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Wills - Revocation and Revival - Subsequent Will

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tion, it is submitted that the result in this jurisdiction ought to follow that of the principal case.[11]

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WILLS — REVOCATION AND REVIVAL — SUBSEQUENT WILL. — Testatrix made two wills, one subsequent to the other, and left them in custody of a bank. In the second will she expressly revoked the first will. Prior to her death she withdrew the second will from the bank with intent to change it, leaving the first will at the bank. After her death the second will could not be found and consequently was presumed destroyed. The Supreme Court of Virginia *held*, two justices dissenting, that the first will was not revoked by the subsequent will. The dissent felt that the revocation became effective the moment the second will was executed. *Timberlake v. State-Planters Bank of Commerce and Trusts*, 115 S.E.2d 39 (Va. 1960).

In absence of statutes, there is great divergence of opinion among the American cases as to when a revocation by a subsequent will becomes effective.[1] Basically there are three views in this country governing this question: (1) the common law or revival theory, (2) the ecclesiastical or intent idea, and (3) the English or anti-revival view which was adopted by statute in England and in nearly one-half of the states.[2]

The common law view is based on the theory that a will is ambulatory until death and that any subsequent revocation is not effective until the death of the testator.[3] It has been said that this view is the weight of authority,[4] however there are cases to the contrary.[5] The defect in this view is that the will revoked may be revived contrary to the intention of the testator.[6]

The ecclesiastical rule says the question of whether or not a revocation of a later will revives the former is a matter of intent and that there is no presumption adverse to or in favor of revival.[7] This theory is derived from the basic principles in all will's cases, that of ascertaining the intention of the testator.[8] As expressed by Roscoe Pound in 1903[9] "it [ecclesiastical rule] has the support of the weight of recent authority in America."

The English rule is exemplified by decisions stating that because of statute, subsequent revocation becomes effective immediately upon execution, and to

11. Although N.D. Cent. Code § 47-09-14 provides that "When a future interest is limited by a grant to take effect on the death of any person without heirs, or heirs of his body, without issue, or in equivalent words, such words must be taken to mean successors or issue living at the death of the person named as ancestor . . ." this would not seem to be conclusive of the issue. Restatement, Property § 292 (1941) uses a broad definition of "issue" and "descendants" but adds the observation that descendants may be excluded from sharing in a distribution under the rule stated in § 303. See, also comment *e* to this section.

1. ATKINSON, WILLS § 92 (2d ed. 1953).
2. See 28 Calif. L. Rev. 265 (1940).
3. Whitehill v. Halbing, 98 Conn. 21, 118 Atl. 454 (1922); Bates v. Hacking, 28 R.I. 523, 68 Atl. 622 (1908).
4. *In re* Gould's Will, 72 Vt. 316, 47 Atl. 1082 (1900).
5. Blackett v. Ziegler, 153 Iowa 344, 133 N.W. 901 (1911); Williams v. Miles, 68 Neb. 463, 94 N.W. 705 (1903).
6. Bates v. Hacking, 28 R.I. 523, 68 Atl. 622, 625 (1908).
7. Williams v. Miles, 68 Neb. 463, 94 N.W. 705 (1903); Wrinkle v. Williams, 37 Tenn. App. 27, 260 S.W.2d 304 (1953).
8. Ewell v. Rucker, 28 Tenn. App. 156, 187 S.W.2d 644 (1945).
9. Williams v. Miles, 68 Neb. 463, 94 N.W. 705 708 (1903).

revive the prior will a new will or codicil must be executed.[10] This view is sustained by reason and weight of authority, although disapproved by a minority of the courts.[11] North Dakota follows the English rule through statute.[12]

In conclusion it is interesting to note that where not governed by statute each view claims to have the weight of authority. It seems that the revival and anti-revival theories are too rigid and may easily destroy the intent of the testator, however the intent theory has remedied this situation and consequently would result in a more just decision.

VINCENT SONJU.

WILLS – TESTAMENTARY CAPACITY – INSANE DELUSION. – After forty years of happy married life decedent became obsessed with the idea that his wife was unfaithful. In fact he had some basis for such thinking although it was illogical, unreasonable, and unjust. The testator was rational and apparently of sound mind in all other respects. The court said that one who believes in suppositions which have no existence except in his imagination is suffering from a morbid delustion so far as these beliefs are concerned. And though he conducts himself logically upon the assumption of the delusion, on that particular subject it is an insane delusion. The New York Court of Appeals *held,* three justices dissenting, that the question of testamentary capacity was for the jury. *In re Honigman's Will,* 8 N.Y.2d 244, 168 N.E.2d 676 (Ct. App. 1960).

An insane delusion which affects the provisions of a will is held to be sufficient to devoid a will for lack of testamentary capacity.[1] Since the testator's mental capacity is assumed[2] the burden of coming forward with the evidence to prove the lack of testamentary capacity is upon the contestants.[3] However, a delusion to be declared an insane delusion[4] must be an irremovable belief that is not true or does not exist, based on no evidence whatever; consequently causing the testator to dispose of his property in a manner different from what he would have followed in the absence of such a belief.[5]

Testator's delusions of wife's unfaithfulness, children's illegitimacy, feelings of having life threatened, or other feelings, however eccentric or absurd, do not invalidate a will if there is some basis for such thoughts.[6]

10. Driver v. Sheffield, 211 Ga. 316, 85 S.E.2d 766 (1955); Singleton v. Singleton, 269 Ky. 330, 107 S.W.2d 273 (1937); *In re* Walsh's Will, 5 Misc.2d 801, 161 N.Y.S.2d 227 (Sur. Ct. 1957). *In re* Eberhardt's Estate, 1 Wis.2d 439, 85 N.W.2d 483 (1957).

11. See Blackett v. Ziegler, 153 Iowa 344, 133 N.W. 901, 904 (1911).

12. N.D. Rev. Code § 56-0408 (1943).

1. *In re* Leonard's Estate, 92 Cal.App. 420, 207 P.2d 66 (1949); Sterling v. Dubin, 6 Ill.2d 64, 126 N.E.2d 718 (1955); Thayer v. Thayer, 188 Mich. 261, 154 N.W. 32 (1915).

2. Houston v. Grigsby, 217 Ala. 506, 116 So. 68 (1928); Roller v. Kurtz, 6 Ill.2d 618, 129 N.E.2d 693 (1955); Black v. Smith, 58 N.D. 109, 224 N.W. 915 (1929).

3. *In re* Johnson's Will, 201 Iowa 687, 207 N.W. 748 (1926); Black v. Smith, 58 N.D. 109, 224 N.W. 915 (1929); Hedderisch v. Hedderisch, 18 N.D. 488, 123 N.W. 276 (1909).

4. Herzog, Medical Jurisprudence, "Not every delusion is an insane delusion. If the belief is supported by any facts, however little their evidential force, then it is not an insane delusion although it may appear illogical and foundationless." Bohler v. Hicks, 120 Ga. 800, 48 S.E. 306 (1904), "The delusion must spring up spontaneously in the mind of the person, and not be the result of evidence of any kind."

5. John v. Tallett, 341, Ill.App. 240, 93 N.E.2d 82 (1950); Jackman v. North, 398 Ill. 95, 75 N.E.2d 324 (1947); Potter v. Jones, 20 Ore. 239, 25 Pac. 769 (1891).

6. *In re* Alegria's Estate, 87 Cal.App.2d 645, 197 P.2d 571 (1948); *In re* Hayer's Estate, 230 Iowa 880, 299 N.W. 431 (1941); *In re* Cole, 5 N.W. 348 (Wis. 1880).