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# WILLS - CONVEYANCE BY TESTATOR OF LAND DEVISED AS IMPLIED REVOCATION

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WILLS — CONVEYANCE BY TESTATOR OF LAND DEVISED AS IMPLIED REVOCATION — Testator devised "all the property, real, personal or mixed of which I die seised" to defendant. Subsequently, he and his wife conveyed a portion of the land he then owned to the defendant. Defendant later reconveyed to the testator. Testator never republished his will, nor altered it in any way. Plaintiffs are his heirs at law and insist that as to these lands the will was revoked and the testator died intestate. *Held*, there was no revocation here. The land in question passed under the devise to the defendant as after-acquired property, the language of the general devise being sufficient to show such was the testator's intent. The case of *Phillippe v. Clevenger*[1] is distinguishable in that that case dealt with a specific devise. *Strang v. Day*, (Ill. 1935) 199 N. E. 263.

At common law and under the early statutes, a testator lacked the power and capacity to make an effective devise of after-acquired real property. So far as realty was concerned, every will spoke from the date of its execution.[2] Consequently, if the testator afterwards conveyed away land he had devised, the effect of this was to revoke the devise at least pro tanto, for if the land were not reacquired, there would be nothing upon which the devise could operate, and if it were reacquired, it would be classed as after-acquired property and therefore held not devisable.[3] Due to its practical similarity the courts classed this result as a revocation by change of circumstances, or as implied revocation, along with the cases of revocation by marriage and birth of issue.[4] This was unfortunate. The implied revocation resulting from subsequent marriage and birth of issue is probably based upon a conclusive presumption of the intention of the testator.[5] The later English cases deny that it is a matter of intention at all,[6] but what they evidently are referring to is the actual intent of the testator. But logically and practically a revoked will may be republished.[7] No amount of republication will make the will operate upon property that has been conveyed away. Hence the conveyance of the devised property was not strictly a revocation at all but rather a pro tanto annulment of the will.[8] The devise became inoperative, not

[1] 239 Ill. 117, 87 N. E. 858 (1909).

[2] Abney v. Miller, 2 Atk. 593, 26 Eng. Rep. 755 (1743); Rudstone v. Anderson, 2 Ves. Sr. 418 28 Eng. Rep. 267 (1752); Kirkpatrick v. Kirkpatrick, 112 Kan. 314, 211 P. 146 (1922); Halderman v. Halderman, 342 Ill. 550, 174 N. E. 890 (1931); Case of Kean's Will, 9 Dana (39 Ky.) 25 (1839); Cave v. Holford, 3 Ves. Jr. 650, 30 Eng. Rep. 1203 (1798); 1 PAGE, WILLS, 2d ed., § 457 (1926). See annotation, 75 A. L. R. 474 (1931). Also see, Lanning v. Cole, 6 N. J. Eq. 102 (1847).

[3] Cave v. Holford, 3 Ves. Jr. 650, 30 Eng. Rep. 1203 (1798); 1 PAGE, WILLS, 2d ed., §§ 456, 464 (1926).

[4] Brush v. Wilkins, 4 Johns. Ch. (N. Y.) 506 (1820); Yerby v. Yerby, 3 Call (7 Va.) 334 (1803).

[5] Brush v. Wilkins, 4 Johns. Ch. (N. Y.) 506 (1820).

[6] ROOD, WILLS, 2d ed., § 377 (1926); Marston v. Roe d. Fox, 8 Ad. & El. 14, 112 Eng. Rep. 742 (1838); Cave v. Holford, 3 Ves. Jr. 650, 30 Eng. Rep. 1203 (1798).

[7] ROOD, WILLS, 2d ed., § 396 (1926).

[8] This misuse of terms was pointed out as early as 1798 by Eyre, Ch. J., dissenting in the case of Cave v. Holford (3 Ves. Jr. 650 at 663-664, 30 Eng. Rep. 1203):
"Wills are said to be revoked in an improper sense, where no actual intention to

because the testator intended that it should be revoked nor because the law so implied, but merely for want of an estate upon which to operate. This was the counterpart of the doctrine of ademption by extinction [9] that was applied to the devise of personalty. Both doctrines operated independently of the actual intent of the testator.[10] When the wills statutes were changed so that after-acquired

> revoke is proved from acts or circumstances of the testator; as where the subject devised is . . . parted with, and never comes back to the testator; or the same lands have come back to him under modifications of the interest, and by force of some legal conveyance. In the latter instance the will cannot take effect for technical reasons: in the former the will is rather annulled . . . than revoked. . . . A revoked will can be republished, but a republication will not bring back the estate, upon which the will was to operate."

Chancellor Eyre went on to say that in the case in which the testator reacquires the property "the will cannot operate upon the new estate, totally independent of the law of revocation."

[9] Where the devise cannot take effect because the subject of the gift is changed or destroyed so that it does not exist in specie at the time of the testator's death, this is called ademption by extinction. Smith, "Ademption by Extinction," 6 WIS. L. REV. 229 (1931); 3 WOERNER, THE AMERICAN LAW OF ADMINISTRATION, 3rd ed., § 446 (1923); 1 PAGE, WILLS, 2d ed., § 456 (1926); Connecticut Trust & Safe Deposit Co. v. Chase, 75 Conn. 683, 55 A. 171 (1903).

[10] Logically the doctrine of revocation by alienation could have been based upon intention actual or presumed, but the important thing to remember is that historically it was *not* a matter of intention, but a matter of technical rules of law that have since been abolished. This was clearly recognized by the court in Cave v. Holford, 3 Ves. Jr. 650 at 651, 30 Eng. Rep. 1203 (1798). Said that court: "If therefore the testator conveys away the whole fee-simple after making the will, though he becomes seized again of the old use, yet the conveyance renders the will ineffectual; not because he intended to revoke the will, but because by the rules of law the will cannot operate."

In Rudstone v. Anderson, 2 Ves. Sr. 418 at 419, 28 Eng. Rep. 267 (1752), the court said, "Revocations are frequently adjudged against the intent."

The immateriality of the question of the testator's intention has been recognized by a large number of American courts. Case of Kean's Will, 9 Dana (39 Ky.) 25 (1839); Hughes v. Hughes, 2 Munf. (16 Va.) 209 (1811), saying the reason of the rule is to favor the heir.

The immateriality of intention appears even more strongly in the cases where there is an intent to dispose of the property but the conveyance fails or is not completed before the death of the testator. In Abney v. Miller, 2 Atk. 593, 26 Eng. Rep. 755 (1743), there was a devise of two college leases. The testator attempted to surrender these and to take new leases. One transaction was completed but the other still lacked the college seal at his death. It was held that the devise was revoked as to the first lease but not as to the second. In Bennett v. Gaddis, 79 Ind. 347 (1881), the court stated that an invalid deed was not sufficient to revoke a will executed prior thereto.

Illinois, strangely enough, reaches the same result on the ground that "A deed procured by fraud or undue influence or executed by one who is mentally incapacitated does not show such an intention and cannot operate as a revocation of a will." Yott v. Yott, 265 Ill. 364 at 368, 106 N. E. 959 (1914).

See also 1 PAGE, WILLS, 2d ed., § 471 (1926); 3 WOERNER, THE AMERICAN LAW OF ADMINISTRATION, 3rd ed., § 449 (1923); Smith, "'Ademption by Extinction," 6 WIS. L. REV. 229 at 231 (1931).

property could be devised,[11] the distinction between revocation in the strict sense and ademption by extinction became important. So long as the devised property was not reacquired, a conveyance still operated as a revocation, but much confusion has resulted from the loose language of the courts in calling it so.[12] However, if the property is reacquired there is no rule of law that can prevent the devise from becoming operative again unless it is revoked.[13] If it is held to be revoked by an implication of law based upon the ground that the conveyance inter vivos indicates a change of intention on the part of the testator, then this is an innovation in the law of revocation by alienation or ademption, as that doctrine was known historically. Yet there is no question but that this is the ground upon which many of the courts have placed their theory of implied revocation.[14] Moreover, logically, to permit such proof of a change of intention would be to violate the spirit of the Statute of Frauds and those provisions of

[11] The general rule today is that a will speaks from the death of the testator and that after-acquired property will pass if it affirmatively appears that such was the intention of the testator. Cummings v. Lohr, 246 Ill. 577, 92 N. E. 970 (1910); Willis v. Watson, 5 Ill. 64 (1842); Wingard v. Harrison, 337 Ill. 387, 169 N. E. 232 (1930); Eckhardt v. Osborne, 338 Ill. 611, 170 N. E. 774, 75 A. L. R. 509 at 515 (1930); Halderman v. Halderman, 342 Ill. 550, 174 N. E. 890 (1931).

Words of general or residuary devise are sufficient to show this intent. Woman's Union Missionary Society of America v. Mead, 131 Ill. 33, 23 N. E. 603 (1890).

[12] 26 MICH. L. REV. 124 (1927); Meily v. Knox, 269 Ill. 463 110 N. E. 56 (1915); Johnson v. Hayes, 139 Ga. 218, 77 S. E. 73 (1912); Caine v. Barnwell, 120 Miss. 209, 82 So. 65 (1919).

Other courts use the term "revocation" but admit that it is technically incorrect usage. Gore v. Ligon, 105 Miss. 652, 63 So. 188 (1913); Dunlap v. Hart, 274 Mo. 600, 204 S. W. 525 (1918).

[13] The English Wills Act provides: "no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked . . . shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death." 7 W. 4 & 1 Vict., c. 26, § 23 (1837). Similar acts exist in Georgia, Indiana, Kentucky, North Carolina, Virginia and West Virginia. New York and some ten other states have statutes limiting the application of the doctrine of revocation by alienation. 3 WOERNER, THE AMERICAN LAW OF ADMINISTRATION, 3rd ed., § 450 (1923).

[14] Johnson v. Hayes, 139 Ga. 218, 77 S. E. 73 (1912); Caine v. Barnwell, 120 Miss. 209, 82 So. 65 (1919); Phillippe v. Clevenger, 239 Ill. 117, 87 N. E. 858, 16 Ann. Cas. 207 at 209 (1909).

The Pennsylvania court carries this theory to its logical conclusion and holds that "A change of intention is just as clearly shown where the instrument purporting to be a conveyance is incapable of taking effect, the attempted act of conveyance being inconsistent with the testamentary disposition." Gensimore's Estate, 246 Pa. 216 at 221, 92 A. 134 (1914).

Michigan also gives some effect to the intent of the testator. If the intent appears to benefit a devisee, the court will not permit him to be cut out of the will by a mere conveyance of the property devised but will give him the proceeds of that conveyance. Laurain v. Ernst, 237 Mich. 252, 211 N. W. 623 (1927), noted 26 MICH. L. REV. 124 (1927); Kirsher v. Todd, 195 Mich. 297, 162 N. W. 129 (1917).

the modern wills acts which provide that wills may be revoked in certain specified ways and in no other.[15] But these provisions, as read by the courts or expressly provided in the statute, do not rule out the doctrine of implied revocation.[16] The vital question, then, is what may be included within this doctrine. As we have seen, the doctrine of revocation by alienation was not really a doctrine of revocation at all but more closely related to, and more properly called, ademption. It was dependent upon rules of law that are today obsolete, and actual intent was immaterial. Consequently, in the majority of cases in which the situation has arisen, the courts have held that in the absence of alteration of the will, property devised, conveyed away and afterwards reacquired, passes by virtue of the devise, regardless of whether it be a general or a special devise.[17] The Illinois court had taken a view contrary to this in the case of the specific devise in *Phillippe v. Clevenger*,[18] which was decided upon the basis of the intent of the testator. This case but carries to its logical conclusion the historically inaccurate theory that revocation by alienation is based upon intention of the testator, actual or implied. That case may perhaps be justified as a recognition of the doctrine of extinction by satisfaction, which has been generally recognized as applicable only to personalty and in which the question of intent is all important.[19] The instant case is interesting in that it indicates that the Illinois court is unwilling to carry its doctrine of revocation by alienation beyond the case of the specific devise, although logically a general devise may be adeemed or revoked in the same way that a specific devise is revoked. Instead the court adopts for the case of the general devise the view that the majority of courts apply to all devises, both general and special.[20] In view of the presumption

[15] Ill. Rev. Stat. (Cahill, 1929), c. 148, § 19, provides that: "No will . . . shall be revoked, otherwise than by burning, cancelling, tearing or obliterating the same . . . or by some other will, testament or codicil in writing, declaring the same, signed by the testator or testatrix in the presence of two or more witnesses, and by them attested in his or her presence. . . ."

Under this provision, if it conforms with the formalities of the section, and expresses an intent to revoke, a subsequent deed may be held an *express*, as distinguished from an *implied*, revocation. Note that here the question of intention is all important. 1 PAGE, WILLS, 2d ed., § 471 (1926).

[16] Caine v. Barnwell, 120 Miss. 209, 82 So. 65 (1919); Dunlap v. Hart, 274 Mo. 600, 204 S. W. 525 (1918).

[17] Woolery v. Woolery, 48 Ind. 523 (1874); Morey v. Sohier, 63 N. H. 507, 3 A. 636 (1885); In re Hopper's Estate, 66 Cal. 80, 4 P. 984 (1884); Gregg v. McMillan, 54 S. C. 378, 32 S. E. 447 (1898).

[18] 239 Ill. 117, 87 N. E. 858 (1909).

[19] When a testator gives property or money to the devisee with the intention that it should be in lieu of the legacy or devise, this is called ademption by satisfaction. By the great weight of authority it has no application to the devise of real estate for the reason that such would violate the spirit of the statute of frauds or for reasons of policy. Barstow, "Ademption by Satisfaction," 6 WIS. L. REV. 217 (1931).

COSTIGAN, CASES ON WILLS, DESCENT AND ADMINISTRATION, 2d ed., 366, note (1929), says "The mistake of the decision in Phillippe v. Clevenger lies in treating the case as one of revocation rather than one of attempted but uncompleted ademption."

[20] No case, apparently, had ever before made such a distinction, though we find it suggested in Gore v. Ligon, 105 Miss. 652, 63 So. 188 (1913).

against intestacy,[21] and the strong language of the testator to the effect that any property that he might have at death should pass by the will, the soundness of the decision cannot be questioned even upon the Illinois theory of intention.[22]

J. S. W.

[21] Watts v. Killian, 300 Ill. 242, 133 N. E. 295 (1921).

[22] How can a conveyance to the devisee be considered as inconsistent with a prior devise of the same property? Is it not a mere indication of the testator's wish that the devisee have the enjoyment of the estate during his, the testator's, life, as well as after his death? If there is a conveyance back, this indicates a change in his intention only as to the enjoyment for life. Gregory v. Lansing, 115 Minn. 73, 131 N. W. 1010 (1911); Aubert's Appeal, 109 Pa. St. 447, 1 A. 336 (1885); Clingan v. Mitcheltree, 31 Pa. St. 25 (1856); Pickett v. Leonard, 104 N. C. 326, 10 S. E. 446 (1889).