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The Doctrine of Dependent Relative Revocation in Pennsylvania

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COMMENTS

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I. Introduction

An effective revocation[1] of a will requires that two concurrent conditions be fulfilled: decedent must have evidenced an intent to revoke—the *animus revocandi*—and an overt act[2] indicative of this intent.[3] Questions ordinarily arise in cases in which the testator makes a valid will, but then revokes the original bequest or will in connection with a subsequent, invalid substitution. This often presents a court with an election: it must either recognize the revocation of the original will, which causes the estate or a part thereof to fall into intestacy or into the residuary, or apply the doctrine of dependent relative revocation, which results in a reinstatement of the original will or bequest.[4]

This comment will examine the theory of the doctrine of dependent

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1. Revocation in Pennsylvania is governed by statute. The applicable statute provides,

> No will or codicil in writing, or any part thereof, can be revoked or altered otherwise than:
> (1) Will or codicil. By some other will or codicil in writing;
> (2) Other writing. By some other writing declaring the same, executed and proved in the manner required of wills; or
> (3) Act to the document. By being burnt, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revocation, by the testator himself or by another person in his presence and by his express direction. If such act is done by any person other than the testator, the direction of the testator must be proved by the oaths or affirmations of two competent witnesses.

20 PA. CONS. STAT. ANN. § 2505 (Purdon 1977).

2. "Not only must there be the present intent to revoke the testamentary writing, but the overt act must be such as to intend accomplishment of a present revocation rather than a contemplated future change of that instrument or writing." Deist Estate, 75 Pa. D. & C. 145, 152 (O.C. Som. 1950).

3. Parol declarations, without physical evidence of intent to revoke, are insufficient to revoke a will. Hildebrand Will, 365 Pa. 551, 76 A.2d 202 (1950). An apparent act of revocation that complies with the formalities of the Pennsylvania Wills Act establishes a presumption of revocation that can be rebutted by evidence of a contrary intent. *See* Ervien Will, 427 Pa. 64, 233 A.2d 887 (1967) (the decedent, who was blind, unintentionally discarded her will among trash papers. The presumption of revocation was overcome by evidence both of her blindness and of an absence of *animus revocandi*).

4. This assumes that ordinary will principles and presumptions cannot be invoked to restore the original will. There are a number of Pennsylvania cases in which it is arguable whether the doctrine or conventional will presumptions were applied. *See* cases cited in note 154 *infra*.

relative revocation, the present scope of its application in Pennsylvania, and problems encountered whenever it is advocated.

II. A Problem of Definition

Since the doctrine's inception,[5] commentators have been unable to agree on a definition of dependent relative revocation.[6] A comparison between two of the most commonly quoted definitions of the doctrine dramatizes this point. Jarman states,

> Where the act of 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 to depend upon the efficacy of the new disposition intended to be substituted, such will be the legal effect of the transaction; and therefore, if the will intended to be substituted is inoperative from defect of attestation, or any other cause, the revocation fails also, and the original will remains in force . . . .[7]

Jarman's rendition of the doctrine of dependent relative revocation, despite its age and the appearance of more modern definitions,[8] has been cited in many Pennsylvania court opinions,[9] and, until recently,[10] has been unquestioningly accepted as the accurate statement of the law as it has been applied in Pennsylvania.

Atkinson puts forth a different view of the doctrine:

> When a testator purports to revoke his will while laboring under a mistake of law or fact in connection therewith, the courts often declare that revocation is dependent upon the existence of the situation as believed by the testator and accordingly hold that the will is not revoked. Instead of this fiction of conditional revocation, it is more realistic to treat the problem as one of

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5. The origin of the doctrine is well explained in Linkins v. Protestant Episcopal Cathedral Foundation, 187 F.2d 357, 359 (D.C. Cir. 1950) in which the court said,

> There is nothing new or novel about the problem thus posed. At least as early as 1716 the English courts were dealing with it. In that year *Onions v. Tyrer* was decided, and the report of the opinion of Lord Chancellor Cowper (as it appears in the Peere Williams reports) [1 P. Wms. 344. 24 Eng. Rep. R. 418] shows in some detail the reasoning of his Lordship. His view was that the cancellation of the first will, although ordered by the testator, 'depended on the validity of the second will, and ought to be taken as one act done at the same time, so that if the second will is not valid, as the testator thought it was, and without which he would not have cancelled the first, the cancelling the first will, depending thereon, ought to be looked upon as null also, and therefore the first will as to the said lands, is still subsisting and unrevoked.' His Lordship rested his conclusions upon the fact that the disposition of the land in question in the second will was the same as it was in the first will, which, he pointed out, 'shews he did not mean to revoke his first will as to the devise of these lands, unless he might by the second will (at the same time that he revoked the former) set up the like devise.'

6. Professor Warren places the blame for the polysyllabic tongue-twister on Mr. Powell, author of POWELL ON DEVISES (1788), the first testbook on wills. *See* Warren, ***Dependent Relative Revocation***, 33 HARV. L. REV. 337, 338 (1920).

7. 1 JARMAN, WILLS 135 (7th ed. 1930).

8. *See, e.g.*, 2 PAGE, WILLS § 21.57 (Bowe-Parker Rev. 1976); SUM. PA. JUR. INTESTACY AND WILLS, § 259 (Supp. 1977) [hereinafter referred to as PA. JUR.]. *See also* note 11 and accompanying text *infra*.

9. *See, e.g.*, Braun Estate, 358 Pa. 271, 56 A.2d 201 (1948); Price v. Maxwell, 28 Pa. 23 (1857); Baily Estate, 35 Pa. D. & C.2d 225 (D. C. Montg. 1964).

10. *See* notes 173-74 and accompanying text *infra*.

> mistake, holding the revocation absolute or void in accordance with which position the individual testator would probably have preferred.[11]

Some courts and writers such as Jarman refer to the doctrine as a judicial tool for the ascertainment of the testator's *actual* intent.[12] Accordingly, a distinction must be made between three types of intents. First, the doctrine of dependent relative revocation focuses on the intent to revoke.[13] This must not be confused with the second type of intent—the intent to make a substitution.[14] The third intent, a creature of the doctrine of dependent relative revocation, is a fictional, conditional intent.[15] A court applying the doctrine construes this final species of intent to grant relief in certain cases in which the testator's actual intent to make a substitution is frustrated. The doctrine is superfluous if the testator's actual intent can be honored.[16] Purportedly, the fiction is adopted to grant relief in accord "with what the testator would probably have intended had he known of the error."[17]

A. The "Pole Star" Fallacy

The case law indicates that the mechanics of the doctrine are misunderstood in Pennsylvania. The leading Pennsylvania case that expressly applied the doctrine, ***Braun Estate***,[18] initiated a discussion of the doctrine by deeming it "a rule of testamentary construction whose use . . . is limited to aiding in the ascertainment of a testator's *true* intent."[19] The statement is patently incorrect. In ***Braun***, there was an express, written revocation of a former bequest by a codicil that failed to include a dollar amount in the substituted bequest.[20] ***Braun*** ignored the

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11. ATKINSON, WILLS § 88 (2d ed. 1953).

12. Braun Estate, 358 Pa. 271, 56 A.2d 201 (1948) ("true intent"); PA. JUR., *supra* note 8, at § 259 ("actual intent").

13. *See* notes 61-68 and accompanying text *infra*.

14. The dissimilarity of these two forms of intent is demonstrated in Holt Estate, 405 Pa. 244, 174 A.2d 874 (1961), and in Emernecker's Estate, 218 Pa. 369, 67 A. 701 (1907). *See* note 108 *infra*.

15. In general the doctrine of dependent relative revocation applies to invalidate the revocation of a will where it is shown that the revocation was conditioned on the occurrence of certain facts which never came to pass or upon the existence or nonexistence of circumstances which were either absent or present contrary to the condition. The courts very frequently apply the same doctrine where the revocation is carried out because of a purely mistaken frame of mind rather than a conditional frame of mind; but the courts still persist in calling it a conditional revocation. The end result in this type of case is perhaps proper, but it would be much better to recognize it for what it is, a mistake, and then proceed to formulate the proper rule. A mistaken frame of mind is really quite different from a conditional frame of mind, and it involves a needless and highly fictional process to pretend that an act unconditionally done by a person who never doubts the truth of the erroneous beliefs which motivate him is in reality done conditionally.

2 PAGE, *supra* note 8, at § 21.57.

16. Such is the case when there is an express conditional intent. *See* notes 27-51 and accompanying text *infra*.

17. ATKINSON, *supra* note 11, at § 88, 463.

18. 358 Pa. 271, 56 A.2d 201 (1948).

19. *Id.* at 273, 56 A.2d at 202 (emphasis added).

20. *See* notes 101-05 and accompanying text *infra*.

distinction between the testator's actual intent to revoke and the constructive, conditional intent to revoke, which is created by the doctrine.[21] The actual intent in the applicable case must always be to revoke the original will or bequest and to make a new provision.

A *Braun*-type error is committed when courts misapply the maxim that "[t]he pole star in the construction of every will is the testator's intent."[22] In the ordinary case, the ability of a court to infer or impute intent is strictly limited to the meaning of the words as they appear on the face of the instrument.

> In determining the testator's intention—if no uncertainty or ambiguity exists—his meaning must be ascertained from the language of his will; it is not what the court thinks he might or would have said in the existing circumstances, or even what the court thinks he meant to say, ***but what is the meaning of his words***.[23]

The point is that the doctrine of dependent relative revocation does *not* apply to the ordinary case, in which a revocation must be accepted at face value. Rather, it applies in the unusual case in which the former and subsequent dispositions of a will "interpreted together"[24] "raise the inference that the testator meant the revocation of the old to depend upon the efficacy of the new disposition intended to be substituted."[25]

Thus, the doctrine of dependent relative revocation requires "looking beyond" the mechanical meaning of the instruments to achieve a more equitable result than would be achieved by adherence to strict canons of construction. Since the actual intent of the testator to provide a substitute cannot be carried out,[26] the court invokes the doctrine to grant the next best relief, which is the gift contained in the former will or bequest.

B. Express Conditional Revocation

The doctrine of dependent relative revocation *should not* apply when the intent of the testator is expressly conditional.[27] There is no need to

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21. *See* note 15 *supra*.
22. Wright Estate, 380 Pa. 106, 107, 110 A.2d 198, 199 (1955).
23. *Id.* at 108, 110 A.2d at 199; Conner's Estate, 346 Pa. 271, 29 A.2d 514 (1943).
24. Braun Estate, 358 Pa. 271, 275, 56 A.2d 201, 203 (1948).
25. JARMAN, *supra* note 7, at 135. Jarman's definition apparently renders the doctrine applicable to conditional revocations.
26. It would appear to have been a rare case in which the doctrine of dependent relative revocation was invoked and the testator's true intent was carried out. This occurred when the former and subsequent provisions were identical in ***all material aspects***. Curiously enough, in Pennsylvania the doctrine has been expressly applied only in such cases. *See* notes 101-20 and accompanying text *infra*.
27. For example, a testator might make a will and in a codicil state that the first will should remain in effect in its unamended state unless the testator lives past a specified date. If the testator does not live until that date, the express condition will be given effect and the original will remains unrevoked. Hamilton's Estate, 74 Pa. 69 (1873). This situation arose in a case in which a provident testator conditioned the efficacy of a second will upon his surviving the thirty-day period essential to the validity of charitable gifts. The court followed the letter of the testator's intent and held that the original will remained in force. Bradish v. McClellan, 100 Pa. 607 (1882).

construct the edifice of fictional, conditional intent if the conditional intent has been provided expressly by the testator. In this case, a court must follow the dictates of the testator's intent and should not resort to unnecessary and confusing constructions. The doctrine applies only when the revocation, standing alone, is effective and unconditional.[28] The revocation can be express or implied,[29] but it cannot be expressly conditional.

A problem of interpretation arises when the testator states reasons or facts upon which he based his revocation or subsequent disposition.[30] The classic decision in this area is the English case of *Campbell v. French*,[31] in which a gift to certain grandchildren was revoked, "they being all dead."[32] The revocation did not have its effect because they were in fact alive.[33] No absolute rule has been developed to dispose of this situation, although Page makes a distinction between a recital of reasons or facts that are apparently material to the change in the will and reasons or facts that do not appear to have affected the testator's actions.[34] The situation also can be viewed as one of mistake.[35]

C. The Relation of the Doctrine to Relief for Mistake

In general, the plain meaning of the language of a will is honored without resort to the rules of construction.[36] Given the presumptions that the testator knows the contents and legal effect of a will, courts have been generally unwilling to grant relief in cases of mistake. Nevertheless, some courts, within strict limits, are willing to grant relief for certain kinds of mistake. The mistake, however, "must appear on the face of the will, and it must also appear what would have been the will of the testatrix but for the mistake."[37]

Several leading authorities have recognized that the doctrine of dependent relative revocation has its basis in granting relief for mistake.[38]

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28. *See* notes 24-25 and accompanying text *supra*.
29. Braun Estate, 358 Pa. 271, 56 A.2d 201 (1948) (express revocation); Shelly Will, 27 Pa. Fiduc. 42 (O.C. Montg. 1976) (implied revocation).
30. *See* 2 PAGE, *supra* note 8, at § 21.64 (Supp. 1976).
31. 3 Ves. Jr. 321, 30 Eng. Rep. 1033 (1797).
32. *Id.* at 321, 30 Eng. Rep. at 1033.
33. *Id.*
34. 2 PAGE, *supra* note 8, at § 21.64 (Supp. 1976).
35. *See* note 37 and accompanying test *infra*.
36. Lyman Estate, 366 Pa. 164, 76 A.2d 633 (1950). In Earle Estate, 369 Pa. 52, 85 A.2d 90 (1952), the court stated that "it is our first duty to examine the will and if possible ascertain its meaning *without* reference to canons of construction." *Id.* at 56, 85 A.2d at 93. "It has long been established that, execution of a will having been proved, knowledge of the contents is presumed." Rusinki Will, 14 Pa. Fiduc. 30 (O.C. Montg. 1963). Also, "even if persuaded by the testimony of contestants that the will in question does not represent decedent's actual testamentary intention, the court is unable to upset the unambiguous provisions of the will." *Id.* at 34.
37. Gifford v. Dyer, 2 R.I. 99, 57 Am. Dec. 708 (1852).
38. The leading article on the subject is Warren, *supra* note 6. *See also* ATKINSON, *supra* note 11, at § 88; 2 PAGE, *supra* note 8, at §§ 21.57-.65; Cornish, *Dependent Relative Revocation*, 5 S. CAL. L. REV. 273, 393 (1932); Evans, *Testamentary Revocation by Act to*

The mistake of the testator, whether of fact[39] or of law,[40] results in a defect in the substitution. In Pennsylvania, the nature of the cause of the defect will determine whether the doctrine will apply.[41] Although the definitions of Jarman[42] and Atkinson[43] base no distinction on the nature of the cause of the defect, the Pennsylvania courts distinguish between defects that are intrinsic and extrinsic.[44] The distinction has arisen merely as a means of limiting or denying application of the doctrine. Two modern authors have criticized the distinction as follows:

> It is quite apparent from the cases that the origin of this distinction lay in cases concerning the invalidity of charitable gifts made within thirty days of death, which invalidity results from statute and is therefore extrinsic. The perpetuation of this distinction hardly seems justified since the enactment of the Wills Act of 1947, wherein it is provided that substituted charitable gifts shall be valid to the extent that they were valid in the original testamentary writing, notwithstanding death within thirty days. In other words, the vitality of the distinction has been weakened by statute with regard to charitable gifts, while it apparently subsists in the area of noncharitable gifts . . . .[45]

If the courts were to recognize that the doctrine of dependent relative revocation was devised to grant relief from mistakes, problems such as the intrinsic-extrinsic distinction might be avoided.[46] This simplification might also avert the present judicial opposition to the expansion of the doctrine.[47]

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the Document and Dependent Relative Revocation, 23 KY. L.J. 559 (1935); Palmer, *Dependent Relative Revocation and its Relation to Relief for Mistake*, 69 MICH. L. REV. 989 (1971).

39. Campbell v. French, 3 Ves. Jr. 321, 30 Eng. Rep. 1033 (1797) (testator mistakenly believed his possible beneficiaries were all dead; consequently, he revoked a former will).

40. McClure's Estate, 309 Pa. 370, 165 A. 24 (1933) (failure of execution in accordance with the provisions of the Wills Act).

41. The difference in effect when the defect is caused by intrinsic or extrinsic failure is discussed in Holt Estate, 405 Pa. 244, 174 A.2d 874 (1961), and in Braun Estate, 358 Pa. 271, 56 A.2d 201 (1948).

42. *See* note 7 and accompanying text *supra*. Jarman would apply the doctrine whether the defect was intrinsic or extrinsic to the instrument.

43. *See* note 11 and accompanying text *supra*. Atkinson would apply the doctrine to mistakes of law or fact. He does not include intrinsic or extrinsic bases for the defect in his definition.

44. *See* note 41 *supra* and note 99 and accompanying text *infra*. An intrinsic defect is apparent on the face of the will and is limited to a defect in the execution of the will. An extrinsic defect falls outside the instrument itself.

45. Walsh & Jones, *Dependent Relative Revocation*, 67 DICK. L. REV. 275, 281-82 (1963). 20 PA. CONS. STAT. ANN. § 2507 (Purdon 1977) validates charitable gifts made within thirty days of death to the extent of a former charitable gift if the person who would benefit from the invalidity of the gift raises no objection. In Estate of Cavill, 459 Pa. 411, 329 A.2d 503 (1974), the Supreme Court of Pennsylvania held that the statute invalidating all charitable or religious gifts included in a will executed within thirty days of death denies charitable beneficiaries equal protection of the laws and is unconstitutional.

46. Pennsylvania case law apparently does not discuss the doctrine's genesis in relief for mistake.

47. *See* notes 48-54 and accompanying text *infra*. If it were accepted by the courts that the doctrine had its basis in granting relief for certain types of mistake (*i.e.* when the mistake is apparent on the face of the dispositive instrument and when there is sufficient evidence as to what the testator probably would have preferred), a fair question would be presented as to whether there is a real need for a separate doctrine. In short, courts might be able to dispense with the doctrine and allow relief for mistake under the circumstances. Professor Warren advocates this position.

III. Application of the Doctrine in Pennsylvania

A. The Prevailing Judicial Attitude Toward the Doctrine

In general, the doctrine of dependent relative revocation "is not favored in [the Commonwealth of Pennsylvania] and has rarely been applied."[48] In *McClure's Estate*,[49] in which the court expressly refused to apply the doctrine, Justice Kephart commented,

> The doctrine of dependent relative revocation, an inferred intention of the testator, to be applied under given circumstances, has not as yet been accepted in its arbitrary form in this State. For its satisfactory solution there is nothing to lead the judicial mind with anything approaching logical certainty to the testatrix's real intent, when the provision of the second will fails either from internal of external causes.[50]

In *Braun Estate*,[51] the leading Pennsylvania decision expressly applying the doctrine, the court indicated its discomfort with the doctrine.[52] Similarly, in *Holt Estate*,[53] in which it again refused to apply the doctrine, the court stated that "[the doctrine] usually furnished only speculation or a wild guess as to testator's intention to make his absolute revocation merely conditional."[54]

Although there has been neither a blanket acceptance nor rejection of the doctrine, the most recent case in which it was expressly applied, *Shelly Will*,[55] severely limits the doctrine's application.[56] In another recent Pennsylvania decision, *Baily Estate*,[57] the court held that Jarman's rendition of the doctrine "generally represents the law as it now stands, although [Jarman's definition] is perhaps a little too broadly stated."[58] The propensity of Pennsylvania courts to limit or refuse to apply the doctrine is not shared by courts in other jurisdictions.[59]

> It is believed that this classification is loose and misleading, that the term "dependent relative revocation," while not entirely devoid of inherent sense, tends toward the treatment of different subjects under a single principle, and should be abandoned for more specific and discriminating nomenclature.

Warren, *supra* note 6, at 338.

48. Holt Estate, 405 Pa. 244, 250, 174 A.2d 874, 877 (1961) (the doctrine was denied application).

49. 309 Pa. 370, 165 A. 24 (1932).

50. *Id.* at 373, 165 A. at 25.

51. 358 Pa. 271, 56 A.2d 201 (1948).

52. While the learned court below correctly observed that the doctrine 'is not forbidden by the authorities in Pennsylvania, . . . it was also said that the doctrine 'has not as yet been accepted in its arbitrary form in this state.' Just what its 'arbitary' form may be or what the caution was intended to mean, in terms of the Rule's availability in Pennsylvania, was not further explained or defined.

Id. at 273-74, 56 A.2d at 202 (citations omitted).

53. 405 Pa. 244, 174 A.2d 874 (1961).

54. *Id.* at 250-51, 174 A.2d at 877.

55. 27 Pa. Fiduc. 42 (O.C. Montg. 1976).

56. When the former and subsequent dispositions are exactly alike in all material aspect, it is obvious that the testator probably would have preferred the former disposition to intestacy. *See* note 115 and accompanying text *infra*.

57. 35 Pa. D. & C.2d 225 (O.C. Montg. 1964).

58. *Id.* at 234.

59. *See* notes 135-44 and accompanying text *infra*.

B. *Prerequisites to the Doctrine's Application*

For the doctrine to be applied, three conditions must be met: (1) there must be a valid, original will; (2) it must be effectively revoked; and (3) an invalid substitution must be made that is similar enough in kind or amount to permit the inference that the testator would *probably* have preferred the former will over any other possible disposition.[60]

Thus, the doctrine will not save a former will or bequest that was not valid at the time it was executed. The doctrine does not improve or diminish the validity of former or subsequent dispositions; it only removes the effect of an otherwise effective revocation. The focus of the doctrine is on the "character of the revocation."[61]

1. The Character of the Revocation.—The Pennsylvania Supreme Court confronted the doctrine of dependent relative revocation for the first time in *Price v. Maxwell*.[62] A strict interpretation of *Price*[63] would deny application of the doctrine whenever there was an express, unconditional revocation.[64] Today this view has been relaxed to allow the doctrine to apply when there is a clause in a subsequent invalid will or codicil expressly revoking the former, valid will.[65] To allow an express revocation to stand in all cases is to misunderstand the import of the doctrine and to limit its application illogically and unnecessarily.

A comparison of former and subsequent dispositions is essential to determine the degree of continuity and consistency between the two.[66] It is logical for a testator to include a clause expressly revoking a former will when he desires to make a second will. The testator wants to give full effect to the subsequent disposition, which he mistakenly believes is valid, and to avoid confusion and resultant litigation concerning the former disposition. The effect of denying the doctrine's application to

60. This "definition" represents the state of the doctrine of dependent relative revocation *as it has been applied and interpreted* by the Pennsylvania courts. Thus, the "definition" is an abstraction and does not appear in any Pennsylvania case as such.

61. Braun Estate, 358 Pa. 271, 275, 56 A.2d 201, 203 (1948).

62. 28 Pa. 23 (1857).

63. *Id.* at 38 (there is language that could be misinterpreted to sustain an express revocation despite the presence of other facts).

64. After determining that the former and subsequent dispositions were manifestly inconsistent, the court said, "But it is not necessary to regard these circumstances, because we have an express clause of revocation [in the later will], and that clause is not in any respect avoided or impaired. . . . It stands in full force. The result is, that the [former will] is revoked." *Id.* at 38-39. The court added, "We have no right to add conditions *not expressed* by the testator, nor implied from his acts. He had it in his power to make conditions, but he made none, and we can make none for him." *Id.* at 39.

65. Braun Estate, 358 Pa. 271, 56 A.2d 201 (1948) (express revocation by subsequent codicil); Shelly Will, 27 Pa. Fiduc. 42 (O.C. Montg. 1976) (express revocation by subsequent will).

66. "The authorities . . . confine the rule, in Pennsylvania, to those cases where the apparent purpose of the revocation of an initial disposition is to make way for a subsequent one of a similar kind or type, and the subsequent one fails from a defect in the instrument creating it." Baily Estate, 35 Pa. D. & C.2d 225, 234 (O.C. Montg. 1964). *See* note 115 and accompanying text *infra*.

cases of express revocation would be to refuse aid to the more provident, but equally mistaken, testators.

The doctrine necessarily applies when there is no express revocation, but an implied revocation evidenced by either an inconsistent provision in a codicil[67] or by a new will purportedly disposing of the entire estate.[68] Nevertheless, a distinction has been maintained between the revocatory effect of a will and a codicil.[69]

2. Subsequent Will or Codicil.—In *Hartman's Estate (No. 1)*,[70] the court held that "a will, complete within its four corners, which makes a disposition of all the property of testatrix . . . , is clearly incompatible with the existence of any former will and must operate as a revocation of all wills previously executed by the testatrix."[71] Thus, a subsequent will "must operate as a revocation without express words to that effect."[72] On the other hand, in *Bingaman's Estate*,[73] a later instrument, although referred to as a will, was in effect a codicil.[74] It revoked all former wills "excepting only so much of the same as relate to the charitable gifts, bequests and devises, which are set forth and made in a former will . . . ."[75] The court looked beyond form to substance and found the later instrument to be a codicil.[76] Therefore, a codicil revokes the provisions of a former will only to the extent that they are inconsistent. In *Mifflin's Estate*,[77] the court explained,

> The will and the codicils are to be read together, and all the parts which are not inconsistent with the latest expression of the testator's intention are brought down to the date of the last codicil and are to be given effect. A new will revokes a former will, but a codicil ratifies the preceding will except as to the changes expressly indicated. A revocation is not be presumed in the case of a codicil. It is only when they are irreconcilably contradictory that the dispositions contained in a codicil revoke those made by the will or a preceding codicil.[78]

Application of the doctrine of dependent relative revocation does *not* depend on whether the subsequent provision is a will or codicil.[79] Nevertheless, language in a few Pennsylvania decisions suggests that the

67. Baily Estate, 35 Pa. D. & C.2d 225 (O.C. Montg. 1964).
68. Shelly Will, 27 Pa. Fiduc. 42 (O.C. Montg. 1976).
69. *See* note 78 and accompanying text *infra*.
70. 320 Pa. 321, 182 A.2d 234 (1936).
71. *Id.* at 326, 182 A.2d at 236.
72. Teacle's Estate, 153 Pa. 219, 223, 25 A. 1135, 1136 (1893).
73. 281 Pa. 497, 127 A. 73 (1924).
74. *Id.* at 506, 127 A. at 77.
75. *Id.* at 505, 127 A. at 76.
76. *Id.*
77. 49 Pa. Super. Ct. 605 (1912).
78. *Id.* at 608.
79. This is not meant to deny the difference in the revocatory effect of a will or codicil. In the situation in which the doctrine of dependent relative revocation clearly does *not* apply—the former and latter provisions are inconsistent and irreconcilable—the distinction between the revocatory effect of a will or codicil is material. Nevertheless, if the facts indicate a continuity and consistency between the instruments, which suggests possible

doctrine is more amenable to substitutions by codicil.[80] Apparently, the courts cannot overcome the view that a second will revokes all former wills *in all cases*. The distinction is spurious because the doctrine looks beyond the immediate form of the substitution to the substantive consideration of the continuity and consistency of the contents of the two instruments.[81] Thus, the character of the revocation is determined by comparing the contents of the former and latter instruments.[82]

3. The Requirement of an Invalid Substitution.—The doctrine of dependent relative revocation applies only if a substitution has been made and subsequently fails. This essential element is illustrated in *Holt Estate*[83] in which the decedent had written across the botton of his will, "I hereby render this will void and intend to make one revised."[84] In the words of Chief Justice Bell of the Pennsylvania Supreme Court, "Holt never made another will. The question we must decide is whether these words effectively revoked Holt's will or whether the principle of dependent relative revocation applies."[85] Holt's widow contended the words, "and intend to make one revised," rendered the purported revocation dependent and conditional and hence ineffectual because a revised will was never executed.[86] The court explicitly rejected this attempt to extend the logic of *Braun*[87] and held that "the unfulfilled intention to execute a new will did not render the revocation ineffective."[88] The court concluded,

> [W]e cannot know or say with any accuracy or certainty—indeed it is the sheerest speculation—whether decedent would change his mind or carry out his intention to make a new will and if so what decedent would or might have provided in a new will. What we believe is clear and certain is that decedent did not wish or intend to dispose of his estate under his [former will] which he specifically said he *rendered void*.[89]

The effect of the revocation, whether express or implied, is determined in light of the relationship between the provisions of a former will

application of the doctrine, the interjection of irrelevant arguments distinguishing wills and codicils merely causes confusion and should be avoided. *See* PA. JUR., *supra* note 8, at § 262.

80. Thus, language from *Teacle's Estate* and *Hartman's Estate* (*see* notes 67-69 and accompanying text *supra*) can be given undue weight. "The most plausible rationale for the rule may be that testator could make no more dramatic or conclusive expression of an intent to revise his testamentary scheme than through the preparation of a new will." Walsh & Jones, *supra* note 45, at 285. This is incorrect since the doctrine's application clearly depends on the *extent of the revision*, in substantive terms, not whether the new provision is a will or codicil.

81. *See* note 115 and accompanying text *infra*.

82. *Id.*

83. 405 Pa. 244, 174 A.2d 874 (1961).

84. *Id.* at 248, 174 A.2d at 876.

85. *Id.* at 247, 174 A.2d at 875.

86. *Id.* at 248, 174 A.2d at 876.

87. *Id.* at 249, 174 A.2d at 876.

88. *Id.*

89. *Id.* at 250, 174 A.2d at 877.

and the subsequent, invalid substitutions.[90] A comparison between the two dispositions is essential to determine what the testator would probably have preferred. The substitution, although invalid, provides guidance as to the testator's intention concerning the ultimate disposition of his estate,[91] which the court requires in the construction of its fictional intent. Without this evidence the court is justified in its unwillingness to build on what is already a speculative venture.[92]

4. The Reason for the Failure of the Substitute Provision.—On several occasions the Pennsylvania courts have distinguished between intrinsic and extrinsic defects in the substitute provision.[93] In *Braun Estate*,[94] the failure of the codicil was intrinsic to the instrument and relief was granted.[95] In *Hartman's Estate (No. 1)*[96] and in *Price v. Maxwell*,[97] gifts to charity failed because they were made within thirty days of death—extrinsic failures beyond the immediate instrument—and the doctrine was denied application. In *Holt Estate*[98] the court said in dictum,

> It is clear from all of the authorities herein cited that (1) the doctrine as applied by our Courts is primarily a rule of testamentary construction which is used as an aid in ascertaining the intent of the testator, and (2) the doctrine has been applied only where there is (a) either a defective execution of a subsequent will or codicil or (b) an intrinsic defect in the subsequent will or codicil. However, where the revoking instrument is in itself valid and operative, but the subsequent disposition fails for some extrinsic reason such as the incapacity of the devisee to take, the revocation nevertheless remains effective.[99]

The distinction has been critized by Pennsylvania commentators,[100] but the courts in all probability will continue to apply the distinction to avoid the doctrine.

C. *Express Application of the Doctrine*

1. The Requirement of Continuity and Consistency.—The leading case in Pennsylvania in which the doctrine was expressly applied is *Braun Estate*.[101] In *Braun Estate* the testator originally bequeathed a

90. *See* note 115 and accompanying text *infra*.
91. *See* notes 115-18 and accompanying text *infra*.
92. *See* note 54 and accompanying text *supra*.
93. *See* notes 44-47 and accompanying text *supra*.
94. 358 Pa. 271, 56 A.2d 201 (1948).
95. *Id.* at 273, 56 A.2d at 202 (failure for indefiniteness).
96. 320 Pa. 321, 182 A. 234 (1936).
97. 28 Pa. 23 (1857).
98. 405 Pa. 244, 174 A.2d 874 (1961).
99. *Id.* at 251, 174 A.2d at 877 (citations omitted).
100. "Whether [failure] is due to intrinsic or extrinsic causes seems to make less practical difference, insofar as many of the reported cases are concerned . . . ." Jones & Walsh, *supra* note 45, at 286; *see* AKER, PROBATE AND INTERPRETATION OF WILLS § 3.14m (1976).
101. 358 Pa. 271, 56 A.2d 201 (1948).

sum of $50,000 to his executors in trust for his adopted daughter.[102] In a codicil the testator wrote, "I hereby revoke the trust fund in favor of my daughter . . . and substitute a lump sum of [ ] dollars in cash."[103] Mrs. Braun, the residuary legatee, contended that the provisions in the codicil constituted an unqualified revocation of the legacy in trust as bequeathed by the will and that the substitution, absent a specific dollar amount, was void for uncertainty.[104] The Supreme Court of Pennsylvania held that the doctrine of dependent relative revocation applied and the revocation was ineffectual.[105]

Once the *Braun* court supplied the blank amount,[106] the former and latter provisions were identical in all material aspects. Thus, in awarding the former bequest, the court was assured that it had done nothing to violate what the testator would probably have preferred. *Braun* has been followed by at least two Pennsylvania courts that have applied the doctrine to sustain a former bequest because the later invalid bequest was identical in all material aspects.[107] The content of the invalid substitution is the best gauge of the testator's actual intent.[108]

In *Braun*, having determined that the amounts of both bequests were equal, the court said that "the so-called revocation in this case was not a revocation even though the testator tabulated it as such. The provision in the codicil was in truth a 'substitutional bequest.' "[109] The codicil merely changed the time of payment, which corresponded to the length of time that had passed since the making of the original will.[110] The court in *Braun* based its decision on *Sloan's Appeal*,[111] in which the testator, by

102. She was to receive the income quarterly after she reached the age of twenty-one and the fund outright when she reached the age of thirty-five. *Id.* at 273, 56 A.2d at 202.

103. *Id.*

104. *Id.* at 277, 56 A.2d at 204.

105. *Id.* at 278, 56 A.2d at 204.

106. The case can be viewed as presenting an evidence problem in the area of wills. Parol evidence is admissible to clarify ambiguities and uncertain terms in a dispositive instrument; the evidence, however, cannot contradict the express language in the writing. *See* Horvath's Estate, 446 Pa. 484, 288 A.2d 725 (1972); England's Estate, 414 Pa. 115, 200 A.2d 897 (1964).

107. Shelly Will, 27 Pa. Fiduc. 42 (O.C. Montg. 1976); Baily's Estate, 35 Pa. D. & C.2d 225 (O.C. Montg. 1964).

108. If no new provision is made, the court must accept the revocation at face value. Even if it can be proved that the testator would have made a similar will or bequest but died before doing so, a revocation that has been made will be honored. The theory is that the testator might change his mind before writing a new will or bequest and the court will not presume that a future will or bequest is an exact replica of the former will unless the actual instrument is laid before it. *See* Holt Estate, 405 Pa. 244, 174 A.2d 874 (1961). To a large degree *Holt* was based on Emernecker's Estate, 218 Pa. 369, 67 A. 701 (1907).

109. 358 Pa. 271, 276, 56 A.2d 201, 204 (1948). In an early Pennsylvania decision, Lutz's Estate, 27 W.N.C. 403 (O.C. Phila. 1890), the court stressed the requirement of a substitution, but did not require continuity or consistency between the former and latter bequests. Nevertheless, the later Pennsylvania cases clearly indicate that continuity and consistency are essential. *See* notes 115-18 and accompanying text *infra*.

110. The testator's adopted daughter was a teenager when the original will was made and thirty-one years old when the codicil was made. Apparently the reason for the trust fund had been eliminated.

111. 168 Pa. 422, 32 A. 42 (1895).

codicil, purported to revoke a prior testamentary bequest, but merely changed "the time of payment of the bequest so as to give the interest to the persons named in the codicil while they lived."[112]

In *Shelly Will*,[113] a recent case that expressly followed *Braun*, the doctrine was invoked to save a former will that in all material respects was republished by a later invalid will.[114] After a lengthy review of the pertinent legal principles, the court succinctly stated the basis for the doctrine's application in Pennsylvania:

> If we seek to find the testatrix's intent in signing her name to the alleged revoking will . . . the best gauge of that and one which the courts of the Commonwealth have used in dealing with such a problem, . . . is to analyze the provisions of the two instruments, to ascertain if there is a *continuity and consistency between the earlier and later testamentary dispositions.*[115]

In *Baily Estate*,[116] the doctrine was held to apply when a charitable gift contained in subsequent codicils was invalid for lack of attestation.[117] The court explained,

> By the codicils, testator did not indicate any intention to extinguish his initial testamentary scheme. On the contrary, they show most strongly further thought and refinement of his original plan. The benefits which he originally conferred upon local charities were changed in form and somewhat in amount, but this represents [a] . . . technical rather than substantial change . . . . Testator's alteration of his original bequest for . . . the same purpose is, likewise, merely refinement of his original concept.[118]

To date, the doctrine has been applied sparingly in Pennsylvania,[119] and the modern cases indicate that it will be expressly applied only when there is at least a near identity and when there are no material discrepancies between the former and latter provisions.[120] This is not meant to imply that the doctrine cannot be invoked to grant relief when there *are* material alterations. Instead, it only acknowledges that in such cases the doctrine has not been expressly applied, although the court may have invoked it sub silentio.[121]

D. Changes in a Subsequent Will or Codicil

1. Change of Beneficiary.—In Pennsylvania the doctrine of de-

112. *Id.* at 430, 32 A. at 44. The doctrine of dependent relative revocation was not expressly applied, although it could have been applied. The case was decided on the principles of the revocatory effect of a codicil, which republishes a will to the extent both are consistent. *See* note 32 and accompanying text *supra*.

113. 27 Pa. Fiduc. 42 (O.C. Montg. 1976).

114. "The two wills have slight variations between them, but the basic and overall plan is similar in each." *Id.* at 50.

115. *Id.* at 60 (citation omitted) (emphasis in original).

116. 35 Pa. D. & C.2d 225 (O.C. Montg. 1964).

117. *Id.* at 235.

118. *Id.*

119. *See* note 50 and accompanying text *supra*.

120. *See* note 115 and accompanying text *supra*.

121. *See* notes 147-68 and accompanying text *infra*.

pendent relative revocation will not be applied when there has been a change of beneficiary.[122] Pennsylvania legal scholars have reasoned that "the refusal to apply dependent relative revocation in such cases is logical; where the testator cancels an executor or beneficiary in favor of a substituted appointee, it is fairly clear that his act arose as much out of a desire to remove the former as it did out of a desire to favor the latter."[123] Thus, in *Melville's Estate*,[124] the testator revoked the residuary legatees under his original will by a subsequent codicil.[125] The codicil provided for a gift to charity that failed because the testator died within thirty days after execution of the codicil.[126] The doctrine was denied, and the will was deemed void.[127] Arguably such a rigid rule does not accomplish the best result in all cases,[128] and other states have recently recognized this in applying the doctrine to a change in beneficiaries.[129]

2. Increase or Decrease in the Pecuniary Amount.—In *Kirk Estate*,[130] the doctrine was held not to apply since there was only one will, in which the paragraph giving the entire estate to the appellant was obliterated, and an attempted codicil, which gave her a much smaller bequest and indicated that three new heirs were to benefit.[131] The court acknowledged the highly factual considerations in applying or denying the doctrine[132] and determined that the amount of the reduction was evidence that the testator would probably have preferred that the beneficiary be disinherited.[133] Similarly, Pennsylvania writers have reasoned,

> Where the legacy is increased in the manner described, it has been held that the original gift is valid, the theory being that the ineffectual attempt to increase it is the very antithesis of an intent to revoke the earlier gift. Although such interlineation is not itself valid, because it is in the nature of a codicil, it is nevertheless admissible as evidence of testator's intent. On the other hand, where testator has by ineffectual interlineation decreased the amount of a legacy, it cannot be argued that there was no intent to revoke the gift, at least pro tanto. The question

122. *See* Ducommun Estate, 2 Pa. Fiduc. 69 (O.C. Lanc. 1951); Swanson Estate, 74 Pa. D. & C. 358 (O.C. Elk 1950).

123. Jones & Walsh, *supra* note 45, at 282.

124. 245 Pa. 318, 91 A. 679 (1914).

125. *Id.* at 320, 91 A. at 680.

126. *Id.* at 322, 91 A. at 681.

127. *Id.* at 324, 91 A. at 682.

128. A testator might prefer that a bequest be given to the former legatee rather than have it fall into the residuary or have the entire will fail, resulting in intestacy. There are no Pennsylvania cases in point, and the matter will probably remain academic because of the overall resistance to the doctrine by the courts.

129. *See, e.g.*, Oliver v. Union Nat'l Bank, 504 S.W.2d 647 (Mo. 1974) (the doctrine applied to a change of beneficiaries coupled with increased shares going to other beneficiaries. The attempted changed failed for want of attestation).

130. 41 Pa. D. & C.2d 777 (O.C. Phila. 1967).

131. *Id.* at 778-85.

132. "The matter of invoking the doctrine is always dependent on the circumstances involved." *Id.* at 781.

133. *Id.* at 780-81.

is whether the legatee takes anything at all. There is dictum to the effect that both the cancellation and the interlineation should be disregarded and that the original gift be left unaffected. Logic would seem to dictate that the original gift should be admitted as evidence of the extent to which testator intended it to be modified.[134]

While there are no Pennsylvania cases *expressly* applying the doctrine in the instance of an increased amount, other jurisdictions have encountered this application of the doctrine. In *Schneider v. Harrington*,[135] the Massachusetts Supreme Court applied the doctrine of dependent relative revocation to grant relief when the testatrix substituted an increased share of the estate for two beneficiaries.[136] Originally, there had been three beneficiaries, but one was cancelled and the shares of the remaining two were increased from one-third of the estate to one-half each.[137] The court allowed the original lesser amount and held,

> The doctrine is widely established that a revocation of a valid will, which is so intimately connected with the making of another will as to show a clear intent that the revocation of the old is made conditional upon the validity of the new, fails to become operative if the new will is void as a testamentary disposition for want of proper execution. Revocation in its last analysis is a question of intent. A revocation grounded on supposed facts, which turn out not to exist, falls when the foundation falls.[138]

The reasoning permits the doctrine of dependent relative revocation to apply in the case of mistake.[139] No attempt has been made to classify the source of the mistake as intrinsic or extrinsic to the instrument.

In the celebrated case of *Ruel v. Hardy*,[140] the Supreme Court of New Hampshire considered the applicability of the doctrine to a much reduced amount.

> The only inkling of intention to be gleaned from either the clause or the entire will itself is found in the amount of the reduction. Had the testatrix reduced the amount bequeathed to a purely nominal sum, it would provide persuasive evidence that she would prefer that the legatees have nothing rather than that they should have the amount which she originally gave them. On the other hand, a slight reduction would tend to show a contrary intention. A reduction of eighty per cent of the legacy tends more to show a preference on her that her legatees

134. Jones & Walsh, *supra* note 45, at 283 (citations omitted). The logic of the foregoing is attractive; unfortunately, the cases cited as authority by the authors do not expressly discuss the doctrine. Nevertheless, the doctrine may have been applied in a few of the cited cases sub silentio. There is currently little Pennsylvania case law on the subject of increases and decreases in subsequent provisions.

135. 320 Mass. 723, 71 N.E.2d 242 (1947).

136. *Id.* at 725, 71 N.E.2d at 243.

137. *Id.*

138. *Id.* at 725, 71 N.E.2d at 244 (quoting Sanderson v. Norcross, 242 Mass. 43, 45, 136 N.E. 170, 171 (1922), in which the court also referred to the doctrine as "a principle to be applied with caution").

139. *See* note 15 *supra*.

140. 90 N.H. 119, 6 A.2d 753 (1939).

should have nothing rather than that they should have the full sum, and since this is the only evidence in the case, the executrix is informed that the legatees named in the third clause of the codicil take nothing under it.[141]

To apply or deny the doctrine because of the simplistic notion that an increase or decrease creates an irrebutable presumption as to the testator's intent would burden a doctrine based on a fiction with yet another fiction.[142] Such a rigid rule of thumb might be regretted later when circumstances arise that tend to prove the reverse of the presumption. The test might produce results that contradict what the testator would probably have preferred. In *Ruel*[143] the court warned,

> This is not by any means to say that the question of intention here presented is always to be solved by a mathematical formula. Mathematics may shed a great deal of light on this question of intent or it may shed only a little. It is only one of the evidentiary facts which might be present in cases of this sort, and its weight will vary in different cases. In the case at bar this evidence is taken to be determinative only because it is the only evidence available.[144]

It is reasonable to conclude that the amount of an increase or decrease is evidence of *animus revocandi*, or its opposite, and nothing more. The distinction between an intent to revoke and an intent to reduce must be made if the doctrine is to remain flexible. A "continuity and consistency between the earlier and later testamentary dispositions"[145] can be achieved regardless whether the change is an increase or decrease. The *amount* of the decrease should be indicative of *animus revocandi*,[146] while *any* increase should be viewed as evidence tending to prove its absence.

E. Possible Applications of The Doctrine—Sub Silentio

There have been a number of Pennsylvania cases in which the

141. *Id.* at 128, 6 A.2d at 759.

142. A modern court exercising its equitable powers should be sophisticasted enough to distinguish between an intent to revoke and an intent to reduce a legacy.

> If the amount of the gift is reduced slightly, it might seem likely that testator would prefer the original gift to nothing at all; but if the amount of the gift is greatly reduced, it might seem likley that testator would prefer intestacy to the original gift.

2 PAGE, *supra* note 8, at § 21.58.

143. 90 N.H. 119, 6 A.2d 753 (1939).

144. *Id.* at 129, 6 A.2d 759-60.

145. *See* note 115 and accompanying text *supra*.

146. Perhaps the solution to this problem does not depend upon the doctrine of dependent relative revocation but rather on the proposition that there is a distinction between an attempt to revoke a legacy and an intent simply to reduce the amount given, and hence under the circumstances, it is reasonable to conclude that in striking out the original amount, the extent of the animus revocandi is limited to the sum which is in excess of the reduced amount stated in the interlineation. Since merely drawing a line through a legacy does not revoke it unless the act was done with intent to revoke, it should follow that drawing the line through the amount originally given with intent of reducing it to a stated lesser sum should be construed as a revocation only to the extent intended and no more. On this theory, the legatee would be entitled to the reduced amount.

PA. JUR., *supra* note 8, at § 266.

doctrine may have been applied, although it was not specifically mentioned by the court.[147] In *Okowitz Will*,[148] the original will made bequests of the residuary estate on a percentage basis, with one legatee receiving "1 percent" of the estate.[149] On the will itself, the figure "2" was written over the figure "1," an increase made without attestation.[150] The original will was held not to be revoked.[151] The doctrine of dependent relative revocation was never mentioned in the court's decision; the case, however, has been cited by subsequent writers as an example of the doctrine's application to an invalid substitution of an increased amount.[152] The result reached in *Okowitz* would have been the same had the doctrine been expressly applied.[153] Nevertheless the court did not state the reasoning upon which it based its decision, but merely held that the outcome of the present case had been determined by a previous case, *Molden Will*.[154]

Molden was, in turn, based on an earlier Pennsylvania decision, *Dixon's Appeal*,[155] in which a testator refused or declined to sign his name to a subsequent reduction of legacies to his three daughters.[156] Apparently the testator was operating under the mistaken belief that his original signature was sufficient to validate the changes.[157] With ample evidence from disinterested witnesses, the court admitted the former, larger amounts to probate.[158] Although the doctrine was not mentioned the case has been cited as an example of the doctrine's application to the case of a reduced amount.[159] This conclusion is unwarranted by the facts or reasoning of the case, since it was decided according to the same presumptions as *Molden*.

147. Okowitz Will, 403 Pa. 82, 169 A.2d 84 (1961); Molden Will, 387 Pa. 484, 128 A.2d 568 (1957); Dixon's Appeal, 28 Pa. 23 (1857); Lewis Will, 21 Pa. Fiduc. 468 (O.C. Del. 1970); Rife Estate, 88 Pa. D. & C. 360 (O.C. Frank. 1954).

148. 403 Pa. 82, 169 A.2d 84 (1961).

149. *Id.* at 88, 169 A.2d at 85.

150. *Id.*

151. *Id.* at 97, 169 A.2d at 88.

152. PA. JUR., *supra* note 8, at § 265 (citing *Okowitz* as the only Pennsylvania case "in which a testator draws a line through the amount of a legacy and makes an unsigned interlienation stating a larger amount"); Jones & Walsh, *supra* note 45, at 283 n.55 (for the relevant text of this article, see note 134 and accompanying text *supra*).

153. *See* notes 135-36 and accompanying text *supra*.

154. "On the authority of *Molden*, the restoration of the amount of this bequest to its original figure was eminently correct." Okowitz Will, 403 Pa. 82, 90, 169 A.2d 84, 85 (1961) (citing Molden Will, 387 Pa. 484, 128 A.2d 568 (1956)). In *Molden*, two substantial original pecuniary bequests were cut in half by writings on the will itself. After the original amounts had been determined by the use of a handwriting expert, the will was probated with the original larger amounts. The doctrine of dependent relative revocation was not mentioned; instead, the decision employed conventional presumptions flowing from the proven facts that the document remained in the testator's possession and that all alterations were made by him. Since the alterations were invalid, the original will was admitted to probate. *Id.* at 484-95, 128 A.2d at 570-71.

155. 55 Pa. 424 (1867).

156. *Id.* at 426.

157. *Id.*

158. *Id.*

159. Jones & Walsh, *supra* note 45, at 283; *see* text at note 141 *supra*.

In *Lewis Will*,[160] a more recent Pennsylvania decision, the testator left a will in which the amounts of pecuniary bequests had been increased by crossing out and interlineation.[161] The court decided that the "testator made the changes in the bequest . . . at the date later than the original 'list' but the changed document was not republished or re-executed by the testator."[162] The appellant, on the authority of *Molden*, contended that the court should award the increased amounts, "because there is a presumption that the paper was signed by the testator after the changes were made . . . ."[163] The court found "no fault with the law in *Molden*," but refused to consider *Molden* controlling.[164] In *Lewis*, the changes had been made with a different writing instrument, and the court permitted this distinction to dispell the presumption.[165]

In the alternative, the appellant cited *Okowitz* "to sustain his position that there cannot be held to be a revocation in this case where it appears that testator was raising the amount of the bequest."[166] The court was "satisfied that originally testator intended a bequest . . . and that the changes . . . were done later and the change never republished."[167] The original lower amount was awarded.[168]

In all of the foregoing cases, the doctrine might have been applied sub silentio and the result would have been the same. Two conclusions can be reached. First, if a case can be decided by recourse to conventional will principles and presumptions, the doctrine should be avoided. Second, such cases cause confusion that could be avoided by express application or denial of the doctrine.

IV. Recommendations and Conclusion

In *McClure's Estate*,[169] the court said that the doctrine of dependent relative revocation "has not been accepted in its arbitrary form in this state."[170] Noting this, the *Braun* court commented, "Just what its 'arbitrary' form may be or what the caution was intended to mean in terms of the rule's availability in Pennsylvania was not further explained

160. 21 Pa. Fiduc. 468 (O.C. Del. 1965).
161. *Id.* at 469-70.
162. *Id.* at 470.
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.* The argument assumes the doctrine of dependent relative revocation.
167. *Id.* at 471. Thus, this language should dispell any idea that the case was decided by the doctrine of dependent relative revocation. Nevertheless, the case is indexed by the Fiduciary Reporter as an example of the doctrine. *See* 21 Pa. Fiduc. (Cumulative Index 1971).
168. Lewis Will, 21 Pa. Fiduc. 468, 470 (1971). The case could have been decided by expressly invoking the doctrine of dependent relative revocation. The result would have been the same. *See also* Rife Estate, 88 Pa. D. & C. 360 (O.C. Frank. 1954) (similar facts and results; the doctrine was not mentioned).
169. 309 Pa. 370, 165 A. 24 (1933).
170. *Id.* at 373, 165 A. at 25.

or defined."[171] Problems of definition and application preclude an exact delineation of the doctrine's limits in Pennsylvania. The court in *Bailey Estate*,[172] after quoting Jarman's definition,[173] vaguely commented that the "quotation generally represents the law as it now stands, although it is perhaps a little too broadly stated."[174]

The discernible trend is to limit the express application of the doctrine to cases in which former and subsequent provisions share common elements. While the rationale for the doctrine is most acceptable under these conditions, the experience of other jurisdictions indicates that its expanded application can be effected without creating chaos in subsequent will contests.

Moreover, a serious problem exists if courts apply the doctrine sub silentio. Under no circumstances should the doctrine be applied secretly, since this inevitably results in confusion as to the true basis of the decision. Speculation in this area is not reduced by avoiding the mention of the doctrine when it is applied.

Although legal scholars base the doctrine on relief from mistake, the courts have obfuscated the issue and appear unlikely to adopt such a rationale for the sake of accuracy alone. Because of the judiciary's obvious disdain for the doctrine, advocates should refrain from invoking it unnecessarily in any event. The judicial attitude toward the doctrine is not favorable and the advocate would be wise to adhere to conventional will principles whenever possible. A network of subtle distinctions surrounds the doctrine, which tends to limit or deny its application.

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171. Braun Estate, 358 Pa. 271, 275, 56 A.2d 201, 202 (1948).
172. 35 Pa. D. & C.2d 225 (O.C. Montg. 1964).
173. *See* note 7 and accompanying text *supra*.
174. Baily Estate, 35 Pa. D. & C.2d 225, 234 (O.C. Montg. 1964).