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DEPENDENT RELATIVE REVOCATION AND ITS RELATION TO RELIEF FOR MISTAKE

George E. Palmer*

I. INTRODUCTION

WHEN an intended legal act is induced by mistake in the sense that it would not have occurred had the actor known the truth, the generally accepted method of analysis in our law is that the act is legally effective; the mistake becomes important only in determining whether it provides a ground for setting aside or rescinding the transaction. If a donor makes a gift while laboring under some fundamental mistake such as the identity of the donee or the donee's relationship to him, the gift is in the first instance effective, but the donor may be able to obtain rescission because of the mistake. Thus a donor obtained rescission of a gift in one case on proof that it was made in the mistaken belief that he and the donee were married when in fact the donee was married to another man.¹ If this had been a testamentary gift, no such relief would have been given.² In such a case, the person who would best know whether the donor held the belief in question and whether he would have made the bequest had the truth been known, would be the donor himself, but he is dead. The testimony of others with respect to these facts is apt to be untrustworthy, and this has led the courts to refuse to give effect to such evidence through the use of remedies which are generally available in connection with inter vivos transactions. This general attitude runs through most of the law of wills. It finds expression, for example, in the refusal of equity to reform a will for mistake,³ even though the circumstances are such that reformation would be granted had the gift been made during the donor's lifetime.

The one part of the law of wills in which courts often do give relief for mistake is in connection with revocation by holding that an apparent revocation was ineffective because of mistake in underlying assumptions. Rarely if ever, however, does a modern court rest its decision squarely on its power to relieve for mistake. Instead, the

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1. *Hutson v. Hutson*, 168 Md. 182, 177 A. 177 (1935).

2. *See, e.g., Stothers v. Flieger*, 13 N.J. Super. 379, 80 A.2d 583 (Ch. 1951).

3. *In re Gray's Estate*, 265 Wis. 217, 61 N.W.2d 467 (1953); *Dye v. Parker*, 108 Kan. 304, 194 P. 640 (1921); 1 W. PAGE, *LAW OF WILLS* § 13.8 (Bowe-Parker ed. 1960).

testator's intent to revoke is regarded as conditioned upon the truth of the matter in question; since the condition has not been met the conclusion is reached that there was no revocation for lack of the requisite intent. This is the doctrine of dependent relative revocation.⁴ It rests upon an analysis that, with few exceptions, is found nowhere else in the law relating to mistake in underlying assumptions.⁵ In the case, for example, of an inter vivos gift produced by mistake as to the identity or relationship of the donee, no court is likely to say that the gift was intended to be effective only if the supposed facts were true and since they were not true there was no gift for lack of the requisite intent to transfer title.⁶

The conditional intent analysis developed as a means of giving relief against a revocation induced by mistake, but if it were to be applied to every case of mistake, the dangers would be the same as though the court gave relief through the traditional method of setting aside a transaction because of mistake. The policies that underlie the refusal of such relief would be wholly undercut. Dependent relative revocation must be kept within narrower limits, and this

4. The most important article in this area is Warren, *Dependent Relative Revocation*, 33 HARV. L. REV. 337 (1920). Every writer on the subject is heavily indebted to Professor Warren. Other discussions will be found in T. ATKINSON, *WILLS* § 88 (2d ed. 1953); 2 W. PAGE, *LAW OF WILLS* §§ 21.57-65 (Bowe-Parker ed. 1960); Cornish, *Dependent Relative Revocation*, 5 S. CAL. L. REV. 273, 393 (1932); Evans, *Testamentary Revocation by Act to the Document and Dependent Relative Revocation*, 23 KY. L.J. 559 (1935). There has been no attempt in the present Article to collect all of the cases on the general topic.

5. An analogous process of constructing a conditional intent has been used, however, in connection with gifts of money or property between engaged persons. Where the engagement is broken off by the donee, restitution is granted to the donor by analyzing the gift as conditional. Some cases have used the same analysis where the contract to marry was abandoned by mutual assent. J. DAWSON & G. PALMER, *CASES ON RESTITUTION* 901 (2d ed. 1969).

6. To bring the matter closer to dependent relative revocation, in *Prudential Ins. Co. v. Bloomfield Trust Co.*, 104 N.J. Eq. 372, 145 A. 735 (1929), an insurance policy was initially payable to the insured's wife, but thereafter the insured revoked this designation and made the policy payable to a trustee, without naming any beneficiary. There was no effective disposition of the proceeds for lack of a trust beneficiary, but the court held that the wife had no claim. Evidently it did not occur to anyone to argue that the revocation with respect to the wife was conditioned on the effectiveness of the substituted disposition. It is reasonably certain that such an analysis would be rejected.

There is, however, an English case in which the court applied the conditional intent analysis to an inter vivos revocation. In *Perrott v. Perrott*, 14 East. 423, 104 Eng. Rep. 665 (1811), a deed exercising a power of appointment was cancelled by mutilation in the mistaken belief that another effective appointment had been made in the donee's will. Lord Ellenborough held that "there was no intention to revoke, unless the will would operate as an appointment; and as the will would not so operate, the *animus cancellandi* or *revocandi* was altogether wanting." 14 East. at 439, 104 Eng. Rep. at 671. The specific issue will rarely arise since an appointment is irrevocable unless the power to revoke has been reserved in the appointing instrument. Lord Ellenborough overlooked this point.

has in fact been done. Apart from one situation,⁷ no case has been found in which the doctrine was applied where the revocation was not connected with some alternative plan for succession to the decedent's estate or a part of it, and the plan failed to take effect. This provides an almost completely settled outer limit for the doctrine. In virtually all of the cases the frustrated plan was to be effected by will.⁸ The doctrine does not apply, therefore, when it is claimed that the revocation was the product of a false belief that the legatee was dead, or had become wealthy, or was leading a dissolute life, or had made unkind remarks about the testator. A listing of similar possibilities could be almost endless, and all such claims will be rejected out of hand if they rest solely on the decedent's mistake—if the mistake was produced by deceit, however, that is another matter.⁹

Although it is clear that the foregoing states the outer limit, it is doubtful that most American courts will press the doctrine this far. In most cases in which it has been applied, the testator *attempted* to make a substitute disposition by will, but the disposition was ineffective. The area of doubt lies between the frustrated attempt to dispose and the uncompleted plan to dispose which had not reached the stage of an attempt. The importance of this distinction will be more fully clarified in the discussion that follows.

II. REVOCATION BY ACT TO THE DOCUMENT

Revocation of a will through an act of the testator directed to that end takes one of two forms: either the testator executes a later will or other testamentary instrument which revokes the earlier will or a part of it, expressly or by implication, or he does something to the document such as drawing lines through some or all of the dispositive provisions with the intent to revoke in whole or in part.

7. This is where the mistake is recited in the terms of the revoking instrument. In *Campbell v. French*, 3 Ves. Jr. 321, 30 Eng. Rep. 1033 (1797), a codicil expressly revoked bequests to two persons, "they being all dead." On evidence that the legatees were living, the court held that there was no revocation, "the cause being false." 3 Ves. Jr. at 321, 30 Eng. Rep. at 1033. The rule of the case is generally accepted in American texts, but there are very few decisions on the point. The *Campbell* case was followed on similar facts in *Gillespie v. Gillespie*, 96 N.J. Eq. 501, 126 A. 744 (1924). See generally 2 W. PAGE, *LAW OF WILLS* § 21.63 (Bowe-Parker ed. 1960).

8. In one case the doctrine was applied when the ineffective disposition was by deed. *Board of Trustees of Methodist Church v. Welpton*, 284 S.W.2d 580 (Mo. 1955). But another reason for the reference in the text to an "alternative plan for 'succession'" rather than "disposition" is because of the possibility of applying the doctrine to revocation when the decedent meant to die intestate but was mistaken as to who his heirs would be. See text accompanying note 35 *infra*.

9. In such a case there are possibilities of both tort and constructive trust relief. See generally Evans, *Torts to Expectancies in Decedents' Estates*, 93 U. PA. L. REV. 187 (1944); Annot., 11 A.L.R.2d 808 (1950).

Dependent relative revocation has been invoked with respect to both forms of revocation, but by far the largest number of cases actually applying the doctrine have involved an attempted revocation through some act physically manifested on the document.

When a testator does some act to the document such as destroying or mutilating it for the purpose of revoking the whole will, this will sometimes be connected with an intention either to reinstate a prior will or to give effect to a later one. In some jurisdictions a testator can reinstate a prior will by this method.¹⁰ In many, however, this is not permitted,¹¹ and there is authority in these states for the application of dependent relative revocation so as to give effect to the will which was destroyed or mutilated. For example, in *In re Callahan's Estate*,¹² the testatrix executed a will in 1944 which revoked an earlier will executed in 1940. Some years later she destroyed her 1944 will with the intention of reinstating the 1940 will. Under Wisconsin law the earlier will could not be revived in this manner, so that her actual intention could not be effectuated. The court applied dependent relative revocation and held that the 1944 will was unrevoked. It treated the attempt to revoke that will as dependent or conditioned upon the revival of the earlier will. The same result had been reached nearly 100 years earlier in an English decision,¹³ and although there are only a few American decisions dealing with this specific application of the doctrine, there is good reason to believe that the approach of the *Callahan* case will be followed.¹⁴

The cases are much more numerous in which the court applied dependent relative revocation where the testator revoked a will by some act to the document in connection with an attempted but ineffective disposition by later will.¹⁵ In most instances the later will was ineffective for lack of valid execution. But the doctrine could be applied also if the later will, though validly executed, was inoperative as a disposition; for example, where the sole legatee under the will was also a witness to the will, and by the law of the jurisdiction the legacy to the interested witness was void. In all of

10. See, e.g., *Whitehall v. Halbing*, 98 Conn. 21, 118 A. 454 (1922). See also notes 80 & 81 *infra* and accompanying text.

11. See statutes discussed in Rees, *American Wills Statutes*, 46 VA. L. REV. 856, 891-92 (1960).

12. 251 Wis. 247, 29 N.W.2d 352 (1947).

13. *Powell v. Powell*, L.R. 1 P. & D. 209 (1866).

14. 2 W. PAGE, *LAW OF WILLS* § 21.58 (Bowe-Parker ed. 1960). The Wisconsin court followed the *Callahan* case on similar facts in *Estate of Alburn*, 18 Wis. 2d 340, 118 N.W.2d 918 (1962).

15. *Strong's Appeal*, 79 Conn. 123, 63 A. 1089 (1906); 2 W. PAGE, *LAW OF WILLS* § 21.58 (Bowe-Parker ed. 1960).

these cases the revocation was connected with an actual attempt to make a new disposition; the problem takes on added complications where the decedent's plan for a new disposition had not reached this stage. In *Dougan's Estate*,¹⁶ the testatrix made numerous marks of cancellation and alteration on her will, with an intention to revoke it and make a new will. She took the mutilated will to her lawyer and requested him to prepare a new will, but before this could be done she died. In refusing to apply dependent relative revocation, the court in effect held that the acts of revocation must have been accompanied by a belief that the testatrix had then made a new disposition. This was not true in the case before it, from which the court concluded that she "had two independent purposes: one to revoke her will, and the other to proceed thereafter as occasion presented itself, with the preparation of a new will."¹⁷ On analogous facts the Probate Division of the English High Court did apply dependent relative revocation.¹⁸

The court pointed out in *Dougan's Estate* that the testatrix was not mistaken at the time of her acts of revocation; instead she simply failed to carry out her purpose to make a new will. This is one of the few cases to suggest explicitly that dependent relative revocation is limited to cases of mistake. The doctrine arose as a means of rectifying the consequences of mistake, and one of the important issues today is whether it is to be limited to such instances. This limit seemingly was imposed in *Dougan's Estate* but not in the English decision. Once conditional intent is accepted as an appropriate method of analysis, and it has generally been accepted, there is no longer any necessary connection with relief for mistake. Dependent relative revocation can take on a life of its own, to be applied without regard to the presence or absence of mistake. Most American cases applying the analysis have involved mistake, and courts sometimes emphasize the fact of mistake, but the general tendency has been to formulate doctrine without mentioning that fact.¹⁹ Although the issue admits of no single answer, it seems likely that mistake is no longer generally regarded as a limiting factor.

There are occasional decisions²⁰ or dicta²¹ which do not limit the doctrine as narrowly as the court did in *Dougan's Estate*, but the

16. 152 Ore. 235, 53 P.2d 511 (1936).

17. 152 Ore. at 271, 53 P.2d at 525.

18. *Dixon v. Solicitor to the Treasury*, [1905] P. 42. See also *Estate of Bromham*, [1951] 2 T.L.R. 1149.

19. *E.g., In re Callahan's Estate*, 251 Wis. 247, 29 N.W.2d 352 (1947).

20. *McIntyre v. McIntyre*, 120 Ga. 67, 47 S.E. 501 (1904).

21. *Roberts v. Fisher*, 230 Ind. 667, 105 N.E.2d 595 (1952); *In re DeLion's Estate*, 28 Wash. 649, 183 P.2d 995 (1947).

indications are that most courts will draw the line between an ineffective attempt to make another disposition and an uncompleted plan to do so.²² This is not, however, because of the absence of mistake in the latter case but rather for the reasons of policy suggested in a decision of the Pennsylvania court in *Emernecker's Estate*.²³ In that case the testatrix destroyed her will, saying to a friend that "on the first fine day"²⁴ she would go to her lawyer to have a new one made, but she died about a week later without having carried out her stated purpose. In refusing to apply dependent relative revocation the court said that the testatrix's statement "was merely the expression of an unwritten intention to do something in the future, and no matter how fully her mind was then made up, there might be a change of intention at any time before it was permanently expressed in writing."²⁵ In that court's view, unless a new dispositive plan has become definitive—and this does not normally occur until the decedent has executed a testamentary writing which he believes to be effective—the evidence is too uncertain that the decedent's intent to revoke is dependent upon putting the plan into effect. In addition, the existence of a writing containing the terms of the substituted disposition provides some assurance that the testator's true intentions in that regard are known. As the discussion below will disclose,²⁶ the doctrine of dependent relative revocation cannot be intelligently applied in the absence of such knowledge.

A related problem is presented when, after the decedent's death, a later writing is found which bears some of the appearance of a will but falls so short of the requisites for due execution as to raise a serious question whether the decedent believed that he had validly executed the writing as a will. Thus, in *Sanderson v. Norcross*,²⁷ the testator's duly executed will was found in his safe with his signature

22. T. ATKINSON, *WILLS* § 88 (2d ed. 1953). If the revocation is held ineffective because of an uncompleted dispositive plan, this will most likely be in a case in which the act of cancelling the will was closely connected in time with the testator's plan to make another will. A physical act of cancellation is effective as a revocation only if the testator intended it to have that effect. Certainly it is psychologically possible in a case like *Dougan's Estate* that the testator had no intent to revoke at the time of the cancellation. It would be possible to find that the testator either (1) did not intend the act to effect a revocation until he had made a new will, or (2) did not intend the act to effect a revocation at any time but instead intended to revoke solely by the terms of the new will. The American cases have demonstrated little inclination to adopt either interpretation.

23. 218 Pa. 369, 67 A. 701 (1907).

24. 218 Pa. at 371, 67 A. at 702.

25. 218 Pa. at 372, 67 A. at 702.

26. See text following note 38 *infra*.

27. 242 Mass. 43, 136 N.E. 170 (1922).

scratched out and words written in the margin in his handwriting stating that "this will is void as I have made a later one."²⁸ Another writing was found with the will which contained dispositive provisions, but it was not dated, signed, or witnessed. The Massachusetts court refused to apply dependent relative revocation on the ground that the testator must have known that this writing was not properly executed as a will. On somewhat similar facts, however, the Connecticut court in *Strong's Appeal*²⁹ decided that the revocation was conditional where the writing found with the cancelled will was unsigned but was in the handwriting of the testatrix. From the fact that she had written on the cancelled will the words "Superseded by written one,"³⁰ the court inferred that she believed the draft in her handwriting "then had full testamentary force and effect."³¹ The cases are not in conflict unless it be in their reading of the facts. Indeed, the two courts tacitly went on the same assumption, that is, that dependent relative revocation would apply only if the cancellation was accompanied by the belief that the other writing was a valid disposition of the decedent's estate. The decision in *Sanderson* could be explained by the fact that there was no mistake in connection with the revocation of the will, but the court did not purport to rest decision on this ground.

In this whole group of cases, the area of legal uncertainty is with respect to those situations in which the revocation was connected with a new dispositive plan which had not reached the stage of attempted execution of a will. The question a court should face in this uncertain area is whether the policy factors emphasized by the Pennsylvania court in *Emernecker's Estate* are to be regarded as decisive.³² On the whole the Pennsylvania limitation seems wise. Such a limitation could be described as confining relief to instances of mistake, but courts have seldom put the matter in these terms. Instead, the search is for reasons of policy which will keep the conditional intent analysis within acceptable bounds. It is an explosive idea which needs to be contained, and the general means of containment is to limit the condition to the effectiveness of another attempted disposition. As later discussion will show,³³ mistake has not been used as a limiting factor in other contexts.

28. 242 Mass. at 44, 136 N.E. at 171.

29. 79 Conn. 123, 63 A. 1089 (1906).

30. 79 Conn. at 125, 63 A. at 1090.

31. 79 Conn. at 125, 63 A. at 1090.

32. See text accompanying notes 23-25 *supra*.

33. See text accompanying notes 73 & 74 *infra*.

In most cases applying dependent relative revocation the revocation was connected with an attempted testamentary disposition,³⁴ but the problem has arisen also where the testator intended by the revocation to die intestate but was mistaken as to the law of intestate succession. For example, in *Allen's Will*,³⁵ where a will bequeathed the entire estate to relatives of the whole blood, the testator tore his signature from the will in the mistaken belief that these same persons would take by intestacy, when in fact under the law of intestate succession his relatives of the half blood would share in the estate. There was evidence that the testator's mistake arose from erroneous advice given to him by a lawyer. The New Jersey court held that the will was revoked, refusing to apply dependent relative revocation because it concluded that the doctrine was limited to instances "in which a substituted will has failed."³⁶ In an English case, however, *Estate of Southerden*,³⁷ the doctrine was applied to a similar situation. As already mentioned,³⁸ intelligent application requires reliable evidence of the decedent's intention concerning succession to his property at death. In most of the cases in which the doctrine has been applied, the evidence consisted of a writing in which the decedent attempted to express his intention, whereas the issue common to *Allen's Will* and *Estate of Southerden* was whether the doctrine should be extended to a situation in which the testator's intention must be derived from evidence which is not in writing because he had no plan to express it in writing. The issue is closely related to that presented when the testator planned to execute a new will but died before this occurred,³⁹ since in that case as well the evidence of his dispositive intent cannot be gathered from an attempted testamentary writing. Since the English court used dependent relative revocation in this latter situation,⁴⁰ it is not surprising that the doctrine was held applicable also in the *Southerden* case. Similarly, if a court limited the doctrine as was done in *Dougan's Estate*, it would not be surprising if the same court denied its application to the mistaken inheritance case. In spite of this similarity, the doctrine could well be extended to *Allen's Will* and like cases even

34. See note 15 *supra* and accompanying text.

35. 88 N.J. Eq. 291, 102 A. 147 (1917).

36. 88 N.J. Eq. at 294, 102 A. at 149.

37. [1925] P. 177, 14 B.R.C. 206. In one American jurisdiction the issue was left open. *In re Kerckhof's Estate*, 13 Wash. 2d 469, 125 P.2d 284 (1942).

38. See text following note 25 *supra*.

39. See text accompanying note 23 *supra*.

40. See text accompanying note 18 *supra*.

though the *Dougan's Estate* limitation⁴¹ is observed. On the average there is substantially less danger of the successful use of fraudulent or mistaken testimony to show who the decedent thought would take by intestacy, than to show who his intended legatees were and what shares they were to take when he had not reached the stage of expressing his intentions in a testamentary writing.

There was mistake in *Allen's Will* and some of the court's language suggests that it may have been influenced in denying relief by the fact that the testator's mistake was one of law, as it clearly was. But where dependent relative revocation is applied in a mistake situation, it is of no consequence whether the mistake is one of fact or of law. This is demonstrated by the *Callahan* case,⁴² where the testator's mistaken belief that she could reinstate a prior will in connection with the revocation of a later will was clearly a mistake of law and yet the court applied dependent relative revocation. Relief may be denied when a revocation is the product of a mistake of law but the basis for such denial is not that the mistake was of law rather than fact. For example, in *Emernecker's Estate*⁴³ a testatrix had executed a will bequeathing her entire estate to a granddaughter. Later, she was told by a friend "that the will was not good because of the omission of gifts to her children of at least one dollar,"⁴⁴ whereupon she tore up the will with the intention of having her lawyer prepare a new one but died before this was accomplished. The revocation was induced by an erroneous belief as to the law, but, as has been seen,⁴⁵ this is not the kind of case in which dependent relative revocation will usually be applied whether the mistake be of law or of fact. The mistake caused the testatrix to revoke the will, but it was not a mistake connected with the failure of another attempted disposition. The decision is a good example of the limited scope of dependent relative revocation as a means of effectuating intent in cases of mistaken revocation.

Nonetheless, the sole justification for the use of dependent relative revocation is to effectuate the decedent's intent as nearly as possible. Occasionally, the application of the doctrine will give complete and exact effect to the decedent's known intent, as would have been the case in *Allen's Will*, but this situation is relatively

41. See text accompanying notes 16 & 17 *supra*.

42. See text accompanying note 12 *supra*.

43. 218 Pa. 369, 67 A. 701 (1907). See text accompanying notes 23-25 *supra*.

44. 218 Pa. at 370, 67 A. at 701.

45. See text accompanying note 16 *supra*.

rare. In most cases the reason for the application of the doctrine is that the known dispositive intent cannot be given effect. Where the act of revocation went to the whole instrument, the court is left with a choice between giving effect to the dispositions contained in that instrument or letting the property go by intestacy. Usually, neither course will effectuate the decedent's intent exactly, but it will often be possible for the court to conclude that one will come closer than the other. If the testamentary disposition is closer dependent relative revocation should be applied and the will held unrevoked, but if intestacy is closer the doctrine should be held inapplicable. Suppose, for example, that a testator with two heirs, a son John and a daughter Mary, makes a will leaving his entire estate to John, but thereafter cancels the will in connection with an attempt to execute a new will bequeathing his entire estate to Mary. The latter will is invalidly executed so that his intended disposition to Mary cannot be given effect. In such circumstances it should be regarded as clear beyond the possibility of serious argument that dependent relative revocation will not be applied. The result of its application is that the entire estate goes to John, whereas the decedent intended that it should go to Mary; if, in contrast, the court refuses to apply the doctrine so that the property goes by intestacy, Mary takes a one-half interest, which is obviously closer to the intended disposition than the only other choice available to the court.

Although dependent relative revocation is a beneficial doctrine when properly applied, a disturbing fact about the cases is that the kind of analysis just suggested is seldom made. While it appears more frequently in modern decisions than in the older cases,⁴⁶ it remains true that in case after case courts apply the analysis mechanically without any attempt to ascertain what might be called the probable intent of the decedent—that is, given the choices available, which would the decedent probably have made had he known that his intended disposition would be ineffective? From the fact that the act of revocation was connected with an attempt to make a different disposition, many courts have thought it followed that the revocation was intended to be conditional on the effectiveness of the disposition.⁴⁷ This does not follow, of course, but an important consequence of this view is that the apparent revocation is made presumptively conditional. This will sometimes lead a court to apply the doctrine

46. It is likely that is partly because of the influence of Warren, *supra* note 4.

47. Examples are *In re Callahan's Estate*, 251 Wis. 247, 29 N.W.2d 352 (1947); *Powell v. Powell*, L.R. 1 P. & D. 209 (1866). See also notes 51 & 53 *infra*.

without even mentioning the terms of the intended disposition.⁴⁸ When the relevant facts are fully disclosed, they may be comparable to those in the John-Mary example, in which case the presumption should give way and the doctrine should not be applied. In contrast, in many of the cases in which it has been applied, this was fully warranted by the facts, because of the similarity between the intended dispositions and those contained in the cancelled wills.⁴⁹

Although full recognition of the fact that the case should turn on probable intent has been slow in coming, it is in the process of being achieved. The great importance of the presumption lies in those numerous situations in which there can be no clear resolution of the issue of probable intent, for in such circumstances the revocation will be regarded as conditional and ineffective. Many of these cases are in the category now to be discussed, where the act to the document was directed to only partial revocation.

The question whether to apply dependent relative revocation arises with considerable frequency where the act of revocation goes only to a part of the document, as by striking out dispositive words with the intention of revoking only that disposition. If the jurisdiction does not permit partial revocation by act to the document that ends the matter, since the intended revocation is inoperative and the will is entitled to probate as originally written. Dependent relative revocation thus becomes an issue only in a jurisdiction that permits partial revocation by striking or other act to the document. It can arise, for example, in a situation in which the testator's will bequeathed 10,000 dollars to John with a residuary bequest in favor of the testator's wife, the testator having thereafter crossed out the name John and written in the name Mary. Unless this is a holographic will in a state which permits such wills,⁵⁰ the attempted disposition to Mary is invalid. The question is whether the revocation is nonetheless effective so that the 10,000 dollars passes under the residuary clause, or whether the revocation of the bequest to John will be regarded as conditioned upon the validity of the at-

48. *In re Macomber's Will*, 274 App. Div. 724, 87 N.Y.S.2d 308 (1949).

49. *Stewart v. Johnson*, 142 Fla. 425, 194 S. 869 (1940); *Flanders v. White*, 142 Ore. 375, 18 P.2d 823 (1933); *Will of Lundquist*, 211 Wis. 541, 248 N.W. 410 (1933). This similarity was relied on in the earliest case on the subject, *Onions v. Tyrer*, 2 Vern. 741, 23 Eng. Rep. 1085, 1 P. Wms. 343, 24 Eng. Rep. 418 (1717), but there the court went principally on the ground of equitable relief, "under the head of accident." 2 Vern. at 743, 23 Eng. Rep. at 1085, 1 P. Wms. at 346, 24 Eng. Rep. at 419.

50. In such circumstances the intended bequest to Mary has been upheld. *Moyers v. Gregory*, 175 Va. 230, 7 S.E.2d 881 (1940); *In re Finkler's Estate*, 3 Cal. 2d 584, 46 P.2d 149 (1935); T. ATKINSON, *WILLS* 447 (2d ed. 1953).

tempted bequest to Mary. The judicial attitudes here are virtually the same as those already discussed. For example, in a Massachusetts case the court concluded that because the cancellations and substitutions were "linked together as parts of one transaction" it was "evident that the testatrix intended the cancellations to be effective only if the substitutions were valid."⁵¹ In fact, this was not evident, but an important meaning of this and numerous like decisions is the same as that already suggested: that is, there is a presumption that the partial revocation by striking was dependent upon the effectiveness of the substituted bequest.⁵² Clearly, however, the case is open to evidence to rebut the presumption, or, to put it another way, to show that the testator probably would have chosen the residuary legatee rather than John as the recipient of the 10,000 dollar legacy had he been faced with this choice. Thus evidence of a deep estrangement between the testator and John would strongly suggest that the revocation of the bequest to him was meant to be absolute. Numerous cases have applied dependent relative revocation to such acts of partial revocation without inquiry into facts bearing on probable intent.⁵³ When this occurs today the fault may well lie with counsel who are insufficiently aware of the fact that a mechanical application of the doctrine is no longer acceptable.⁵⁴

III. REVOCATION BY INSTRUMENT

The issue of dependent relative revocation can arise also in connection with revocation by later testamentary writing, both

51. *Schneider v. Harrington*, 320 Mass. 723, 726, 71 N.E.2d 242, 244 (1947). *Accord*, *In re Appleton's Estate*, 163 Wash. 632, 2 P.2d 71 (1931).

52. See text accompanying note 47 *supra*.

53. In addition to the cases cited in note 51 *supra*, see *In re Bonkowski's Estate*, 266 Mich. 112, 253 N.W. 235 (1934); *In re Knapen's Will*, 75 Vt. 146 (1902); *Wolf v. Bollinger*, 62 Ill. 368 (1872).

54. The kind of inquiry that should be made is suggested in part in *Ruel v. Hardy*, 90 N.H. 240, 6 A.2d 753 (1939), where legacies of "five hundred dollars" were given to each of three persons, but the testatrix in a later unattested act struck out "five" and wrote in "one." The court held that dependent relative revocation was inapplicable for the reason that "[a] reduction of eighty per cent of the legacy tends more to show a preference on her part that the legatees should have nothing rather than that they should have the full sum" 90 N.H. at 248, 6 A.2d at 759.

The earlier attitude is exemplified in *Locke v. James*, 11 M. & W. 901, 152 Eng. Rep. 1071 (1843), where in an unattested act a legacy of six hundred pounds was altered by striking "six" and writing in "two." The court applied dependent relative revocation, saying:

What the testator in such a case is considered to have intended, is a complex act, to undo a previous gift, for the purpose of making another gift in its place. If the latter branch of his intention cannot be effected, the doctrine is, that there is no sufficient reason to be satisfied that he meant to vary the former gift at all. 11 M. & W. at 910-11, 152 Eng. Rep. at 1075.

where that writing contains an express revocation clause and where it revokes only by inconsistency of the dispositions when the two wills are compared. In most of the reported cases there was an express revocation clause and this aspect of the problem will be discussed first.

A. *Express Revocation Clause*

When the later instrument contains an express revocation clause, the decisions indicate a markedly different attitude than that shown when the revocation is by act to the document. Thus if the testator bequeaths 10,000 dollars to John in the original will and later executes a codicil which recites the bequest to John, states that the bequest is revoked, and provides that in lieu thereof 10,000 dollars is given to Mary, one aware of the courts' approach to revocation by act to the document might suppose that a court would treat the revocation of the bequest to John as presumptively conditioned upon the effectiveness of the bequest to Mary. Hence, if the bequest to Mary were for some reason invalid (for example, because she was a necessary witness to the codicil), there would be no revocation because the condition was not met. Nevertheless, it is reasonably certain that a court would not act in the manner described.

When the revocation of the bequest to John is by act to the document it is regarded as presumptively conditioned upon the validity of the bequest to Mary; but no such presumption is indulged where both the revocation and the ineffective disposition are by instrument. The cases go further than this however; until relatively recent times they contained almost nothing to suggest that a court would apply the doctrine in the latter situation even if it concluded that this would effectuate the decedent's probable intent.

The reasons for this difference in treatment are obscure. In *Tupper v. Tupper*,⁵⁵ an early and perhaps the leading English decision on the point, the court refused to apply dependent relative revocation in a situation similar to that just described, because it was unwilling to "speculate on whom [the testator] might wish to confer the benefit"⁵⁶ in the unforeseen circumstances. Yet such speculation is inherent in the analysis if the revocation is by act rather than instrument.⁵⁷ The practical effect of the *Tupper* case

55. 1 K. & J. 665, 69 Eng. Rep. 627 (Ch. 1855).

56. 1 K. & J. at 670, 69 Eng. Rep. at 629.

57. Compare the attitude found in *Locke v. James*, 11 M. & W. 901, 152 Eng. Rep. 1071 (1843), where the English court applied the doctrine to a case of attempted

seemed to be that dependent relative revocation would not be applied to express revocation by instrument. In *Hairston v. Hairston*,⁵⁸ a Mississippi case decided the same year as *Tupper*, this limitation was explained on the ground that an express revocation clause is an unequivocal act which makes it "incompetent to seek for the intention outside of the instrument itself."⁵⁹ Extrinsic evidence may always be used to show that a testamentary instrument in proper form was not intended to be effective,⁶⁰ but that is not the purpose of the resort to such evidence in these circumstances. Instead, the purpose is to show a condition precedent to the effectiveness of a portion of a testamentary writing, the express revocation clause.

The court in the *Hairston* case adopted an unacceptable view concerning the meaning of language—that meaning must be derived from the words themselves, divorced of the circumstances in which they are used. This is rejected generally in modern law and specifically in decisions construing express revocation clauses. Thus there are cases holding that words of revocation in conventional form, such as a statement "revoking any and all former wills by me made," did not operate to revoke an earlier will when the extrinsic circumstances persuaded the court that the testator did not so intend.⁶¹ The Mississippi court's attitude toward meaning is rejected also in some of the cases discussed hereinafter, in which dependent relative revocation was applied to an express revocation clause.⁶²

Nonetheless, there can be little doubt that the *Hairston* explanation has influenced the general refusal to apply dependent relative revocation to wills containing an express revocation clause. Such decisions have given rise to the commonly stated position that the doctrine can be applied only where the conditional intent appears on the face of the instrument.⁶³ It remains uncertain when, if ever,

reduction in the amount of a money bequest, saying that "there is no sufficient reason to be satisfied that he meant to vary the former gift" when the substituted bequest proved invalid. 11 M. & W. at 911, 152 Eng. Rep. at 1075.

58. 30 Miss. 276 (1855).

59. 30 Miss. at 305.

60. *Fleming v. Morrison*, 187 Mass. 120, 72 N.E. 499 (1904).

61. The language quoted is from *Allen v. Beemer*, 372 Ill. 295, 23 N.W.2d 724 (1939), where the court held that it did not revoke an earlier will because the extrinsic evidence showed that no revocation was intended. *Accord*, *In re Smith's Will*, 254 N.Y. 283, 172 N.E. 499 (1930); *In re Watt's Estate*, 168 Pa. 422, 32 A. 42 (1895).

62. See notes 66-72 *infra* and accompanying text.

63. In some of the cases refusing to apply dependent relative revocation, it is said that this is because the disposition in the revoking instrument failed "because

this requirement is satisfied. For example, in the John-Mary hypothetical case and in the *Tupper* case as well, the codicil recited that the bequest made therein was in lieu of the revoked bequest, the terms of which were also recited in the codicil. In view of the courts' treatment of revocation by act to the document, one might expect a court to hold that the *terms* of the codicil show presumptively that the revocation was conditioned upon the effectiveness of the substituted disposition.⁶⁴ In fact, courts have not taken this step and the likelihood therefore is that the bequest to John will be unqualifiedly revoked.

Except for scattered decisions,⁶⁵ there was little reason to believe, until the advent of some relatively modern cases, that the doctrine would ever be applied to express revocation by will or codicil. But in recent years a significant number of cases have appeared in which the original bequest, which was in terms revoked by a later will or codicil, was identical with or similar to an invalid bequest contained in the revoking instrument. In a number of these cases the court saved the original bequest through use of the conditional intent analysis.⁶⁶ Thus, in *Linkins v. Protestant Episcopal Cathedral Foundation*,⁶⁷ a case from the Court of Appeals for the District of

of something dehors" the instrument. *Wallingford's Executor v. Wallingford's Administrator*, 266 Ky. 723, 99 S.W.2d 729 (1936); *Melville's Estate*, 245 Pa. 318, 91 A. 679 (1914). *Contra*, *Blackford v. Anderson*, 226 Iowa 1138, 286 N.W. 735 (1939). It is believed that the statement is of no significance on the present point. The decisions are based on the view that the conditional nature of the revocation must be expressed in the revoking instrument.

64. See text accompanying notes 47 & 48 *supra*.

65. *Security Co. v. Snow*, 70 Conn. 288, 39 A. 153 (1898) (the revoked and substituted bequests were similar though not identical).

66. *Ruth v. Ruth*, 35 Del. Ch. 573, 123 A.2d 132 (1956); *La Croix v. Senecal*, 140 Conn. 311, 99 A.2d 115 (1953); *Estate of Kaufman*, 25 Cal. 2d 854, 155 P.2d 831 (1945); *Charleston Library Soc. v. Citizens & S. Natl. Bank*, 200 S.C. 96, 20 S.E.2d 623 (1942); *Blackford v. Anderson*, 226 Iowa 1138, 286 N.W. 735 (1939).

67. 187 F.2d 357 (D.C. Cir. 1950). *Accord*, *Estate of Kaufman*, 25 Cal. 2d 854, 155 P.2d 831 (1945). *Contra*, *In re Pratt's Estate*, 88 S.2d 499 (Fla. 1956); *Teacle's Estate*, 153 Pa. 219 (1893). In all of these cases the two sets of charitable bequests were identical and the disposition by the later will was ineffective because the testator died too soon after execution of that will. In *Newman v. Newman*, 28 Ohio Op. 2d 154, 199 N.E.2d 904 (P. Ct. 1964), the same charities were legatees under each instrument but the amount that would have gone to the charities under the later instrument could have been either more or less than that given in the first will, depending on the size of the estate.

In the *Pratt* case there is some suggestion that the doctrine was considered inapplicable because the revocation was not the product of mistake, but the principal reason given was that it was not permissible to "look beyond the probated will for testamentary intent." 88 S.2d at 503. The court made this interesting distinction, however: if the invalid bequests had been by codicil it would have been possible to apply dependent relative revocation because in such a case the will and codicil must both

Columbia Circuit, the substituted bequests to certain religious organizations failed because the testator died within thirty days after execution of the will and this invalidated the dispositions pursuant to statute.⁶⁸ The same bequests had been made in an earlier will, which was expressly revoked by the terms of the later will. In applying dependent relative revocation to save the bequests, the court rejected the position taken in *Hairston* and similar cases and held that extrinsic evidence could be used to show that the express revocation clause was conditional. The extrinsic evidence consisted of the terms of the earlier will, which obviously sufficed to show that application of the doctrine would give exact effect to the testamentary wishes.⁶⁹

A few cases have gone beyond this to apply the doctrine when there was enough similarity between the two bequests to convince the court that the decedent would have preferred the original bequest to the consequences which would ensue from a decision that it had been unconditionally revoked. For example, in a South Carolina case⁷⁰ a bequest of property for the benefit of the Charleston Library Society was expressly revoked by a codicil which provided that "in lieu thereof"⁷¹ the same property should be used to establish a public museum in Charleston. The latter bequest was held invalid under the rule against perpetuities, whereupon the court applied dependent relative revocation in order to leave in effect the

be presented to the probate court and the doctrine can therefore be applied "without resort to evidence extrinsic to the documents themselves." 88 S.2d at 502. But in the case before the court the ineffective bequests were contained in a later will which expressly revoked the earlier will, so that the earlier will was not "necessarily before the court." 88 S.2d at 503. In the *Linkins*, *Kaufman*, and *Teacle* cases the later instrument was a will which expressly revoked the prior will, whereas in the *Newman* case it was a codicil.

68. D.C. CODE ANN. § 18-302 (1967) provides: "A devise or bequest . . . to . . . a religious sect, order, or denomination . . . is not valid unless it is made at least 30 days before the death of the testator."

69. It should be possible to reach the same result without applying dependent relative revocation once there is an appropriate separation of the instrument expressing the testator's dispositive intent from the dispositive intent itself. When, as in *Linkins*, each will makes the same dispositions, the words of express revocation revoke the instrument but they do not revoke the dispositions expressed therein. On the contrary, the later will was intended to keep those dispositions in force, and it should be concluded that they were never revoked for lack of any intent to do so. This analysis was adopted in *In re Watts Estate*, 168 Pa. 422, 32 A. 42 (1895). Judge Edgerton seemingly had such analysis in mind in his short concurring opinion in the *Linkins* case. 187 F.2d at 361 (Judge Edgerton, concurring).

70. *Charlestown Library Soc. v. Citizens & S. Natl. Bank*, 200 S.C. 96, 20 S.E.2d 623 (1942).

71. 200 S.C. at 100, 20 S.E.2d at 625.

library bequest. It concluded that the testatrix "did not intend an absolute revocation . . . but intended to make a substitution of one public charity of a cultural nature for another; the revocation being conditional upon the effectiveness of the provision for the museum."⁷² In order to reach this conclusion it was necessary for the court to look outside the revoking instrument for the purpose of learning the terms of the prior bequest.

The ultimate effect of such decisions is as yet uncertain. They have rejected the position that the conditional nature of the revocation must appear on the face of the revoking instrument. Once this step is taken it would seem that the case should be open for the consideration of all evidence bearing on the decedent's probable intent in a situation which he did not foresee, and to apply the doctrine when it is concluded that this will come closer to his dispositive wishes than will the other choice available. However, one difference is likely to remain between express revocation by instrument and revocation by act to the document; that is, courts will not be prepared to treat the express revocation by instrument as presumptively conditioned on the effectiveness of the substituted disposition.

One remaining aspect of the *Linkins* case is yet to be noticed. According to the conventional analysis of mistake, the revocation there was not a product of mistake. The charitable bequest was invalid because of a fact occurring after execution of the will, the death of the decedent in less than thirty days, whereas mistake traditionally refers to a discrepancy between what the actor believes to be true at the time of his act and the actual facts at that time. Even if the mistake concept were stretched to include a case in which the testator was unaware of the statute invalidating the charitable bequest, it cannot be made to cover a case in which he knew of the statute and of the possibility that his gift might be invalidated. Yet the California supreme court applied dependent relative revocation in just such a case.⁷³ Under such decisions at least, dependent relative revocation has become an independent mode of analysis, free of the limitations imposed by a desire merely to give relief for mistake.⁷⁴ However, there remains one significant difference between these cases and those such as *Dougan's Estate*, where

72. 200 S.C. at 125, 20 S.E.2d at 635.

73. *Estate of Kaufman*, 25 Cal. 2d 854, 155 P.2d 831 (1945).

74. But in *Blackford v. Anderson*, 226 Iowa 1138, 286 N.W. 735 (1939), the court emphasized the presence of mistake and used language suggesting that this was an essential element.

the court seemingly refused to extend the doctrine beyond the boundaries of mistake. In *Dougan's Estate* the testator's plan to make a new will was frustrated before he had attempted to execute the will, whereas in *Linkins* and similar cases the intended dispositions, although ultimately declared invalid, were expressed in a duly executed will.

B. *Revocation by Inconsistency*

When one turns to revocation by later instrument which does not contain an express revocation clause, almost nothing definitive can be said. Dependent relative revocation began in 1717 with the decision of an English court in *Onions v. Tyrer*,⁷⁵ and it seems extraordinary that after more than 250 years almost all of the issues remain open with respect to revocation by inconsistency. The problem has gone largely unanalyzed, and what is needed most is an analysis which will provide a reasonably firm guide to decision. This is what will be attempted in the following discussion.

1. *Revocation upon Execution of the Later Instrument*

In many states revocation by later will occurs when the instrument is executed, both where it contains an express revocation clause and where it revokes only because the dispositions are inconsistent with those in the prior will. In the second situation, sometimes referred to as implied revocation, the court concludes that the dispositive terms of the later will express an intention to revoke the earlier will, but it should reach this conclusion only after going outside the later will and taking into account the terms of the earlier will. The reason given in the *Hairston* case⁷⁶ for refusing to go outside the will to seek the testator's intention where the will contains an express revocation clause simply does not apply, since it is necessary to do so in the first instance in order to find an intent to revoke. The conclusion in these jurisdictions should be that the use of dependent relative revocation when revocation is by inconsistency is appropriate without regard to the position taken in that jurisdiction when there is an express revocation clause in the later instrument.

It is probable, however, that, as in the case of express revocation, the revocation by inconsistency will not be treated as pre-

75. 2 Vern. 741, 23 Eng. Rep. 1085, 1 P. Wms. 343, 24 Eng. Rep. 418 (1717).

76. See text accompanying notes 58 & 59 *supra*.

sumptively conditioned on the effectiveness of the new dispositions. In *Crawford v. Crawford*,⁷⁷ a first will bequeathed the entire estate to a sister of the testator, and a later will, without expressly revoking the first, bequeathed the entire estate to a nephew. The nephew was a witness to this will and the statutory consequence was that while the will was valid the bequest to the nephew was void.⁷⁸ It was held, nonetheless, that the first will was revoked, with the result that the decedent died intestate. While the court did not mention dependent relative revocation by name, it discussed the case in a manner appropriate to that doctrine and concluded that there was nothing "to justify the court in assuming . . . that it was the testator's intention that, in the event the later will should prove to be ineffective to pass the title to the property to the devisee, the earlier will should be deemed to continue in effect."⁷⁹ The case can fairly be read to mean that, while dependent relative revocation can be used in such a case, there is no presumption in favor of its application.

2. Common Law Rule

Under what has been called the common law rule, developed principally from two decisions by Lord Mansfield,⁸⁰ a will does not operate to revoke a prior will unless it remains in effect at the testator's death. This is true whether the later will contained an express revocation clause or revoked only by inconsistency. The theory is that the will does not take effect for purposes of revocation until the testator's death, just as it does not take effect for purposes of disposition until that time. This is the rule of law in a significant number of states in this country.⁸¹ The analysis of the problem under this approach should be the same as in those jurisdictions just discussed, where revocation by later will occurs immediately upon execution. That is, if the revocation is by inconsistency, dependent relative revocation should be available regardless of the position the state takes with respect to express revocation. Thus, on the facts of the *Crawford* case it should make no difference that the

77. 225 Miss. 208, 82 S.2d 823 (1955).

78. Miss. CODE ANN. § 661 (1942) provides that any bequest to a subscribing witness shall be void.

79. 225 Miss. at 225-26, 82 S.2d at 830.

80. *Harwood v. Goodright*, 1 Cowp. 87, 98 Eng. Rep. 981 (1774); *Goodright v. Glazier*, 4 Burr. 2512, 98 Eng. Rep. 317 (1770).

81. See cases discussed in Zacharias & Maschinot, *Revocation and Revival of Wills* (pts. 1 & 2), 25 CHI.-KENT L. REV. 185 (1947), 26 CHI.-KENT L. REV. 107 (1948).

revocation by inconsistency is regarded as not operative until the testator's death. At that time the inconsistent terms are still regarded as expressive of an intent to revoke the prior will, and this is effective unless dependent relative revocation is applied. Since an intent to revoke calls for inquiry into facts outside the will, it is proper for the court to consider whether these facts indicate that the revocation was conditioned on the effectiveness of the substituted disposition.

3. *Rule of Necessity*

There is a third view of the manner in which a later will containing no express revocation clause revokes or fails to revoke an earlier will, expressed by a New York court in an early case as follows: "[It is] a rule of necessity, and operates only so far as is requisite to give the later provision effect."⁸² This is an unsatisfactory theory, which seems to go by analogy to the physical displacement of one object by another, such as water by a solid object immersed in the water. It would apply, for example, where a will bequeaths a specific one hundred shares of General Dynamics stock to *A*, and a codicil, without reciting that bequest or expressly revoking it, bequeaths the same shares of stock to *B*. If the codicil is left in effect at death, it is not possible to give full effect to both bequests, and under the New York view the first is revoked because, and only because, this is necessary in order to make way for the second. This analysis eliminates the issue of dependent relative revocation since that doctrine applies only where the disposition in the later will is for some reason invalid. When this is the case there has been no revocation of the earlier disposition under this theory of revocation and that ends the matter.

The same position as that of the New York court was taken by three of the five judges in *Ward v. Van der Loeff*,⁸³ a decision of the House of Lords. In that case the original will left the residuary estate to trustees for the benefit of the testator's wife for her life, then for the benefit of their children, and if there were no children (which was the case) for the benefit of the testator's nieces and nephews. By a codicil which contained no express revocation clause, the testator changed the provisions following the wife's life estate so

82. *Austin v. Oakes*, 117 N.Y. 577, 598, 23 N.E. 193, 197 (1890).

83. [1924] A.C. 653.

that the beneficiaries were still largely the same group, but a change in language resulted in the invalidity of the whole bequest under the rule against perpetuities. It was held that the original will was unrevoked. Three of the Law Lords thought this was not a case for the application of dependent relative revocation because, in their view, there had been no revocation. Their position was summarized in the statement of Lord Dunedin that "if the only revocation is that which is to be gathered from the inconsistency of the subsequent disposition with the earlier one, then if the subsequent disposition fails from any reason to be efficacious there will be no revocation."⁸⁴

It is significant that two of the judges in *Ward* thought that it was a proper case for the application of dependent relative revocation. Because of the similarity between the two sets of dispositions, the case is comparable to a number of modern American decisions in which the doctrine was applied where there was an express revocation clause.⁸⁵ But whatever position may be taken in that situation, the opinions of these two judges support the conclusion previously reached that cases of revocation by inconsistency are always open to inquiry on the issue of probable intent.⁸⁶

IV. CONCLUSION

There is a close connection between relief for mistake and dependent relative revocation simply because there was mistake in most of the situations in which the doctrine has been applied. While there are occasional suggestions that it should be limited to instances of mistake, cases such as *Linkins* indicate that this would be unwise. It is important, however, to limit the conditional intent analysis to cases in which the apparent revocation was connected with another dispositive plan, and in general it seems best to require that the plan be one which the testator attempted to put into effect. In close cases such a limitation could become somewhat arbitrary, and cases can be imagined in which a literal adherence to the limitation would be inadvisable.⁸⁷ Nonetheless, this is an area in which there is need

84. [1924] A.C. at 671.

85. See notes 66-72 *supra* and accompanying text.

86. See text accompanying notes 77-79 *supra*.

87. Thus, a dictum in *Roberts v. Fisher*, 230 Ind. 667, 105 N.E.2d 595 (1952), suggests that the doctrine would apply if the testator destroys his will "with a present intention of making a new one immediately," but the new one is not made. 230 Ind. at 675, 105 N.E.2d at 598. If this occurred because of death or disability before the "immedi-

for fairly well-defined boundaries in the application of an analysis which is not self-limiting.

ate" plan could be put into effect, it is possible that a conditional revocation analysis would be accepted. Statements to the same general effect appear in *In re DeLion's Estate*, 28 Wash. 2d 649, 183 P.2d 995 (1947). It should be noted that if dependent relative revocation were applied, it would be operating in a situation in which there was no mistake connected with the apparent revocation.