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The Doctrine of Dependent Relative Relocation in Kentucky

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THE DOCTRINE OF DEPENDENT RELATIVE REVOCATION IN KENTUCKY

The doctrine of dependent relative revocation in the law of wills is based essentially upon mistake. In all cases where a testator attempts to revoke an existing will by an act of cancellation or mutilation to the instrument itself, the act of cancellation or mutilation, in order to effect a revocation of the existing will, must be done with the intention to revoke. The intention and the act must concur. Otherwise the act is void. Thus, the doctrine has been stated by an eminent English text writer as follows: "Where the act of cancellation or destruction is connected with the making of another will so as fairly to raise the inference that the testator meant the revocation of the old will to depend upon the efficacy of the new dispostiion, such will be the legal effect of the transaction; therefore, if the will intended to be substituted is inoperative for defect of attestation or any other cause, the revocation fails also and the original will remains in force."[1] The basic theory of this doctrine is that the intention of the testator at the time he did the act to revoke the existing will was conditioned upon the validity of some other testamentary paper which he was about to make. If the other testamentary paper was never established, the prior intent was not effective to give effect to the act. Then, since there was only an act of revocation without an intent to revoke, the act was void and the recovation was not accomplished. This doctrine is called the doctrine of dependent relative revocation. That is, the attempted revocation was dependent upon a related act which never came to pass. Therefore, there was, in law, no revocation at all. The original will still stands as it did in the first instance. The intention of the testator is the test of the doctrine in all cases.

The general doctrine in its entirety is applied in something more than half of the states. It is accepted in many other states with certain limitations.

In Kentucky we are confronted with a rather unique situation. So far as we have been able to find by a thorough search of the books, there is no case in Kentucky that even considers the doctrine of dependent relative revocation as such. The

[1] 1 Jarman on Wills 160.

courts of this state have neither accepted or rejected it in express terms. In no decision in this state are the words "dependent relative revocation" used. However, there are several cases in Kentucky that seem to involve the doctrine in substance. We now turn to consider these cases to determine, if possible, the probable effect they would have should the question be presented to the courts of this state in a proper case.

In the case of *Youse* v. *Forman*[2] there is a dictum as follows: "There is a class of cases, to which, however, this does not belong, where the testator does an act of cancellation or mutilation with the view of having his will immediately changed or altered; where the act of cancellation and the reconstruction of the will are intended as a part of the same transaction, and the reconstruction or republication of the will is not perfected, then the acts of cancellation are to be regarded also as incomplete because of the failure of the other essential acts." This proposition, although it is dictum only, seems to involve the doctrine of dependent relative revocation in a modified or limited form. But it would seem to limit it to the cases where the cancellation and the reconstruction of the new will are part and parcel of the same transaction.

In the case of *Wells* v. *Wells*[3] the court of the county where the testator died refused to probate the will because, according to the view of the county court, it had been revoked by the testator before it was offered for probate. The will that was offered for probate was proved by the subscribing witnesses thereto. The capacity of the testator was not questioned. The will when first executed was acknowledged and published. Some time afterwards—the case does not say how long—the testator sent for the amanuensis who wrote the will and one of the witnesses thereto. The testator told the draftsman that he (the testator) had determined to change one of the executors named in the original will, and to substitute another executor in his stead. The person who wrote the will then erased the name of that executor from the original will and inserted in the same place the name of another individual whom the testator chose as executor. After this erasure and insertion there was no formal publication of

[2] 5 Bush 337.
[3] 4 T. B. Monroe 152.

the will before the same or other witnesses, or any other attempted compliance with the requisites of the statute. This was the only ground urged by the contestants to invalidate the original will. The county court held that the original will had been revoked by the erasure and substitution, and refused to allow it to probate. The upper court reversed the lower court and ordered the will to be probated. The opinion of the court on this this point is as follows:

"It must strike every one who hears this statement that to make such an act amount to the revocation of a will, once valid and well executed, is to torture the act of the testator to speak a language directly contrary to his evident intention; and the intention must always be sought for in express revocations. This erasure did not and could not affect a single devise or bequest; but rather confirmed them. So well settled is the law on this subject that striking out without republication even the name of a devisee after the publication of the will has been held to be a revocation pro tanto only. Much stronger is the reason for not holding the exchange of the name of an executor to be a revocation. The power of an executor generally extends to the personal estate only; he may be appointed or exchanged with one witness only.

"The judgment of the county court is therefore held erroneous and must be reversed with costs. The will must be admitted to record in this court, as fully proved, and then remanded to the court below, there to be recorded and preserved, as fully proved in this court."

The judgment admits the will to record in the upper court, as fully proved, and then remands it to the lower court, there to be recorded and preserved, as fully proved in the upper court. This is provided for in the specifice words of the judgment. But so far as we can determine from the opinion in the case the court did not say who was to be the executor of the will. There are three possibilities: First, that the original will as it stood before the change was made was probated just as if there had never been any attempted revocation of it and the persons named therein as the executors of the estate were declared by the county court to be the executors of the will as probated. Second, that the erasure and insertion were considered as a revocation pro

tanto only and the will admitted to probate with the name of one executor stricken out and the other remaining executor made the sole executor of the estate under the will as probated in this instance. Third, that the county court probated the will as it stood after the erasure and insertion and allowed both of the persons named therein as executors to be the executors of the will as it was probated in the country court. In the first case the doctrine of dependent relative revocation applies. The situation is treated as if the erasure and insertion were made only on the condition that the will as it stood after the change was made was valid. Then, since the altered will was not duly executed in compliance with the statute, as the testator intended, the change did not amount to a revocation of the part altered and the whole will as originally executed still stands just as if no attempt had been made to change it. This view of the case represents the doctrine of dependent relative revocation in its general application. In the second proposition advanced, *supra,* the doctrine of partial revocation applies without regard to the doctrine of dependent relative revocation. The idea here is that the erasure amounted to a revocation pro tanto only of the original will and that the inserion of the name of another person as executor, not being duly attested, did not become a part of the partially revoked will. The third case seems to be the most improbable of the three propositions advanced above as to the possible final disposition made of the case in the county court under the decree of the upper court remanding the case with instructions to the county court to probate the will. That is, it seems absurd to say that the county court probated the will as it stood after it was changed because the altered instrument was never duly attested nor was the alteration therein ever attested by the witnesses to the original will or by other witnesses. Therefore, it is almost certain that this view of the case is erroneous and was not applied by the county court in making a final disposition of the case.

In determining who will be the administrator of the estate in a case of this sort the court will first have to decide whether the doctrine of dependent relative revocation is to obtain at all in the jurisdiction in which the court is. If it does not obtain in that jurdisdiction, then the court will probably apply the

doctrine of partial revocation and allow the will to be probated as it stood after the erasure was made. But if this question arises in a jurisdiction where neither the doctrine of dependent relative revocation nor the doctrine of partial revocation is recognized, then the court must declare the whole will to be void when it is presented for probate. If, however, the question comes up in a state where the doctrine of dependent relative revocation prevails, and also the doctrine of partial revocation, the court will first have to decide whether the case at hand is one in which either doctrine should be applied. In such a case the decisive question will be whether the testator intended the act or erasure and insertion to be an unconditional revocation pro tanto only of the will or whether the intent of the testator was to make such act or erasure and insertion contingent on the validity of the altered instrument. If the latter is the case, then, since the act or erasure and insertion was void for want of proper attestation, the doctrine of dependent relative revocation applies and the will should be probated as originally drawn.

Even in the jurisdictions where the doctrine of dependent relative revocation obtains it is not ordinarily applied in the cases where the testator destroys his will, when, at the time of destroying the will, he merely intends at some indefinite future time to make another will. This proposition was laid down in the case om *Semmes* v. *Semmes*,[4] a Maryland case where the doctrine of dependent relative revocation is generally applied in its full scope. The indefiniteness of the time at which the future will is to be made seems to have a great deal to do with this decision. Most other jurisdictions follow the same rule. We may well expect the same principle to apply to the cases in Kentucky if the doctrine is ever expressly recognized in this state. And although the words "dependent relative revocation" are not expressly used, this very proposition was raised in the Kentucky case of *Sanders* v. *Babbitt*.[5] In this case the county court refused to probate a certain instrument propounded as a last will and testament. In December, 1892, the testator had one of his neighbors write his will at his dictation which he subsequently signed in the presence of two witnesses, who attested the will

[4] 7 Har. & J. (Md.)
[5] 106 Ky. 646, 51 S. W. 163.

at his instance and request. He then gave the will to one of the witnesses to keep until his death. Two years later he took the will away from the witness to whom he had given it, telling him as a reason for his taking it away that he wanted to make some changes in it. Later he sent for the other subscribing witness and told him what he wanted to do. After some discussion as to the proper way to make the proposed changes, the testator told the witness to cut his name and the names of the subscribing witnesses from the paper, leaving the body of the instrument unchanged. Then the witness in the presence of and by the direction of the testator, made on the paper several additional bequests to the children of the testator and gave the instrument back to him, so he could have it properly attested. The testator died within a year and this instrument was found among his other papers, signed in his own handwriting but not attested. The fourth clause of the will had been cancelled by being interlined in the testator's own handwriting and a memorandum had been made on the will by him explaining his reasons for cancelling the fourth clause. The testator had never asked the witnesses of the original instrument to attest the will after the addition had been made to it. When the will was offered for probate, the county court rejected it on the ground that the cutting of the names of the testator and subscribing witnesses therefrom by the testator's direction and in his presence was a revocation of the will, and the paper never having thereafter been re-executed as required by statute, it was adjudged by the court that the instrument as offered was not entitled to be probated as a last will and testament. The upper court was asked, on appeal, to direct the county court to probate that part of the will which remained after the signatures of the testator and of the attesting witnesses were cut off, upon the ground that the cutting of the signatures from the will by the direction of the testator was not done with the intent to revoke the will unconditionally and, at all events, and that the addition thereto should only be treated as a codicil. The Kentucky statute in regard to the revocation of wills is a substantial re-enactment of the English Statute of Frauds. It requires the act of revocation to be done with the intent to revoke the will. The upper court held in this case that the act of the testator in having his name and the names of the

subscribing witnesses cut from the will indicated an intention on his part to revoke the will unconditionally and at all events and without any direct regard to future events or contingencies. The opinion in part on this point is as follows:

"It is apparent that the controlling fact to be ascertained in passing upon the question of revocation is, what was the intention of the deceased in having the signatures of himself and of the attesting witnesses clipped from the paper? The signature is certainly an essential part of the will. Without it there can be no will, and, if it was the purpose of the deceased to revoke his will, no more effectual means could have been resorted to, short of the total destruction of the paper. The evidence of such intention is fortified by the fact that, in addition to cutting off the signatures of himself and of the subscribing witnesses, he made a number of important and material changes in the disposition of his property, both by adding other clauses, and by erasing provisions previously inserted. It is certain that the paper sought to be probated is essentially different from that from which the signatures were clipped, and this is in itself persuasive of the intention of the deceased to revoke the other; and that he thought the old will was revoked is conclusively shown by the fact that he informed the draftsman, after the additions had been made, that he would have the new document properly attested when the witnesses came out. After careful consideration of all the facts and circumstances connected with the mutilation of the old will, we are of the opinion that it was done by the deceased with the intention of revoking it, and, as the new will has never been revived by a re-execution thereof as provided by law, it was properly rejected as the last will and testament of decedent. For the reasons indicated the judgment is affirmed."

The mere fact that the court refused to apply the doctrine of dependent relative revocation in this case does not positively mean that the doctrine could not be invoked in a proper case in Kentucky. If the facts of this case are transferred to a jurisdiction where the doctrine of dependent relative revocation is recognized in express terms and applied in its full scope, it is still not such a case as would come within the rule. The mere fact that the testator destroys his will intending to make an-

other will at some indefinite future time and fails to make the will as he intended is not of itself a sufficient reason to invoke the doctrine even in the states where it would ordinarily apply in a proper case. This point was decided in the case of *Semmes* v. *Semmes, supra.* The doctrine of dependent relative revocation will never apply where a person has deliberately and intentionally cancelled his will, intending the cancellation as unconditional, even though he may intend to execute another will at some indefinite future time. Therefore, the case of *Sanders* v. *Babbitt, supra,* is not authority in point for the proposition that the doctrine of dependent relative revocation is rejected in the law of Kentucky.

The result of our search of the books for cases in Kentucky applying or rejecting the doctrine of dependent relative revocation in express terms is "no cases found." But the cases discussed above seem to involve the doctrine in some form even though it may be only a modified form. The Kentucky court has not precluded itself from adopting the doctrine of dependent relative revocation if and when a case involving such a revocation is presented to it and argued squarely on the basis that where the act of cancellation or destruction is connected with the making of another will so as fairly to raise the inference that the testator meant the revocation of the old will to depend upon the efficacy of the new disposition, such will be the legal effect of the transaction; therefore, if the will intended to be substituted is inoperative for defect of attestation or any other cause, the revocation fails also and the original will remains in force.[6]

WOODSON D. SCOTT.

[6] Jarman on Wills, *supra,* note (1).