

DEPENDENT RELATIVE REVOCATION OF WILLS.

The statute of frauds provided for the revocation of a will in one of two ways (a) by another duly executed will, or (b) by burning, tearing, canceling or obliterating *with intent* to revoke. In the first case the *animus revocandi* was expressed; in the second the *animus* was implied in the act of cancellation. But the statute said that the will should only be revoked in the second case, if the act was done with intent to revoke. As a result of this language it soon came to be the interpretation of this clause that the intent was the indispensable requisite of a revocation by an act of canceling and that while the intent would be presumed from the *fact* of destruction, that, nevertheless, such destruction was only *prima facie* evidence of an intent to revoke, and that this *prima facies* might be overcome by parol proof showing that the testator's act was not prompted by an intent to revoke, that the tearing or burning or canceling was done by some third person without the testator's knowledge or consent, or that the will was torn by a mistake, on the supposition that it was some other paper. The reception of such evidence seems warranted by the wording of the statute. It goes simply to prove the presence or absence of intent.

The courts have taken a further step, however, which seems not so clearly warranted by the statute. They have said that if absence of intent may be proved, then a mistake of fact or law on which such intent to revoke is founded may be proved; and the moving cause of the *animus revocandi* having failed, the *animus* must be taken not to exist. Or in other words, since the revocation was based on a condition or fact, and that supposed condition or fact did not really exist, the revocation would never have taken place, if the true state of affairs had been known to the testator. So that, on proof of the mistaken belief of the testator and of the fact that the revocation depended on such mistaken belief, the court will declare the revocation of no effect. This doctrine is commonly named dependent relative revocation.

The object of this paper is to classify the cases which

have been considered as coming within this doctrine, and to inquire how far they do come within it as above stated, and further to determine whether the doctrine is permissible, under the statute of frauds, in any of the cases to which it has been applied.

The cases will be grouped, for convenience, under five heads, as follows:

1. The revocation of a will or a particular bequest, by a subsequent will or codicil, the reason for such revocation being stated in the subsequent paper.

2. The revocation of a will by one of the acts of destruction specified in the statute of frauds upon the supposition that a new will has been made, or with the intention of making a new will.

3. The revocation of a second revoking will, on the supposition (false in point of law in many jurisdictions) that this will revive a former will.

4. The cancellation or obliteration of a particular legacy or devise in a will, accompanied with an inofficious and therefore ineffectual attempt to substitute a different provision.

5. The cancellation or revocation by a later instrument of a particular provision of a will, accompanied by a new testamentary gift, which, while properly executed, cannot take effect, by reason of some legal obstacle, such as, *e. g.*, a mortmain act.

I.

Cases coming within this description occurred quite early, the first being *Attorney-General v. Lloyd*.¹ In that case a testator made his will in 1734, leaving certain real estate to a charity; he made a codicil in 1736, stating that as he was doubtful whether, under the late mortmain act, his devise to the charity, or part thereof, would be valid, and being desirous to confirm it in that case and not otherwise, he gave so much of it as could not pass by his will to the charity to his nephew. He afterwards made another codicil, reciting the former codicil and the will, "and that *being advised* that his devise to the charity was void, as to the real

¹ 1 Ves. Sr. 32 (1747).

estate, though not as to the personalty," he gave his realty to his nephew. The Probate Court ordered the charities to be carried out, on the theory that this was no revocation. Lord Hardwicke, on appeal, said he doubted the correctness of this decree and gave three reasons for his doubts: (1) If the testator had intended that this was a revocation and a new devise only in case the will was not good, he would have left it stand on the first codicil. (2) "It is very nice to say that because the reason a testator gives fails, the devise also fails." (3) He doubted whether the revocation was put singly and solely on the point of law; the words "being advised" were material, and they show that he may have changed his will to avoid all controversy. The Kings' Bench, to which court the case was certified, decided that under the second codicil the nephew was entitled, and it was so decreed.

While Lord Hardwicke's second reason seems to be opposed to the doctrine itself, yet his other two reasons seem to recognize the doctrine and distinguish the case on the ground that it was not clear that the revocation was dependent solely on the reason given. And the case is considered an authority for this proposition, that where the testator gives a reason for revoking, stating merely that he "is advised" that the fact is so, or "fears" or "doubts," then he is to be taken to have revoked absolutely and not dependently. For the courts say that he may change his will to avoid any uncertainty, and the very fact of a revocation coupled with a statement as to his advice, is enough to show that he intends not to run any risk, and, whether the advice be correct or not, intends to revoke. So in *Attorney-General v. Ward*,² where a testatrix left property to A. and B., the children of C., and subsequently, by a codicil, revoked the bequests, saying "I now give X.'s children the legacy designed for C.'s children, as I know not whether any of them are alive, and if they are well provided for." The court said it would refuse to hear evidence as to whether the children were alive and well provided for, or not, as this was evidently intended to be an absolute revocation. So in *Skipwith v. Cabell*,³ where a testatrix who lived in Virginia

² 3 Ves. Jr. 327 (1797).

³ 19 Gratt (Va), 758 (1870).

was advised that a legacy left to a person resident in Pennsylvania would be void under the confiscation laws of the Confederate States, and she drew a codicil stating that, "In consequence of the state of the country" she revoked said legacy, the court held this language too indefinite to make the revocation dependent.

If, however, the testator states his belief in a certain supposed fact and it turns out that his information was false, then, the courts hold, there is a proper case for the application of the doctrine. The earliest case standing for this proposition is *Campbell v. French*.⁴ In that case the testatrix's will ran as follows: "As I understand that my late sister M. had two grandchildren living in N. County, whose names are P. and C., I give to each of them £500." A codicil read, "As to the legacies or bequests given or bequeathed by my will to my sister M.'s grandchildren, I hereby revoke such legacies and bequests, they being all dead.") P. and C. were not in fact dead. On testatrix's death, they claimed the legacies, and were awarded them. In the leading case of *Doe v. Evans*,⁵ the testatrix devised lands to L. for life, remainder to his first and other sons and daughters successively in tail. L. died leaving a son and a posthumous daughter. The son died. Testatrix, being ignorant of the existence of the daughter, made a codicil, reciting the death of L., without issue, and devising the property to H. It was held that the codicil must be construed as a conditional revocation only, and was inoperative as against the daughter of L., and this, though testatrix after making the codicil, and two years before she died, had become acquainted with the daughter's existence.

The American courts have limited the doctrine represented by the foregoing cases within quite narrow lines. It was early held that such a mistake of fact inducing a change of testamentary disposition could not be proved *dehors* the will. Thus in *Gifford v. Dyer*,⁶ a testatrix made a will wherein she gave her property to her brother-in-law and her nephews, and completely ignored her only son. The son

⁴ 3 Ves. Jr. 321 (1797).

⁵ 10 Ad. & El. 228 (1839).

⁶ 2 R. I. 99 (1852).

had disappeared some ten years before the making of the will and had not been heard of since his disappearance. When asked why she left him nothing she said he was dead. She further said, however, that even if alive she would leave him nothing. After her death, the son returned and attempted to have the will set aside on the ground of mistake. The court held that there was no mistake here, as testatrix clearly intended to cut out the son, but that even if his supposed death was the controlling reason for cutting him off, still as this did not appear in the will, but lay purely in parol, it could not be considered. An English case, *Goods of Moresby*,⁷ is opposed to this decision, but it is an ecclesiastical case and probate of the will supposed to be dependently revoked was granted *ex parte*.

The courts in this country have gone a step further in narrowing the principle of such cases as *Campbell v. French* (*supra*).

They have said that though the fact stated as the reason for revoking the will is untrue, this in itself is not enough to render the revocation of no effect, for if the fact was one peculiarly within the testator's own knowledge, and not one for which he depended merely on information from others, then even such a misstatement amounts to nothing as respects the revocatory clause, and the revocation will be absolute, not dependent. On this ground, that the supposed fact rested on information derived from third parties in the cases of *Campbell v. French* (*supra*) and *Doe v. Evans* (*supra*), those cases are distinguished.

In *Hayes v. Hayes*⁸ the testator bequeathed a certain sum to A. to establish a home for himself. In a codicil he revoked this bequest, on the stated ground that he had provided A. with a home by other means. On testator's death A. sought to recover the amount of the original bequest, on the ground that testator had not in fact provided him a home by any other means, and that as the revocation was grounded on that assumption it was inoperative. The court held that this was not such a case of mistake as equity ought to relieve against, because the testator must, in the

⁷ 1 Hagg. Ecc. 378 (1828).

⁸ 21 N. J. Eq. 265 (1871).

nature of things, have known whether or not he had provided A. a home. It was not a case where he relied on information which proved untrue.

In *Mendinhall's Appeal*⁹ a testator by his will divided his property in equal shares between his daughters. Subsequently to executing said will, he aided the husband of one of his daughters in a business transaction, wherein he made a sale of certain property to the said son-in-law. After this he made a codicil in which he stated that inasmuch as he had made a gift to his son-in-law, he revoked the legacy left to his daughter, the wife of said son-in-law, in his will. On testator's death, the daughter claimed the legacy on the ground that the transaction in question did not constitute a gift as testator had termed it, and hence the revocation, being dependent on that fact, was inoperative. The court, on investigation of the transaction, found that it was not a gift, but a sale; and that testator ought to have known the distinction. The court stated the broad rule laid down by the text-writers that when a revocation was expressly grounded on the assumption of a fact which turns out to be false, the revocation does not take effect; and then said, "The principle referred to may be conceded to be correct when applied to cases in which the falsity or error of the alleged fact rested not in the personal knowledge of the testator, but was assumed upon information derived from others." On this distinction *Campbell v. French* and *Doe v. Evans* are disposed of. The revocation was held to be absolute.

The same view was taken in the late case of *Giddings v. Giddings*.¹⁰ There X. devised to his son A. a tract of land, a similar tract to his son B., and two tracts to his son C. B.'s tract was subsequently sold. By a codicil reciting this fact X. gave B. the proceeds of the sale. The codicil also stated that one of C.'s tracts had been sold, and revoked that portion of the will which gave this tract to C., but did not dispose of the proceeds of the sale. X. died seised of this same tract, it never having been sold. C. claimed it on the theory of dependent relative revocation of the devise to him. It was held he was not entitled to the land.

⁹ 124 Pa. 387 (1889).

¹⁰ 65 Conn. 149 (1895); see, also, *Dunham v. Averill*, 45 Conn. 61 (1877).

From these cases it appears that where the doctrine of dependent relative revocation is applied to a second will or codicil, it is confined to the case where a testator states the reason of the revocation in the revoking paper, and where such reason is based on information merely and not on facts within his knowledge or which ought to be within his knowledge.

II.

Let us turn now to the second class of cases named above, viz., those where a will is destroyed under the mistaken belief that a new will has been executed or with the intention of making a new one, which intention fails of execution.

In this sort of cases the doctrine really had its inception. The case usually cited as the pioneer and leading case is that of *Onions v. Tyrer*.¹¹ In this case a testator made a duly-attested will in 1707. In 1711 he made a second will, containing a clause revoking all former wills, but this will was not properly attested. It was given in evidence that he called for his former will and directed his wife to destroy it, and the witness swore she heard her tear it. A copy of the will of 1707 was offered for probate, and the question was whether that will was well revoked or not. Four conclusions were reached by the court: (1) the later will being void and not operating as a will, it did not do away with the former; (2) as to the actual canceling of the former will, the evidence was not full and clear that it was done; (3) it was plain he did it only on the supposition that he had made a later will at the same time; (4) and in case it had been a good canceling of the will at law, it ought to be relieved against in equity on the ground of mistake.

In *Hyde v. Hyde*¹² a testator made his will and subsequently made another which was not duly executed. Thinking he had made a valid second will he started to tear up the first will, but before he had finished he was told that the second could not take effect for want of due execution

¹¹ 2 Vern. 742 (1717): see, also, *Goods of Middleton*, 3 Sw. & Tr. 583 (1864).

¹² 1 Eq. Cas. Abr. 409.

and he at once desisted from further tearing. It was held that there was no revocation of the first will. This case, though it has been so treated, is, of course, not a direct authority, for the act of destruction was not completed.

In *Dancer v. Crabb*,¹³ it appeared that testatrix, having her will in hand, dictated the alterations she wished made therein to a friend. These were written out in a rough draft. Testatrix, feeling unwell, desired her friend to stop before she reached the end of the will, and then tore the old will in two at the point where they stopped and left the latter half of it, containing the signatures, etc. This testatrix folded up with the new draft and they were found together at her death. Probate of the whole of the old will was asked. It was argued that testatrix thought that the piece of the old will and the new draft together constituted a new will, and tore off the piece of the old will, laboring under this mistake. The court held that this was a case of dependent relative revocation and decreed the probate of the old will.

From the above citation, especially the last, it appears how much is taken for granted in these cases. It is admitted that the act is done *animo revocandi*, and the court goes further to inquire whether that *animus* was founded on a mistake; further the inquiry comprehends a mistake of law, and lastly the court says, that, though the testator has said nothing about it, it is clear that he would wish to have his first will operate if the second cannot. What right has the court to assume this? If it have the right to receive parol evidence to prove this fact, which seems doubtful, has it a right to guess at the facts even in the absence of parol evidence? Yet this seems to be what the court must do in order to reach such a result as was reached in *Dancer v. Crabb*.

A case in England which seems to run *contra* to the doctrine of the above cases is *Goods of Mitcheson*.¹⁴ In that case it appeared that there was a will made in 1856. In 1861 deceased instructed a solicitor to prepare a will for him, without telling the solicitor that he had made a previous will.

¹³ L. R., 3 P. & D. 98 (1873).

¹⁴ 32 L. J. N. S. (P. & M.) 202 (1863).

The draft of a will was prepared, but never executed. When decedent was dying he was asked whether he had made his will, and he said that he had. After his death search was made for a will and nothing was found except the unexecuted draft of 1861. As late as 1863 deceased had said that it was high time the draft was executed. *Held*, that the presumption was that the will had been destroyed *animo revocandi* and that there was no evidence in the case to rebut the presumption.

Perhaps such a doctrine as that of *Onions v. Tyrer* and *Dancer v. Crabb* may be justifiable in a case where, as in *Wilbourn v. Shell*,¹⁵ the intention is to execute a fair copy merely, no new provisions being substituted, and the original will torn up on the mistaken supposition that the copy has been duly executed.

There is another class of cases, somewhat similar to those above mentioned, wherein the doctrine of dependent relative revocation has been applied. These are cases where a testator has torn or otherwise destroyed or canceled his will with the intention of making another, and has failed to carry out that intention. In such cases it has been held by some courts that the revocation was dependent on another will being made, and hence if none other is made the revocation does not take effect.

The leading authority for this proposition in England is *Winsor v. Pratt*.¹⁶ This was an action of detinue to recover the title deeds of certain real estate. R. made a will in 1812 whereby he left the rents and issues of certain realty to his wife for life, remainder to M., her mother, for life, remainder to his executors in fee, in trust. In 1816 he made certain interlineations, the effect of which was to confine the devise to the wife to her widowhood, and to strike out the devise to her mother. The original date was stricken through and "the — of November, 1816," was substituted. The will was never re-signed, re-published, or re-attested, but in the following month, R. caused a fair copy to be made, and added one interlineation not affecting the real estate. On R.'s death, his widow, the defendant, claimed that the will

¹⁵ 59 Miss. 205 (1881).

¹⁶ 2 Fred. & B. 650 (1821).

had never been revoked and that she was entitled. The plaintiffs in this suit were R.'s heirs. Judgment was given for defendant. Three reasons for the decision were given: (1) This was not an obliteration within the statute of frauds; (2) if it had been, still it was only intentional and not final, and must be taken to have been grounded on the making of a new will, which the testator, who was a solicitor, must have known would not take effect until signed and attested by three witnesses; (3) there was clearly no intention to die intestate. It seems that too much was taken for granted in this case, but still it was a case that might bear the construction put on the facts. But this principle has been carried to cases that are by no means so clear.

In *Goods of Applebee*¹⁷ there were presented to the Probate Court a will (A) and a paper (B). The signature of A was struck through in pencil. B was not signed. The evidence was that testator had said that he intended revising his will (A). There was very little difference in the provisions of the two papers. Probate of the paper A was decreed on the ground that there was only a conditional cancellation. It is submitted that this case goes too far. The court had no definite evidence whatever as to the testator's wish regarding the paper A. True, it is quite likely that the inference the court drew from the facts it had before it was correct, but a man's will should not depend on the inferences of a Probate Court. If he does not make his will himself, he can hardly expect the court to make it for him.

In *Goods of Eeles*,¹⁸ the case was clearer in this respect, that here the court had evidence to show exactly what the testator wanted done, and the only question was whether his wishes could under the law be carried out. In this case the testator cut out the names of the witnesses to his will, saying to a witness as he did so, that he had some idea of making a new will. Later in the day he pasted the piece in again, saying it would do for the present. Probate of the will was granted, by consent of all those interested in an intestacy. As this case was decided by consent it does not stand as an authority, but it would be interesting to know

¹⁷ 1 Hagg. Ecc. 143 (1828).

¹⁸ 2 Sw. & Tr. 600 (1862).

what would be done in a similar case in England if it were contested. The attitude of American courts to this application of the doctrine of dependent relative revocation, so far as it has been expressed, seems to be contrary to that of the English courts.

In *Semmes v. Semmes*,¹⁹ the testator canceled his signature to his will, writing below such cancellation, "In consequence of the death of my wife, it has become necessary for me to make another will." He died without having made another will, and probate of the old canceled will was asked. This was refused on the ground that no accident or mistake existed here, but that testator had done the act deliberately and with intent to cancel, and though such cancellation might have been done solely with intent to make another will, yet the court could not make a will for the testator, who had made none for himself.²⁰

In *Johnson v. Brailsford*²¹ a testator made a will and subsequently tore it up,—as the jury found,—*animo cancellandi*. Subsequently he gave directions for the making of another will. It was contended that the intention thus manifested was enough to set up the canceled will, since he intended to cancel it only in case the new one was executed. The court refused probate of the canceled will, saying, first, that the facts of the case were no evidence of such an intention as was contended for, and second, that this was a very different case from *Onions v. Tyrer*²² (*supra*), because in that case the intent and the cancellation were simultaneous, and further, the second will was in existence at the time of the cancellation of the first. Further, the court drew the distinction that in the present case the proposed second will was materially different from the first, while in *Onions v. Tyrer* the two papers were very similar.

The court used this language, which, it is submitted, applies with great force to all the cases under this subdivision of this paper except such as *Onions v. Tyrer*, where the two wills are practically the same. The testator appears

¹⁹ 7 H. & J. (Md.) 388 (1826).

²⁰ See, also, *Banks v. Banks*, 65 Mo. 432 (1877).

²¹ 2 Nott & McC. 272 (1820).

²² 2 Vern. 742.

to have preferred another will to intestacy, but it does not appear that he preferred the will in question to intestacy; the will directed, but not executed, was materially different, probably as variant from the one in question as that the law would have supplied in case of intestacy."

In *Brown v. Thorndike*²³ the fact that every revocation is, in a sense, made on the supposition that testator will make another will is recognized. But it is held that such intention, even if expressed, does not make the revocation dependent. In that case testator wrote on his will, "It is my intention at some future time to alter the tenor of the above will; or rather to make another will; therefore be it known, if I should die before another will is made, I desire that the foregoing be considered as revoked and of no effect." It was held that this constituted a present revocation and not merely the declaration of an intent to revoke by some future act.

In the late case of *Olmstead's Estate*²⁴ Henshaw, J., called attention to the dangers which he thought were involved in the application of this doctrine to cases where a will is revoked with the intention of making another.

The authorities appear to be few,—in England they seem to tend to the application of the doctrine to such cases as *Onions v. Tyrer* and *Winsor v. Pratt*,—in America the tendency seems the other way.

III.

In England since the Wills Act of I Victoria, c. 26, and in this country, in many jurisdictions, the destruction of a later revoking will with intent to revive an earlier revoked will does not revive such earlier will.²⁵ The question then arises, What will happen, if a testator, ignorant that such is the law, does in fact tear up his later will with intent to set up the former?

This question first arose in England in *Dickinson v. Swat-*

²³ 15 Pick. 388 (1834).

²⁴ 122 Cal. 224 (1898).

²⁵ See AMERICAN LAW REGISTER, Vol. 48, p. 505, September, 1900.

*man.*²⁶ Deceased died in 1860. A will of 1826 was pronounced. The defendant pleaded the revocation of this will by a later will of 1851. Plaintiff replied that after the execution of the last will, the deceased revoked the same by tearing and burning it, when of sound mind. Sir C. Cresswell said, "To make this a case of dependent relative revocation you must introduce the ingredient that deceased intended that unless the will of 1826 stood, the will of 1851 was to stand. If he intended to make a new will the doctrine would not apply. This question may also be suggested, namely, whether he would rather have no will at all than the will of 1851." There was a declaration of intestacy.

This case seems to the writer sound law. In the first place there is no question that there was an intent to revoke the second will when it was destroyed. If that be so, what right has a court to go further and attempt to discover, by parol evidence, why the testator had an *animus revocandi*? But, as intimated by the learned judge in this case, even if the court by such evidence discovers that there was an intent to set up a prior will, this discovery will not help the court to ascertain what testator would have desired, as between intestacy and the destroyed will, unless there be evidence that he distinctly said that unless he could have the earlier will the latter should be his will. If there should be such evidence, would not the receipt and consideration of it be allowing a testator to make a will by spoken words merely?

But in *Powell v. Powell*²⁷ this case was disapproved and practically overruled. There it appeared that a testator made his will in 1862, and a second will revoking it in 1864. In 1865 he destroyed the will of 1864, saying he wished that of 1862 to be his will, and the question was whether, by the act of destruction the will of 1864 had been legally revoked. The court took the view, from the facts, that the destruction of the will of 1864 was done with the sole intention of setting up the will of 1862, and said that if this was the case, then the intent to revoke that of 1864 was

²⁶ 4 Sw. & Tr. 205 (1860).

²⁷ L. R., 1 P. & D. 209 (1866).

relative merely, and the will of 1864 ought to be set up, for the testator's intent with reference to that of 1862 could not be carried out.

In later cases²⁸ the English courts have recognized the authority of *Powell v. Powell*, but have distinguished it on the ground that in those cases the courts were not satisfied that the sole ground of the revocation was the intent to set up the earlier will. In *Powell v. Powell* the court professed, on consideration of all the facts, to be so satisfied. And in *Goods of Weston*²⁹ the court held that the declaration in favor of the first will must be contemporaneous with the destruction of the second. There it appeared that the testatrix made a first will, and a second revoking the first. Frequently she said she was dissatisfied with the second will and would go back to the first one. One day her daughter came into testatrix's room and saw the second will lying torn in the fireplace. She asked her mother what she had done and she replied that she had torn up her second will with the idea of relying on the first. The court refused probate to a copy of the second will, saying the case of *Powell v. Powell* was one where the declaration and destruction were simultaneous. There seems no logical ground for this distinction unless the court felt that the rule of *Powell v. Powell* is an unsatisfactory one and wished to narrow the case as much as possible. It has always been held in the case of parol evidence, to show *quo animo* a destruction of a will took place, that declarations of the testator before as well as after the destruction were admissible.

It is submitted that the rule of dependent relative revocation as administered in this class of cases in England is far from satisfactory. That it consists, at best, of a guess by the court as to testator's wishes, and that that guess is founded on parol evidence, the admission of which is practically the making of a will by parol. No cases of this sort seem to have arisen in American courts.

²⁸ *Eckersley v. Platt*, L. R., 1 P. & D. 281 (1866); *Wilch v. Garden*, 51 J. P. 760 (1887).

²⁹ L. R., 1 P. & D. 633 (1869).

IV.

Cases in which the doctrine of dependent relative revocation have been applied as often and as uniformly as anywhere are those which arise when a testator cancels or obliterates some particular legacy or some part of a provision in his will, and attempts by interlineation or writing over the erasure to substitute some other provision from that destroyed, but does not execute the substitution in accordance with the requirements of the statute of frauds. In such a case it is uniformly held that the doctrine of dependent relative revocation applies.

Perhaps the leading case, in England, is *Locke v. James*,³⁰ where it appears that X. devised certain realty to his son charged with the payment of an annuity of £600 to A. Afterwards he struck through the word "six" with a pen, leaving it still legible and wrote over it the word "two." The same day he made a codicil referring to the said alteration, but this was only attested by one witness. It was held that the £600 legacy had not been revoked. Baron Parke said, "What the testator in such case is considered to have intended is a complex act, to undo a previous gift, for the purpose of making another gift in its place. If the latter branch of his intention cannot be effected, the doctrine is that there is no sufficient reason to be satisfied that he meant to vary the former gift at all."³¹

This ruling has been applied to the striking out of one of two devisees in trust, and the substitution of others in his place;³² to the erasure of the names of the executors, and the substitution of other names;³³ to the erasure of the names of legatees and the substitution of other names;³⁴ to the erasure of the time of life at which a legatee is to be entitled to legacy, and the interlineation of a different age.³⁵ And in such cases the courts hold that in case of an obliteration

³⁰ 11 M. & W. 901 (1843).

³¹ See, also, *Kirke v. Kirke*, 4 Russ. 435 (1828); *Soar v. Dolman*, 3 Curt. 121 (1841); *Brooke v. Kent*, 3 Moo. P. C. 344 (1840).

³² *Short v. Smith*, 4 East, 419 (1803).

³³ *Goods of Parr*, 6 Jur. N. S. 56 (1859).

³⁴ *Goods of McCabe*, L. R., 3 P. & D. 94 (1873).

³⁵ *Sturton v. Wheelock*, 31 W. R. 382 (1883).

tion or erasure the court may hear parol testimony as to what the writing was which has been erased;³⁶ and in *Goods of McCabe*,³⁷ the court drew inferences from the relations existing between the parties to the suit and the testatrix, so as to determine who would most likely have been remembered by testatrix in the will as it originally stood, it being impossible from inspection of the will to determine what the words originally were. So in *Goods of Horsford*³⁸ the court took up strips of paper pasted over the original bequest to determine what was underneath. The American cases follow the same rule as the English cases.³⁹

The same comment applies to this line of cases as to the preceding one. If A. cancels a legacy of \$500 to B. and substitutes one of \$300, it is no more than a guess for a court to say that the testator would wish B. to have \$500 rather than that he should have nothing, if it were impossible for B. to have the \$300. *A fortiori* is this true in a case where A.'s name is substituted for B.'s. If A. cannot take there is, to the writer's mind, a presumption that testator would rather that no one should take, than that B. should. Nevertheless the rule is well settled.

V.

There remains but one class of cases, namely, those where a testator substitutes for an earlier bequest a later one to a charity or object which by reason of some positive rule of common or statutory law, cannot be carried out. In these cases there is no defect in the expression of the testator's substituted gift. It is only when it comes to the carrying out the testator's wish, that the legal difficulty is encountered. In these cases the revocation is held not to be relative, but absolute.

³⁶ *Brooke v. Kent* (*supra*).

³⁷ L. R., 3 P. & D. 94.

³⁸ L. R., 3 P. & D. 211 (1874).

³⁹ *Jackson v. Holloway*, 7 Johns. 394 (1811); *Stover v. Kendall*, 1 Cold. (Tenn.) 557 (1860); *Wolf v. Bollinger*, 62 Ill. 368 (1872); *Gardiner v. Gardiner*, 19 Atl. 651 (1890); *In re Thomas' Will*, 79 N. W. 104 (1899). In *Dixon's App.*, 55 Pa. 424 (1867) the facts were exactly similar to those of *Locke v. James* (*supra*), but the point was not raised.

Thus in *Tupper v. Tupper*,⁴⁰ testator made his will leaving his property to three different objects. There was a codicil revoking these bequests and leaving all the property to one charity which was disabled from taking by the mortmain acts. The codicil stated that he revoked the legacies and gave the charitable legacy in lieu thereof. It was held that the legacies to the first three objects could not be set up as the revocation was absolute, not dependent. The same result was reached in *Price v. Maxwell*.⁴¹

In *Quinn v. Butler*⁴² X., by will, created a charge on certain lands, to be paid to A. for life, and on his death gave him a power of appointment by will among his children. A made a will appointing four-sevenths to his son and one-seventh each to his three daughters. Subsequently he made a codicil revoking his former appointment and appointing it all to his son. This was void, because he did not have an exclusive power of appointment. On his death, the daughters claimed, on the ground that the first will was only revoked in the belief that the second appointment was valid. This contention was overruled by the court and *Tupper v. Tupper (supra)* was cited. Probate of the first will was refused.⁴³

It is somewhat difficult to see why, when the substituted gift cannot take effect because of improper execution of the will or codicil making it, there is a case of dependent relative revocation, the same thing should not be true when the substituted devise fails because of some other reason; in either case the testator's intent is the same. This summary of the cases is presented:

Sufficient has been said in connection with the above summary of the authorities to show what are conceived to be the important questions of principle involved in this doctrine of dependent relative revocation.

In all the variations of the doctrine recognized, save the first and last sorts, above noted, parol evidence is received to show, not with what intent a given act was done to the

⁴⁰ 1 K. & J. 665 (1855).

⁴¹ 28 Pa. 23 (1857); *Hairston v. Hairston*, 30 Miss. 276 (1855).

⁴² L. R., 6 Eq. 225 (1868).

⁴³ See, also, *Baker v. Story*, 23 W. R. 147 (1875).

testator's will, but, granted that he had an intent to revoke, why he had the intent. And then if the court makes up its mind that such intent was based on a given belief or condition, failing the truth of the belief, the testator would not have revoked. It appears to the writer that in most of the cases above cited the evidence was not sufficient in quantity or quality to justify such a conclusion as being the only conclusion the court could draw from the facts and circumstances of the case. *Non constat* but that the testator would have preferred intestacy to the supposed revoked will.

On the other hand, in the first sort of cases the court refuses to hear parol testimony to show that the revoking will or codicil was founded on a condition or supposition which proved untrue. This must appear from the face of the instrument itself, and the court refuses to draw any inferences. And such a dependent relative revocation may be rebutted by proof of any facts which would tend to show that the testator could not have meant his revocation to be dependent solely on the reason given.

In the fifth class of cases mentioned no dependent relative revocation is allowed, though presumably the testator's mental attitude is exactly the same as in the first and second classes.

It is submitted that the cases are not consistent, nor logical, and that so far as the doctrine extends beyond the class of cases represented by *Doe v. Evans*, *Mendinhall's Appeal*, or *Hayes v. Hayes*, it is whether tacitly or openly a departure from the true meaning of the statute of frauds. If the doctrine is to be recognized in all its forms, it would seem that it should be made at least consistent, as to the character and amount of proof required to make what would otherwise be an absolute revocation under the statute of frauds, a relative revocation, that is—in any case held to come within the rule, no revocation at all.

Owen J. Roberts.

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