim to the proceeds: *Beck* v. *McGillis*, 9 Barb. 35; *Vandemark* v. *Vandemark*, 26 Barb. 416.

A change from personalty into real estate will revoke a bequest, as where a testator forecloses a mortgage disposed of by his will, and buys in the land: *Ballard* v. *Carter*, 5 Pick. 112 (1827); *Bingham* v. *Winchester*, 1 Metc. 390 (1840).

Sale in Fee Reserving Rent.

A grant in fee of previously devised property, renders the devise inoperative, although a rent be reserved, with a clause of re-entry: *Herrington* v. *Budd*, 5 Denio, 321.

So, in Pennsylvania, where, upon such a grant, a ground rent in fee was reserved, it was held that the conveyance was an entire transfer and disposal of the estate, and a substitution of an incorporeal hereditament issuing out of the ground, which preserved to the grantor no residuary estate in the land, so that there was nothing left for the devise to operate upon: *Skerrett* v. *Burd*, 1 Whart. 246.

Conveyances in Trust for Special Purposes.

In general, a conveyance to trustees for some particular purpose, such as the payment of debts, and then to reconvey to the grantor, or his heirs, resembles a mortgage, in that it is held to render void a previous devise of the lands, only *quo ad* the special purpose: *Livingston* v. *Livingston*, 3 Johns. Ch. 148; *Jones* v. *Hartley*, 2 Whart. 103; *Hughes* v. *Hughes*, 2 Munf. 209. So, where the deed of trust was to the executors, the residue to go to the devisee, it was held to be only an ademption *pro tanto*: *Minuse* v. *Cox*, 5 Johns. Ch. 441.

Of course, if the purpose of the trust exhausts the entire estate, the devise is deprived of all effect, just as by an absolute conveyance: *Clingan* v. *Mitchtree*, 31 Pa. 25; *Collup* v. *Smith*, 15 S. E. 584 (Va.).

Inoperative Conveyances.

In the old case of *Walton* v. *Walton*, 7 Johns. Ch. 269, it was held that a conveyance totally inoperative for want of completion or incapacity of the grantee, may amount to a revocation if it shows the intention of the testator to revoke his will.

As remarked above, this theory has no connection with the doctrine of ademption. There is not a defeat of the devise because of subsequent dealing with the devised property. There is simply an additional method of revoking a will besides those specified in the statute.

And this appears clearly in a recent case, where it is held that a conveyance executed by one who is mentally incapacitated, or unduly influenced, is ineffectual as a revocation, since there must be *animus revocandi: Graham* v. *Burch*, 47 Minn. 171 (1891).

In Louisiana there is an express statutory provision that a subsequent conveyance will operate a revocation, although the sale or donation be null and void, and the thing has returned to the possession of the testator: La. Civ. Code, § 1696.

Conveyance to the Devisee.

A conveyance of land is a revocation of the devise, even though the devisee and grantee are the same person, for he will take by the deed and not by the will: *Arthur* v. *Arthur*, 10 Barb. 9; *Rose* v. *Rose*, 7 Barb. 174; *Marshall* v. *Rench*, 3 Del. Ch. 239. This has been held to be so, even though the deed was cancelled in the lifetime of the testator: *Kean's Will*, 9 Dana, 25 (Ky.). See *contra*, *Woolery* v. *Woolery*, 48 Ind. 523.

But conveyance to a devisee, of other lands than those devised has never been held to be an implied revocation of the devise: *Marshall* v. *Rench* (*supra*); *Arthur* v. *Arthur* (*supra*).

Increase in Value of Property.

The great increase in the value of devised property by the erection of buildings thereon, is not a revocation of the devise, although the devise was made in satisfaction of a debt: *Havens* v. *Havens*, 1 Sand. Ch. 324 (N. Y.). See also *Wogan* v. *Small*, 11 S. & R. 141. SAMUEL DREHER MATLACK.