CASE LAW

DEPENDENT RELATIVE REVOCATION

RE MILLS, DECEASED (No. 1)
RE MILLS, DECEASED (No. 2)

The doctrine of dependent relative revocation originated as a sort of conditional revocation, the condition being that another disposition which has already been made, or is intended to be made, should take effect.[1] Case law has extended the doctrine beyond its simple original scope. It has been applied where the condition relates, not to a second disposition, but to the law of intestacy: *Re Southerden, Adams* v. *Southerden.*[2] But in the last analysis the operation of this doctrine is still founded on the existence of a condition, express, implied or imputed.[3] This means that the doctrine can be applied with great flexibility, and so applied it possesses tremendous potentiality in salvaging testamentary dispositions from the operation of s. 13 of the Wills Probate and Administration Act 1898-1965 (N.S.W.). The New South Wales decision in *Re Mills, Deceased*[4] is a good illustration of this point.

The Facts

On 17th August, 1955, a testator made a will giving legacies to six persons, including Mrs. Tomlinson, W. Mills and E. Mills. The residue of his estate was given to Mrs. Menser. On 29th May, 1957, he made a second will. By this time W. Mills and E. Mills were dead, and Mrs. Tomlinson was seriously ill. This second will omitted the legacies given to these three people, but was identical with the first will in all other aspects. A general revocatory clause was inserted in the second will:

> I hereby revoke all former wills and testamentary writings at any time heretofore made by me and declare this to be my last will and testament.

One of the witnesses to the second will was Mr. Menser, husband of the residuary beneficiary under both wills. Section 13 of the Wills Probate and Administration Act clearly applied to avoid the residuary gift in the second will.

Probate was applied for by the executors (one of whom was Mrs. Menser) in alternative forms:

(a) a copy of the first will, or

(b) a copy of the first will together with a copy of the second will other than the revocatory clause.

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[1] See 39 *Halsbury's Laws of England* (3 ed. 1962) 899.

[2] (1925) P. 177.

[3] *In the Goods of Hope Brown* (1942) P. 136 at 138-39; see also F. C. Hutley, "Dependent Relative Revocation and Mistake" (1948) 22 *A.L.J.* 259.

[4] *Re Mills, Deceased (No. 1)* (1968) 88 W.N. (Pt. 2) (N.S.W.) 74; *Re Mills, Deceased (No. 2)* (1968) 88 W.N. (Pt. 1) (N.S.W.) 573.

At First Instance

Myers, J., sitting as the judge in Probate, dismissed the application.[5] His Honour treated the case as one of dependent relative revocation. The first alternative would, in his Honour's opinion, necessitate a finding that not only the revocatory clause but the whole of the second will was conditional on every disposition taking effect. The second alternative would, according to his Honour, involve the finding that the revocatory clause in the second will was dependent on every disposition therein, however trifling, being effective. He refused to make these findings.

His Honour also rejected an argument based on mistake: in his opinion the second will was duly executed and it was not shown that a real case of mistake of a relevant type had occurred before the execution.[6]

The most important part of his Honour's judgment was his opinion on a course he was not asked to take: the granting of probate of both wills including the revocatory clause, such clause to be applied distributively, so that the residuary gift in the first will would be preserved. The theoretical basis for such a grant would be that in relation to every disposition that was in both wills, the revocatory clause was intended to operate only if the one in the second took effect. If it did not, then the clause would not operate on its counterpart in the first will.

Myers, J. said he would not have taken such a course had he been asked to. His Honour preferred the Victorian decision of *Re Bourke*[7] to the South Australian decision of *Re Rich*.[8] These cases differ as to the facts; but the principle to be applied was the same in each case.

In *Re Rich*[9] the second will, except for one omission, contained identical dispositions to the first, with a general revocatory clause inserted. The husband of one of the beneficiaries witnessed the second will. Mayo, J. in the South Australian Supreme Court granted probate of both wills with a declaration that the disposition which failed in the second will was not revoked in the first. In effect, his Honour gave the revocatory clause a distributive operation, treating this as being one instance of the application of dependent relative revocation.

The Full Court of the Victorian Supreme Court, however, came to a different conclusion in *Re Bourke*.[10] The facts of this case were identical in all material aspects to *Re Rich*, except that the second will here did not omit anything but added an extra gift. The husband of a legatee witnessed the second will. The Court held that the doctrine of dependent relative revocation did not so operate as to make the validity of the legacy in the second will a condition for the revocation of its counterpart in the first.

But the same Court seemed to have changed its mind in a later case, *Re Tait*.[11] In this case there was an oversight in omitting several gifts from the second will. Otherwise, apart from several alterations, the two wills were identical. Testatrix was not aware of the omissions. The second will contained the usual revocatory clause. The Victorian Full Court in this case granted probate of the second will together with the devises in the first will which were omitted from the second. The reasoning of the Court seemed to indicate that this was an orthodox dependent relative revocation case: the revocatory clause in the second will, said their Honours, was con-

[5] His Honour's judgment was not reported.

[6] This is consistent with the High Court case of *Lippe* v. *Hedderwick* (1922) 31 C.L.R. 148, in which mistake was treated as operative only if it negatives the existence of an *animus revocandi*.

[7] (1923) V.L.R. 480.

[8] (1947) S.A.S.R. 98.

[9] *Supra* n. 8.

[10] *Supra* n. 7.

[11] (1957) V.R. 405.

ditional upon that will containing the same provisions as the first (except for the changes made by the Testatrix). The actual form of the grant, however, placed it beyond doubt that the Court gave a distributive effect to the revocatory clause. Indeed, Sholl, J. expressly recognised this,[12] though Martin and Lowe, JJ. treated the case as an ordinary one of dependent relative revocation.

In the Court of Appeal

The Court of Appeal unanimously upheld Myers, J.'s decision and generally agreed with his reasons.[13] But on that part of his Honour's judgment dealing with the course which he was not asked to take the Court of Appeal was divided in opinion.

Wallace, P. concluded that the revocatory clause did operate distributively, so that if a gift in the second will becomes void the clause will not operate on its counterpart in the first will. His Honour preferred *Re Rich*[14] to *Re Bourke*,[15] and cited *Re Tait*[16] in support. Reasoning from the premise that a will is really a series of dispositions, his Honour concluded:

> Whilst a revocatory clause in a later will *prima facie* relates to each and every dispositive clause in the earlier will, if an intention can be shown that the revocation is conditional in the case of one or more of such dispositions, I see no reason why in case of non-fulfilment of the condition the revocatory clause should not operate distributively.[17]

Jacobs, J.A. proceeded along much the same lines and came to the same conclusion as the learned President. A will is in essence a disposition or a series of dispositions, and when the testator says that he revokes all former wills and testamentary writings he is, in his Honour's view, "referring to such wills and testamentary writings not as mere documents but as dispositions and appointments . . . when the testator in the present case said that he revoked all former wills and testamentary writings I think that his words should be construed as a revocation of the aggregate of his testamentary intentions rather than as a revocation of a document or documents."[18]

To fortify his conclusions, his Honour remarked that it would be regrettable if a doctrine that had at times defeated the primary intentions of testators could not operate in this case, where its operation would undoubtedly fulfil the testator's unqualified intention in respect of his residue.

Walsh, J.A. disagreed strongly with his colleagues and held that the revocatory clause in this case could not be given a distributive effect. As opposed to Wallace, P. and Jacobs, J.A. his Honour came close to saying that the general revocatory clause operated not as a revocation of each and every one of the testator's testamentary intentions in the previous will but as a revocation of the whole will as a document. It seems that Walsh, J.A.'s basic reason for his conclusion was that his colleagues' views involved giving to the revocatory clause an interpretation which it cannot bear. If this is a correct interpretation of his Honour's judgment then it follows that he was not rejecting the proposition that a revocatory clause can be so drafted that dependent relative revocation will operate distributively. This makes his Honour's disagreement with his colleagues one of interpretation of the

[12] At 418.
[13] *Re Mills (No. 1)*, *supra* n. 4.
[14] *Supra* n. 8.
[15] *Supra* n. 7.
[16] *Supra* n. 11.
[17] *Re Mills (No. 1)*, *supra* n. 4 at 78.
[18] *Id.* 86.

particular testator's intentions, and not one of principle. The disagreement will then merely illustrate the point that the existence of the condition and its nature is to be ascertained as a question of fact in each case.

Back to First Instance

After the Court of Appeal decision a second application was lodged for grant of probate. The Registrar referred the matter to Helsham, J. whose decision became, for New South Wales, the first on the distributive operation of dependent relative revocation.[19]

What was said in the Court of Appeal concerning the distributive operation of the revocatory clause through the doctrine of dependent relative revocation was strictly *obiter dicta*. Helsham, J. was, in theory anyway, free from binding authority on the point. His Honour, however, accepted the majority view (Wallace, P. and Jacobs, J.) in the Court of Appeal as correctly stating the law. He then proceeded to examine whether the doctrine of dependent relative revocation does apply and applies distributively in the present case. His Honour's starting point was stated thus:

> The determination of whether there has been any revocation and, if so, in what manner it operates, seems to me to be essentially a question of fact upon which I must make a finding, seeing that the matter was not before their Honours upon or for such a finding.[20]

This is strong support for the proposition that the question of the applicability of dependent relative revocation in a distributive manner is a question of interpretation of the will concerned. And this, as submitted above, is the ground on which it can be said that Walsh, J.'s "dissent" was not on a matter of principle, but rather on a point of interpretation.

Helsham, J. concluded that the proper inference to be drawn was that the words of revocation in the second will should be read as operating not absolutely upon all the dispositions contained in the first will, but conditionally upon them, so that such words of revocation should not be effective to destroy those prior dispositions which were not effectively repeated in the second will. This was the intention of the testator as his Honour saw it and he concluded that the doctrine of dependent relative revocation applied to give effect to such an intention. The residuary gift in the first will was, therefore, not affected by the revocatory clause in the second.

At this juncture it is clear that the doctrine is being used to avoid what seems to be a regrettable state of affairs. This is laudable. But as a matter of reality the testator probably did not contemplate what would happen if a disposition in the second will failed. The interpretation placed on the revocatory clause is not necessarily the real intention of the testator. The application of the doctrine of dependent relative revocation in this case is really a judicial attempt to mitigate the drastic effect of s. 13 of the Wills, Probate and Administration Act, 1898-1965 (N.S.W.).

The next question Helsham, J. had to answer was: what form should the grant of probate take? Three alternatives presented themselves:

(a) the whole of the second will plus the unrevoked part of the first will (that is, the residuary gift);
(b) both wills with a declaration as to the operation of the revocatory clause;
(c) the second will together with the unrevoked portions of the first will plus a declaration on the effect of the revocatory clause.

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[19] *Re Mills (No. 2)*, *supra* n. 4.
[20] *Id.* at 577.

All three alternatives have support in authorities.[21] It is submitted that the first is the correct course, on the principle that only testamentary documents should be admitted to probate. The second alternative raises the question of how far a court of probate can bind a court of equity regarding the interpretation of a will. Helsham, J., however, adopted the second course on the ground that it best clarified the position.

Conclusion

Because of the lack of binding authority and the existence of differing judicial opinions, it is uncertain whether Helsham, J.'s decision will be treated as a correct statement of the law. In the present case, the New South Wales Court was confronted with a vacuum as far as binding authority is concerned, and in choosing as it did it probably went against the legislative policy embodied in s. 13 of the Wills Probate and Administration Act. Perhaps this section is disliked by the courts for it has led to injustice more often than it has prevented fraud.[22]

It seems probable that the present case will be followed: the trend among the courts is to uphold as far as they can what they regard as the testator's probable preference had he been confronted with the full legal consequences.

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AN EXERCISE IN SHADOW-BOXING

MADZIMBAMUTO v. *LARDNER-BURKE AND OTHERS*[1]

The Facts

In 1923 Southern Rhodesia was annexed by the British Crown.[2] In the same year the Legislative Assembly of Southern Rhodesia was established, with power to pass legislation for the peace, order and good government of the Colony. All legislation had to be assented to by the Governor, who was appointed by the British Crown which retained the power of disallowance of any law within one year of the Governor's assent. Nevertheless, although the Statute of Westminster did not refer to the Colony, by 1961 it had become an established convention that the Parliament of the United Kingdom would not legislate for the Colony in matters within the competence of the Legislative Assembly of Southern Rhodesia except with the agreement of the Southern Rhodesia Government.[3] In 1961 the United Kingdom granted

[21] The first alternative has the support of Jacobs, J.A. in *Re Mills (No. 1)* at 86; the second, that of Wallace, P. in *Re Mills (No. 1)* at 78, and of *Re Rich, supra* n. 8; and the third, that of *Re Tait, supra* n. 11.

[22] A remarkable example is the recent English case of *In the Estate of Bravda* (1968) 2 All E.R. 217.

[1] (1969) 1 A.C. 645.

[2] Southern Rhodesia (Annexation) Order in Council, 1923. This was made on 30th July, 1923, but was not numbered in the Statutory Rules and Orders series.

[3] Statement made by the U.K. Government in 1961. See *Cmd.* 1399. Sir Humphrey Gibbs, in his Speech from the Throne in 1962, said: "My Ministers have received the clearest assurances from Her Majesty's Government that they cannot revoke or amend the Constitution" (quoted by Macdonald, J.A. in *R.* v. *Ndhlovu & Ors.* (1968) 4 S.A.L.R. 515, at 543). *Sed quaere* whether the speech had carried the assent of the British Government.