Rectification of Mistakes in the Inducement of Testamentary Dispositions

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Introduction

Mistake, as far as it can be distinguished from other legal concepts, consists in an erroneous belief as to the existence of a state of facts or in the unconscious ignorance of some fact, which is not the product of the intentional intervention of another and which results in the execution of a legal act that would not have been undertaken had there been no such erroneous belief or ignorance.\(^1\) In the law of wills, mistake has assumed a character alien to that which has been traditionally ascribed to it in so far as the analysis of it, and its effects, has not proceeded on the basis that an instrument executed under mistake is valid, notwithstanding the error, subject to rescission or rectification when challenged.\(^2\) Rather, the courts have worked from the first principles of testimony disposition and treated questions of mistake as not requiring the application of a discrete and comprehending principle of law, but merely as involving aberrations, to be rectified in an ad hoc fashion only if this could be done within the existing structure of the law.

No statutory consideration has been given to the establishment of a comprehensive remedial jurisdiction to deal with testamentary errors, nor has an attempt been made, through the cases, to formulate workable guidelines for the realisation of dispositive intentions which otherwise would be defeated by mistake. The result has been a jurisdiction premised on ill-conceived rules formulated to work some justice in cases of patent mistake where the governing precepts of succession law so allowed; and which is severely restricted in ambit and partial in its operation\(^3\).

An analysis of the existing jurisdiction of the Court of Probate to rectify mistakes of a testator reveals that the rudiments of an integrated equitable jurisdiction can be found in principle and in the case law: which heretofore has uniformly been denied by both the courts and the commentators.\(^4\) Although the present law contained doctrines which "overtly and apparently without remorse trample upon the reasonable expectations of rational testators"\(^5\) such powers as are to be found to exist and the rationale under which they operate provide a sound basis for a limited statutory intervention to refine and perfect the remedial jurisdiction.

Where a testator makes a mistake in his will there are two occasions for correcting it. The first is in the probate process and the second is after pro-

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1 Page on Wills (Bowe-Parker Revision 1969) Vol. 1 S.13.2.
4 See infra nn. 118, 120.
bate of the will, on interpretation. The jurisdiction of the interpretation court is strictly limited, for it “is bound to assume that all documents admitted to probate are testamentary documents.” There is power in the court as part of the process of construing the will, to read it as if certain words had been omitted, changed or inserted. But this will only be done, however, where it can be shown from the language of the will itself that the words appearing do not represent the testator’s intentions and also what omission, substitution or insertion is required to carry out those intentions:

The only sense in which it is true to say that a court of construction may correct mistakes in a will is that that court may give effect to inferences obtained from the will as a whole (with the assistance of evidence of surrounding circumstances if ambiguity in the will justifies resort to such evidence) . . . notwithstanding that to do so involves an alteration of the words used.

Since the relation between words and objects involves two steps, two different kinds of mistake may occur. First, the thought may not adequately represent the object, which is reflected in succession law as a mistake in the inducement to execute or revoke a will. This error is extrinsic to the document and its contents. Secondly, the word may not correctly express the thought, which is found in succession law as an error as to the factum of the will or its contents. Ex hypothesi, these errors are intrinsic to the document and are taken to include errors as to the legal effect of language used. The distinction is important because the usual remedy for mistakes in inducement is to set aside the testamentary act; whereas rectification is the usual remedy sought in cases of mistake in expression.

This article is confined in its treatment to mistakes in inducement.

The Accepted Premises

Mistake in the inducement exists where a testator executes a document, the contents of which he is aware of and approves, under a mistaken belief as to facts extrinsic to that document, causing him to select that particular dispositive plan; whereas, had he been in possession of full knowledge of the facts, the dispositions would have been otherwise. In this regard, the law draws no distinction between mistakes of fact and mistakes of law.

7 In *re Barrance* [1910] 2 Ch. 419, 421 per Parker J.
8 For a comprehensive discussion of the jurisdiction of the Construction Court see: *Page on Wills* op. cit. s.13.9; *Jarman on Wills* (8th ed. 1951) Vol. 1 Ch. XIX; *Theobald, Wills* (13th ed. 1971) Ch. 54.
9 *Tatham v. Huxtable* (1950) 81 C.L.R. 639, 651 per Kitto J.
13 *Page on Wills*, op. cit. s.13.11.
14 *Attorney General v. Lloyd* (1747) 3 Atk. 551; *In the Estate of Southerden* [1925] P.177; *Doe v. Evans* (1839) 10 Ad. & E. 228.
Whilst Roman law recognised that an error in motive always vitiated a disposition\(^{15}\); the generally accepted view in English jurisprudence has been that, provided the testator has knowledge and approval of the contents of the will,\(^{16}\) a mistake inducing a certain dispositive scheme, is immaterial, constituting no ground for avoidance or correction\(^{17}\).

It is the submission of the writer that this view does not accurately represent the state of the law, for it can be shown that there is a firmly established jurisdiction in the court to grant relief, in these circumstances, in cases of mistaken revocation and moreover, within certain limitations, the courts have released testators from dispositive provisions in a will the execution of which was induced by mistake.

**Mistake in the Inducement to Dispose of Property**

Where it can be shown that a testator was labouring under a mistake as to a salient fact\(^{18}\), extrinsic to the will, at the time of execution there is, in certain circumstances, a residuary equitable jurisdiction in a court of probate to set aside the dispositions. There is a clear line of authority to the effect that, where both the mistake and what the will would have been but for the mistake appear on the face of the will, the court will set the mistaken dispositions aside to reprove the testator from the consequences of his mistake.

In *Doe v. Evans\(^{19}\)*, decided in 1839, the testatrix in her original will devised lands to L., with remainder to L.'s sons and daughters. L. died leaving one son and a posthumous daughter. The son having subsequently died, the testatrix, being ignorant of the birth of the daughter, made a codicil reciting the death of L. without leaving issue and devised the lands to H. It was held that the codicil was to be construed as a conditional revocation only: being inoperative as against L.'s daughter. A similar result was reached in *Barclay v. Maskelyne\(^{20}\)* where a gift in a codicil was vitiated by a mistake of the testator as to the identity of a beneficiary of a gift under his will, which mistake appeared on the face of the instrument. The same principle was applied in *Thomas v. Howel\(^{21}\)* in which a legacy in the will was considered to be conditional upon the truth of a belief of the testator as to income capacity of part of his property. The final entrench-

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16 See *Guardhouse v. Blackburn* (1866) L.R. 1 P. & D. 109; *Re Carson’s Estate* 194 Pac. 5; Gray, "Striking Words Out of a Will" (1912) 26 Harv. L.R. 212, 223-224.
18 It would seem that mere errors of foresight or judgment are non-remediable: Henderson, op. cit. 404 and cases there cited.
19 (1839) 10 Ad. & E. 228; accord *Gillispie v. Gillispie* (1924) 96 N.J. Eq. 501.
20 (1858) Johns 124; see also *Allen v. Bewsey* (1877) 7 Ch.D. 453.
21 (1874) L.R. 18 Eq.Cas. 198 refusing to follow *Attorney General v. Lloyd* (1747) 3 Atk. 551.
ment came in 1911, in *In re Faris (No.2)*\(^{22}\), where a bequest of stock in a second will, grounded on the false assumption that the testator had not made any other disposition of that property, was held to be conditional and contingent upon the truth of the assumption.

Indeed, in the early English cases of *Kennell v. Abbott*\(^{23}\) and *In the Goods of Moresby*\(^{24}\), the court granted relief where the will was executed under a false assumption of fact which could only be proved dehors the will; though it seems that post *Wills Act* 1837 courts have been reluctant to intervene on such facts as to do so, they say, would subvert the policy of that legislation\(^{25}\).

The real problem in this area is not one of lack of jurisdiction in the court to grant relief in the face of the *Wills Act*, but rather the court's responsibility for maintaining the integrity of formal testamentary dispositions against the intolerable difficulties of admitting extrinsic evidence on the extent of the testator's mistake and what his will would have been if he was cognisant of all the facts\(^{26}\). Looking at the case law from this viewpoint, a number of conclusions can be generated. First, where the mistake has prevented the execution of dispositions, it is clear that the court cannot reform the will by adding words which were not contained therein at the time of execution\(^{27}\). Secondly, where the courts have remedied mistakes, in cases in which the mistake and the alternative disposition had there been no mistake appear in the will, the result is unexceptionable from the point of view of violation of the *Wills Act* by parol evidence for the strictest requisites of certainty are satisfied\(^{28}\). Equitable powers have been exercised by Probate Courts in these circumstances to set aside the mistaken dispositions. Thirdly, the very clear, though somewhat illogical\(^{29}\) distinction in the cases between mistakes inducing dispositions and mistakes inducing revocations is seen to have its basis in the vagaries of extrinsic evidence and the attributed deity of the *Wills Act*.

Whilst the jurisdiction of the court to rectify mistakes inducing testators to execute particular dispositions is admittedly confined and narrow, it is shown to be firmly established and operates on general principles of equity. The equitable nature and the scope of the jurisdiction in relation to mistakes in inducement is more fully explored in the following section.


\(^{23}\) (1799) 4 Ves. Jr. 802; see also *Wilkinson v. Joughin* (1866) L.R. 2 Eq. 319; *Brady v. Cubitt* (1778) 1 Doug 31; *Gordon v. Gordon* (1816) 1 Mer. 141.

\(^{24}\) (1828) 1 Hagg. Ecc. 378.

\(^{25}\) See supra n.17. It is accepted that the requirement that the mistake appear on the face of the will may result in practically denying common law relief for mistake in inducement.

\(^{26}\) Henderson, op. cit, 343; *Page on Wills* op. cit. s.13.11; Palmer op. cit. 989; *Gifford v. Dyer* supra n.24.

\(^{27}\) N.S.W.: *Wills, Probate and Administration Act* 1898, s. 7; Vic.: *Wills Act*, 1958 s.7; Anon. (1587) Godb. 131 pl. 149; *Re Harris* [1942] O.W.N. 429; *Norton v. Jordan* 360 Ill. 419; *Heiss v. Earle* 134 N.J. Eq. 393.

\(^{28}\) Page op. cit. s.13.11 describes this "exception" as "just and sound".

Mistake in the Inducement to Revoke

General Principles

The briefest examination of the case law on purported revocation where the testator is mistaken as to a matter of fact or law in connection therewith discloses a more liberal judicial inclination to provide relief from the mistake. It has been argued that a distinction exists between the revocation and the execution of dispositions made under a mistake of fact on the basis that the executed instrument is ambulatory during the life of the testator and contingent upon his death, whereas revocations take effect immediately. The argument is that a testator is able at any time before death to discover and correct his error inducing the execution of dispositions but revocations, albeit mistaken, take effect upon execution. This suggestion overlooks the realities of mistake and the usual will-making process. Moreover, there can be no doubt that acts of revocation are testamentary acts to the same degree as are acts of disposition:

While various presumptions and peculiarities of procedure may afford practical bases for distinguishing between them, there is no less the logical necessity of showing that a particular instrument has not been revoked than there is of showing that it was formally executed in the first instance.

Whatever may be the theory, it is clear that the courts have demonstrated a greater willingness to approximate to the intentions of a testator where he purports to revoke a will whilst under a mistake, by declaring the revocation to be dependent upon the existence of the situation as believed by the testator, and accordingly hold that the will is not revoked. The accepted textbook statement of the law is in Theobald:

A revocation grounded on an assumption of fact which is false takes effect unless, as a matter of construction, the truth of the fact is the condition of the revocation, or, in other words, unless the revocation is contingent upon the fact being true.

It is submitted, however, that instead of this fiction of conditional revocation, it is more realistic to treat the problem as one of mistake; holding the revocation absolute or void in accordance with the putative intentions of the testator.

31 Wetherill op. cit. 429; Hare & Wallace, Leading American Cases 517 s.2; and see In the Will of Steward [1964] V.R. 179.
32 Henderson, op. cit. 314.
33 In the Estate of Southerden [1925] P. 177, 182-183; In re Feis [1964] Ch. 106, 112; In re Faris (No. 2) [1911] 1 I.R. 469, 472.
34 Wills (13th ed. 1971) 1922.
35 See also: Jarman on Wills op. cit. 164; Hastings & Weir, Probate Law and Practice (2nd ed. 1948) 90, s. 17; Tristram & Coote's Probate Practice (25th ed. 1978) 679.
Although traditionally the courts have worked a reconciliation of the strict requirements of the Wills Act with the demands of justice and good sense in granting relief from the effects of this type of mistake, through the invocation of the doctrine of dependent relative revocation\(^{37}\), even in cases in which the testator’s intent in truth was neither “dependent” nor “relative”\(^{38}\), it will be demonstrated that, in the face of dicta to the contrary\(^{39}\), there is an inherent equitable jurisdiction in a Court of Probate to grant this relief for simple mistaken revocation where it will more closely fashion the testamentary dispositions of the testator to his true intentions.

In the majority of cases analysed, the courts appear to proceed on the theory that the presence of the mistake prevents the animus revocandi\(^{40}\); a simplification which overlooks the distinction between complete and incomplete acts induced by mistake\(^{41}\). Revocation, in these cases, is not in any sense conditional; the mistake simply operates as an inducement to the complete act of revocation and does not prevent it coming into being\(^{42}\). Yet equity might well relieve against such a revocation where to do so would more nearly carry out the intentions of the testator\(^{43}\), for there can be no valid practical objection to the Probate Court setting aside a revocation in this manner provided that the equitable basis of its action is recognised\(^{44}\). The failure to draw the distinction and make explicit the basis of the action has resulted in many decisions which seem to do violence to the intentions of the testator\(^{45}\). Probate Courts must face the question squarely, recognising that a revocation induced by mistake is not really conditional and either refuse to do equitable work or disregard the

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37 'I think the correct approach is to ascertain the intention of the testator and then invoke the doctrine as a means of giving effect to it', Re Mills, deceased (No. 2) (1968) 88 W.N. (Pt.1) (N.S.W.) 573, 578 per Helsham J.; see also In re Faris (No. 2) [1911] 1 L.R. 469; In the Goods of de Bode (1847) 5 Notes of Cases 189; Wissor v. Pratt (1821) 5 Moore C.P. 484; In the Goods of Applebee (1828) 1 Hagg. Ecc. 143; Palmer op. cit. 993, 998; Note, (1926) 74 Uni. of Penn. L.R. 615.

38 E.g. In the Goods of Horsford (1874) L.R. 3 P.D. 211; In the Goods of McCabe (1873) L.R. 3 P.D. 94; and see Cornish, op. cit. 375; Newark, "Dependent Relative Revocation" (1955) 71 L.Q.R. 374; Bregy Pennsylvania Intestate, Wills and Estates Act of 1947 2369: "The heart of the problem is how far the court will go in relieving the testator from the consequences of his intentional and otherwise effective act".

39 See infra n.118; and Re Mills (1968) 88 W.N. (Pt.2) (N.S.W.) 74, 81; and see also Palmer, op. cit. 991; Gray op. cit. 212, 214.

40 E.g. Locke v. James (1843) 11 M. & W. 901; Clarkson v. Clarkson (1862) 2 Sw. & Tr. 497; In the Goods of Irvine [1919] 2 L.R. 485; Beardsley v. Lacey (1897) 78 L.T. 25.

41 Cornish op. cit.; Warren, "Dependent Relative Revocation" (1920) 33 Harv. L.R. 337, 342: ‘Just as title passes to the subject matter of a sale induced by fraud or mistake .. . so here a legal transaction has taken place and can only be affected through the equitable jurisdiction of the court"; Note, (1909) 22 Harv. L.R. 374.


44 Cf. the commercial law position where the actions of detinue (see Hollins v. Fowler (1875) L.R. 7 H.L. 757) and trover (see Fouldes v. Willoughby (1841) 8 M. & W. 540) were based in equity.

45 E.g. In the Goods of Middleton (1864) 3 Sw. & Tr. 583; Powell v. Powell (1866) L.R. 1 P. & D. 209; Re Mills, Deceased. (1968) 88 W.N. (Pt.2) (N.S.W.) 74, 87 per Jacobs J.A.: ‘“That doctrine [dependent relative revocation] itself is a creation of the courts which, however one may look at it, cannot really be reconciled with the specific language of the Act. It has at times operated to defeat rather than promote the primary intention of testators”'; and see: Newark, op. cit. 386.
revocation and revive the former will only where that result is clearly the intent of the testator.46

Case Law

The cases illustrating the jurisdiction and approach of the courts can be conveniently collected as follows:

1. Where the testator revokes a will believing that by so doing a previous testament will be revived — involving a mistake of law.47

2. Where the testator revokes a will because of a mistake of fact.

3. Where the testator revokes a will believing that he was made a valid alternate disposition of his property or believing the will to be invalid or no longer needed — involving a mistake of law.

The fons et origo, in the first class, is the case of Powell v. Powell48, in 1866, where the testator destroyed his will with the intention of setting up a former will by that act of revocation. Sir J.P. Wilde (as he then was), overruling Dickinson v. Swatman49, held the testator’s animus revocandi to have only a “conditional existence”50 and as he laboured under a mistaken belief as to the fulfilment of that condition the revocation was not effective. The case provides a classic instance of the conditional intent analysis stultifying the testator’s intentions: for the very reason that the testator destroyed his later will was to disinherit a nephew who took thereunder, but the blind application of the dependent revocation doctrine frustrated this intention51. Had the court perceived its jurisdiction as being purely equitable this anomalous result would not have followed52. Powell v. Powell53 was applied on similar facts in Cossey v. Cossey54 where, the mistaken belief that an earlier will would be revived by the revocation of the later will vitiated the revocation; the result going some way to consummating the testator’s patent intentions55. The same solution was reached in the comparatively modern case of In the Estate of Bridgewater56, firmly establishing the power of a court of probate to set aside a

46 See In re Jones [1976] 2 W.L.R. 457; In the Estate of Zimmer (1924) 40 T.L.R. 502; Richardson v. Barry (1830) 3 Hagg. Ecc. 249; and Chambers v. Chambers 542 S.W.2d. 901 where the court held the doctrine of dependent relative revocation inapplicable as the testator’s intentions best followed by allowing the property to pass on intestacy; and see Jarman on Wills op. cit. 166.

47 N.S.W.: Wills, Probate and Administration Act 1898, s.19; Vic.: Wills Act 1958, s.20.


49 (1860) 30 L.J. 84.

50 (1866) L.R. 1 P. & D. 209, 212.


52 Cf. cases cited supra n. 48.

53 (1866) L.R. 1 P. & D. 209.

54 (1900) 82 L.T. 203; cf. In the Goods of Emma Keal Weston (1869) L.R. 1 P. & D. 633; In the Goods of Gentry (1873) L.R. 3 P. & D. 80.

55 The beneficiary taking a limited interest instead of an absolute title.

revocation based on a mistake of law of this kind. The law in the United States also recognises this jurisdiction.

The second category is well illustrated by the seminal case of *Campbell v. French* in which the testator revoked gifts to certain legatees “they being all dead”, whereas in truth they were alive. Lord Loughborough set the revocation aside for mistake: “It appears to me, there is no revocation, the cause being false . . .”. Two later cases, *Doe v. Evans* and *Barclay v. Maskelyne*, applied the principle on similar facts, where the erroneous belief of fact was recited in the revoking document, to effectuate the intentions of the testator. Although the courts have spoken in terms of conditional revocation, it is clear that these cases are truly ones of mistake, for in each, the testator expressly revokes “because” he believes a certain situation to exist, not “if” that situation exists.

A number of cases have suggested that a mistake of fact inducing a change of testamentary disposition cannot be proved de hors the will, which imposes a severe limitation on the court’s ability to grant relief in these cases. However, there is authority to the effect that a revocation founded on a mistaken assumption of fact not expressed on the face of the revoking instrument will be set aside. This appears to be the better view, for in this situation the statute is not really being ignored by importing into a formal revocation a condition proved by parol evidence but rather, the formalised act of revocation simply does not result in a valid revocation: a construction unobjectionable from the point of view of the Wills Act.

In two final cases requiring mention, it was held, as a matter of construction, that revocations were absolute although premised on erroneous assumptions of fact. In *Attorney General v. Ward*, the revocation was

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57 79 Am. Jur. 2d., s.569; In re Forbes’ Will (1893) 24 N.Y.S. 841; In re Callaghan’s Estate (1947) 29 N.W. 2d 352; Appeal of Strong 63 A. 1089; McCaffrey’s Estate (1940) 174 Misc. 162.


60 (1839) 10 Ad. & E. 228; see also In the Goods of Richard Morseby (1828) 1 Hagg. Ecc. 378.

61 (1858) Johns 124; see also Allen v. Bewsey (1877) 7 Ch.D. 453.

62 Burtonshaw v. Gilbert (1774) 1 Cowp. 49; Major v. Williams (1843) 3 Curt. 432; Bransby v. Haines (1752) 1 Lee 120; Gifford v. Dyer (1852) 2 R.I. 99.

63 A further limitation is imposed in the United States that the testator is bound by a mistake as to facts peculiarly within his knowledge (Hayes v. Hayes (1871) 21 N.J. Eq. 265; Giddings v. Giddings (1895) 65 Conn. 149; Mendinall’s Appeal (1889) 124 P. 387). But this does not appear to be the law in the United Kingdom (In re Taylor’s Estate (1882) 22 Ch.D. 495).

64 Perrott v. Perrott (1811) 14 East. 423; In re Jones (1976) 2 W.L.R. 457; In the Goods of Morseby (1828) 1 Hagg. Ecc. 378; In re Kerckhoff’s Estate (1942) 125 P. (2d) 284.

65 Cf. the cases of mistakenly induced disposition.

66 “Parol testimony of the testator’s intent is admissible, for one is not construing a writing, not altering the meaning of a document, but setting in its proper light an act” Warren, op. cit. 339; see also: In The Will of Page (1969) 90 W.N. (Pt.1) (N.S.W.) 6, 9-14; Newark, op. cit. 376; 3 Wigmore on Evidence (3rd ed. 1940) s.1782.

67 (1797) 3 Ves. Jun. 327; see also Skipwith v. Cabell (1810) 19 Grat. (Va.) 758; In re Provost’s Estate (1919) 264 Pa.27.
held sufficient because it was founded only on "doubts" of the testatrix whether the former legatee were still living and "well provided for". But in *In re Churchill*, the testator, having expressed the revocation to be based on what proved to be erroneous facts, was held to it, defeating his plain intentions. Neville J. regarded the case as involving merely an imperfect gift, reluctantly not applying *Campbell v. French* and *Doe v. Evans* of which he said:

It seems to me that those cases have gone a considerable way towards making a will for a testator in order to carry out what was extremely probably his intention.

It would seem a safe proposition that the authorities are agreed that a testator, having deceived himself as to a state of facts, will be relieved from a revocation executed under that deception where to do so will more closely approximate his intentions.

The final class of case involves revocation under the belief that the instrument is invalid, or of no use, or that a valid subsequent instrument has been made. The cases are more difficult of analysis, but involve the same principles or relief.

Where a testator destroys a testamentary instrument in the belief, albeit mistaken, that the instrument is invalid and ineffective, the correct approach is to deny the revocation on the basis of absence of animus revocandi; for he clearly had no intention to revoke a valid will. As Lord Penzance put it in *Giles and Clark v. Warren*, "He does not revoke it if he does not treat it as being valid at the time when he sets about to destroy it". This proposition is supported in *In the Goods of Thornton*, *Perrott v. Perrott*, *Swanson Estate* and *Beardsley v. Lacey*. However, the matter was taken much further in the recent English case of *In re Carey*, where the testator destroyed his will on the assumption that he no longer had any need for it, not then having any property. He subsequently took 4000 pounds on the intestacy of his sister which constituted his estate on death. Latey J. applied *In the Estate of Southerden*, construing the revocation as conditional on the fact that he had nothing to leave.

An analogous line of cases involve the testator destroying an old will in the belief that he has executed a subsequent valid one, which turns out to

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68 [1917] 1 Ch. 206.
69 Cross J. in *In re Feis* [1964] Ch. 106, 114 said: "For my part I do not fully understand why Neville J. did not think that the case could be decided (as he said he would have liked to have decided it) on the lines of *Campbell v. French*".
71 (1839) 10 Ad. & E. 228.
72 [1917] 1 Ch. 206, 211.
73 See Warren, op. cit. 342; Cornish, op. cit. 280.
74 (1872) L.R. 2 P. & D. 401, 403; and see *In the Goods of Colberg* (1841) 2 Curt. 832; *Scott v. Scott* (1859) 1 Sw. & Tr. 258; *In the Will of Cotton* [1863] 2 S.C.R. 123.
75 (1889) 14 P.D. 82; cf. *Emernecker's Estate* 67 Atl. 701.
76 (1811) 14 East 423; See also: *Hyde v. Hyde* (1708) 1 Eq.Cas.Abr. 409; cf. *Bilbie v. Lumley* (1802) 2 East. 469.
78 (1897) 78 L.T.R. 25.
80 [1925] P. 177.
be ineffective for some legal reason. The cases begin in 1716, with *Onions v. Tyer*\(^{81}\) where the Lord Chancellor (Cowper) treated the destruction, semble, as a good revocation at law, yet it would be relieved against, in equity, under the head of mistake. The case has variously been explained as one in which the mistake prevented the formation of the animus revocandi\(^{82}\), as one of conditional revocation\(^{83}\), and as one of no revocation at all in the sense that the testator intended to recall or destroy the gift\(^{84}\). Whatever the correct basis may be, it remains that the testator was relieved of the consequences of his formal act of revocation. The principle was reasserted through the nineteenth century in *Clarkson v. Clarkson*\(^{85}\) *Beardsley v. Lacey*\(^{86}\), *In the Goods of James*\(^{87}\) and *Windsor v. Pratt*\(^{88}\), all decided on substantially similar facts; and has been applied so many times this century\(^{89}\) that its validity cannot now be doubted.

Indeed, it has been the subject of extension in *In the Estate of Southerden*\(^{90}\) where the testator destroyed his will in the mistaken belief that his widow would take everything under the intestacy laws. The Court of Appeal set aside the revocation under the doctrine of dependent relative revocation, applying the conditional intent analysis: "To put a will into the fire is simply only destroying a piece of paper"\(^{91}\) *Southerden* was cited in *In re Feis*,\(^{92}\) where the testator revoked a gift of his German estate believing he had made a valid separate arrangement in respect of it. As it turned out, the power of attorney he had left was expressed to continue post mortem which was impossible under German law. Cross J., however, refused relief, concluding as a matter of construction, that the revocation was not conditional.

The last line of cases falling within this group have in common a valid testamentary instrument, followed by a revocation (by either act or instrument), relating to specific devises or bequests, and then substitution of new gifts which fail for some legal reason. One of the earliest cases was

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81 (1716) 2 Vern. 741; 1 P.Wms. 343; see also: *Jekyll v. Jekyll* (1753) 1 Lee 419; *Limbery v. Mason and Hyde* (1731) 2 Comyns. 451.
82 *Durberv. Bunn* (1926) 134 L.T. 669; *West v. West* [1921] 2 I.R. 34; *In the Goods of Middleton* (1864) 3 Sw. & Tr. 583.
83 *Perrott v. Perrott* (1811) 14 East 423; *Dixon v. The Solicitor to the Treasury* [1905] P. 42; see also *In the estate of Bromham* [1951] 2 T.L.R. 1149; *In the Goods of Woodward* (1871) L.R. 2 P. & D. 206; *In the Goods of White* (1879) 3 L.R. Ir. 413.
85 (1862) 2 Sw. & Tr. 497.
86 (1897) 78 L.T. 25.
87 (1869) 19 L.T. 610.
88 (1821) 5 Moore C.P. 484; cf. *In the Goods of Weston* (1869) 1 P. & D. 633; *In the Goods of Gentry* (1873) 3 P. & D. 80.
91 [1925] P. 177, 185 per Atkin L.J.
Ex parte The Earl of Ilchester, in which Sir William Grant accepted the doctrine of implied condition based on mistake:

The rule of the Civil Law, is Tunc prius testamentum rumpitur, cum posterius perfectum est. In Limbery v. Mason (Com. 451) that is laid down as the rules of our law.44

In the same year Short v. Smith was decided, where it was held that the erasure of the name of a trustee in the will did not constitute an effective revocation of the appointment, for it was conditional upon the valid insertion of the new trustee and the substitution was not properly executed. The same result was reached in a number of nineteenth century cases building upon this precedent: Kirke v. Kirke, Brooke v. Kent, Soar v. Dolman, Locke v. James, In the Goods of McCabe, although it is clear, in each case, that the court was merely approximating to the testator's intentions; being shackled by the Wills Act formalities from giving effect to the patent intentions of the decedent.

The opposite conclusion was arrived at in Tupper v. Tupper where a codicil revoking previous bequests left the property of those bequests to a fund which was under a legal incapacity to take. Page-Wood V.C. held the revocation to be absolute. In 1868, Tupper v. Tupper was followed in Quinn v. Butler, in which the substituted gift was void as the testator did not have an exclusive power of appointment. The revocation, again, was held to be absolute. The results in these cases are consistent, it is submitted, with the principle of equitable relief for revocation based on mistake; as by holding the revocation to be effective, the court was able, in each case, to more closely approximate the testator's true intentions than if the original gifts had been given effect. The jurisdiction is the same

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94 Id. 380; the quotation continues: "There is no doubt, but the testator by any writing . . . or by any cancelling . . . designed merely to disannul the former will, might have revoked it without more: but he designs to do it by a new will; and unless such writing be effectual to operate as a will, it shall not amount to a revocation. (Com. 454)".
95 (1803) 4 East 418.
96 (1828) 4 Russ. 435, citing Hyde v. Mason 8 Vin.Abr.Devise, (R) 2, pl. 17, 139.
97 (1840) 3 Moore P.C. 334; see also In re Horsford (1874) L.R. 3 P.D. 211; Sutton v. Sutton (1778) 2 Cowp. 812; In The Goods of Nelson (1872) 6 Ir.R.Eq. 569; Dancer v. Crabb (1873) 3 P.D. 98.
98 (1842) 3 Curt. 121.
99 (1843) 11 M. & W. 901.
100 (1873) 3 P.D. 94; see also: In the Goods of Harris (1860) 1 Sw. & Tr. 536; In the Goods of Parr (1859) 29 L.J. (P) 70; the position in the United States is the same: In re Dixon (1867) 55 Pa. 424; In re Thomas' Will (1899) 79 N.W. 194; Schneider v. Harrington (1947) 71 N.E. (2d) 242; In re Knapen's Will 53 A. 1003; In the Will of Marvin 179 N.W. 508.
101 Writing, signature, and attestation; see supra n.29.
103 (1855) 1 K. & J. 665, citing French's Case, Rolles Abr., Dev (0) 4 (c.1587); see also: Price v. Maxwell (1857) 28 Pa. 23.
104 Cf. In the Goods of Evans 1952 (unreported) but see Newark, op. cit. 386; Roper v. Radcliffe (1714) 9 Mod. 167, 181.
105 (1855) 1 K. & J. 665.
106 (1868) L.R. 6 Eq. 225.
as that exercised in cases such as In re Jones\(^\text{107}\) where the court more openly weighed the comparative advantages of allowing the property to pass as on intestacy against those attaching to it passing under the original disposition.

The cases this century support this rationalisation and serve to illustrate its application\(^\text{108}\). In In re Bernard's Settlement,\(^\text{109}\) the testatrix sought, by codicil, to increase the security of a gift to one of her daughters by means of protective trusts which infringed the rule against perpetuities. The revocation was set aside and the daughter took an absolute interest under the will. In the goods of Hope Brown\(^\text{110}\) a holograph will purported to revoke prior testamentary dispositions. However, being incomplete in material particulars, it was held, under the doctrine of dependent relative revocation, not to revoke the prior will disposing of all the testator's property. Langton J. saying at 138:

> The duty of the court is, if it be possible, to collect and give effect to the manifest intentions of the testator. In doing so, the court is, of course, restrained from any attempt to make for the testator a new will which he has not made for himself. The court is only entitled to give effect to what appear to be clear intentions and to admit to probate such documents as will give effect to those intentions.\(^\text{111}\)

Finally, in In re Murray\(^\text{112}\), the testator, by his second will, expressly revoked certain clauses of the previous will, but the gifts substituted failed for uncertainty. Harman J. refused to apply the doctrine of dependent relative revocation, holding the revocation absolute, for it was only a matter of speculation whether the revocation was dependent upon the validity of the later provisions.

The line is clearly established that where a testator is induced to revoke testamentary dispositions, by a mistaken belief as to law or fact, there is an equitable jurisdiction in a court of probate to set aside the revocation on the ground of mistake; where to do so will go some way to consummating the testator's manifest intentions.

**Conclusions**

Given the demonstration of a mistake by extrinsic evidence\(^\text{113}\) and given

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107 [1976] 2 W.L.R. 457; see supra n.48.
108 The paragon is the American case of Swanson Estate (1950) 74 Pa.D.C. 358 in which the testator struck out a gift in his will to B', the latter having died, inserting B'' (the only son of B') as beneficiary. The substitution was improperly executed. The revocation was held to be conditional on a valid substitution so that the gift to B' stood, with the result that B'' in fact took under s.14(8) Wills Act, Pennsylvania (anti-lapse legislation). The testator's intention was perfected.
109 [1916] 1 Ch. 552, following Duguid v. Fraser (1867) 31 Ch.D 449.
111 See further In the Estate of Green (1962) 106 Sol.Jo.1034; In the Goods of Weston (1869) 1 P. & D. 633.
112 [1956] 1 W.L.R. 605; see also: In the Goods of Mitcheson (1863) 32 L.J.P. 202; Eckersley v. Platt (1866) 1 P. & D. 281.
the unexceptional basis on which to ground a remedial jurisdiction, it can fairly be said that the established rules governing the exercise of this jurisdiction, being "fraught with inconsistencies and unnecessary doctrinal commandments"\textsuperscript{114}, are inadequate and entirely unsatisfactory. The generally accepted method of analysis in our law of an intended legal act induced by mistake or containing a mistake is that the act is legally effective; the mistake becomes important only in determining whether it provides a ground for rescinding the transaction or rectifying the error as the case may be.\textsuperscript{115} In the law of wills, however, the courts have taken a different approach to the question of mistake and produced a unique jurisdiction which is both restricted in its ambit and partial in its operation.

The books are full of statements denying a Court of Probate the power in equity to reform or rectify a will\textsuperscript{116}. "The written instrument is the final and unalterable expression of the purpose of the testator"\textsuperscript{117}. However it has been shown that some jurisdiction to rectify, albeit restricted, does exist in the court; yet it must be admitted that its nature is exceptional.

Traditionally three reasons have been given for the refusal of the courts to reform wills\textsuperscript{118}. First, beneficiaries under a will are usually\textsuperscript{119} volunteers and it is a clear tenet of equity that it will not assist a volunteer to obtain legal rights\textsuperscript{120}. The lack of consideration was thought by some writers to be the most cogent objection to the application of the doctrine of rectification\textsuperscript{121}. In \textit{Newburgh v. Newburgh}\textsuperscript{122}, however, Sir John Leach V-C. thought it no bar to the imposition of constructive trusteeship on devisees to make the dispositions accord with the intentions of the testator, that the will was a voluntary settlement. Moreover, courts have always been ready to rectify post-nuptial marriage settlements to make them conform with the articles entered into before marriage\textsuperscript{123} and, indeed, there is authority in which the court has granted rectification to a volunteer in a suit against the settlor's personal representatives after the settlor's death\textsuperscript{124}. A fortiori there should be equity to rectify a will in favour of in-

\textsuperscript{114} Henderson, "Mistake and Fraud in Wills" (1969) 47 Boston Uni. L.R. 303, 304.
\textsuperscript{116} E.g. \textit{Osborne v. Smith} (1960) 105 C.L.R. 153, 163 per Windeyer J.; \textit{In re Bywater} (1881) 18 Ch.17, 22; \textit{In the Goods of Louis Schott} (1901) P.190; \textit{In re Bacharach’s Will Trusts} (1959) Ch.245, 249; \textit{In the Goods of George Collins} (1849) 7 Notes of Cases 278, 279-280; \textit{Powell v. Mouchett} (1821) 6 Madd. 216; \textit{Burke v. Central Trust Co.} (1932) 242 N.W. 760, 761; \textit{Sanderson v. Norcross} (1922) 136 N.E. 170.
\textsuperscript{117} \textit{Polsey v. Newton} (1908) 85 N.E. 574, 575 per Rugg J.
\textsuperscript{118} See Gray, op. cit. 213-214; Lee, op. cit. 328; Warren, "Fraud, Undue Influence, and Mistake in Wills" (1927) 41 Harv. L.R. 309, 329.
\textsuperscript{119} Cf. the case in which the testator has contracted to leave a certain benefit by his will: e.g. \textit{Birmingham v. Renfrew} (1937) 57 C.L.R. 666.
\textsuperscript{120} \textit{In re Kay’s Settlement} [1939] Ch.329; \textit{In re Cook’s Settlement} [1965] Ch.902.
\textsuperscript{121} Warren, loc. cit.; Gray, loc. cit.
\textsuperscript{122} (1820) 5 Madd. 364, 366.
\textsuperscript{123} \textit{Bold v. Hutchinson} (1855) 5 De G.M. & G. 558; \textit{Thompson v. Whilmore} (1860) 1 J. & H. 268.
tended beneficiaries as against voluntary legatees and devisees under the will or as against takers as on intestacy.125.

The second objection taken to the power to reform is that it would oblige the court first to ascertain by extrinsic evidence what the testator’s intention was, and then to expunge such words or phrases, as, being removed, will leave a residuum, carrying out the intentions of the testator in the particular case, though different in form, and possibly in legal effect, from that which the testator or his advisers intended.126

This, it was said, “would introduce a most alarming insecurity in the testamentary dispositions of . . . property”127, for, if “the writing is to be contradicted by parol evidence the object of the law will be defeated and all certainty destroyed . . . It would open such a door for perjury and confusion as would render wills of very little use”128 and “would bring in a flood of litigation, disturbing the peace of families, and endangering the security of title”129.

This line of argument contains two misconceptions. A jurisdiction to rectify mistakes of a testator does not involve jettisoning the written formulation of testamentary intentions under a barrage of evidence from the “mercies of memory”130. Rather, the question is one of certainty and of proof; so where there is a demonstrable error and the true intentions of the testator are apparent, it is difficult to see why in principle reformation should not be allowed.131 Moreover there is nothing in the provisions of the Wills Act which denies the court such a jurisdiction. The idea originates from the general concept of the intendment of the Act to achieve certainty of the testator’s intentions by requiring them to be in writing132. The courts here, however, as elsewhere, have allowed the tool to become the master: “testamentary intentions which it is the purpose of the Act to preserve and clarify are surrendered to the formalities which seek to have that effect”133.

Experience in other jurisdictions has shown that a system of succession can operate effectively without always requiring compliance with formalities.134 The extrinsic evidence argument is no objection to a reform jurisdiction: it is a reflection of the tendency to overprotect against tampering with the

126 Harter v. Harter (1873) L.R. 3 P.D. 11, 21 per Sir James Hannen.
128 Iddings v. Iddings 7 Serg. & R.C. (Pa) 111 per Tilghman C.J.
130 Guardhouse v. Blackburn (1866) L.R. 1 P.D. 109, 117 per Sir J.P. Wilde.
133 Bates, op. cit. 1085.
wording of wills\textsuperscript{135} and is a useful caveat against possible abuse of the jurisdiction.

The third reason voiced against the power to reform has its genesis in the statutory formalities as to execution. The \textit{Wills Act}\textsuperscript{136} requires that a will be in writing, signed by the testator and proved by two witnesses. To assume a jurisdiction to reform would, in effect, be to repeal the statute and to operate this repeal by the admission of extrinsic evidence, which it was the policy of the statute to avoid.\textsuperscript{137}

On this reasoning, it has uniformly been held that a court has no power to insert provisions mistakenly omitted from a will, and indeed has no jurisdiction to reform by omission where the sense of the remainder will be affected by that omission: the eviscerated will is no longer the will of the testator within the terms of the \textit{Wills Act}.

However, the \textit{Statute of Frauds} has not prevented the rectification of deeds and contracts on account of mistake where similar formalities apply\textsuperscript{138}. Although the question under that statute goes to enforceability, whereas the \textit{Wills Act} formalities pertain to validity, the principle involved in each is the same\textsuperscript{139}. The basis of the doctrine of rectification is the reform of an instrument in which the parties\textsuperscript{140} have mistakenly expressed their agreements:\textsuperscript{141} "Courts of Equity do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts."\textsuperscript{142}

A fortiori, the doctrine could be applied in succession law where the court is dealing with only one mind and the error is more capable of demonstration. The essence of the problem in the probate jurisdiction is that the courts fail to conceive their powers as equitable in nature. Once this approach is adopted and the \textit{Wills Act} no longer considered

\textsuperscript{135} "It is more important that the probate of the wills of deceased persons be effectively shielded from the attacks of a multitude of fictitious mistakes than that it be purged of wills containing a few real mistakes. The latter is a testator may be due care avoid in his lifetime. Against the former he would be helpless." \textit{Re Gluckman} (1918) 101 A. 295, 296 per White J.

\textsuperscript{136} N.S.W.: \textit{Wills, Probate and Administration Act} 1898. s.7; Vic.: \textit{Wills Act} 1958. s.7.


\textsuperscript{138} \textit{Hall-Dare v. Hall-Dare} (1885) 31 Ch.D. 251 (deed); \textit{Meeke v. Meeke} [1917] 1 Ch. 77. (deed); \textit{White v. White} (1872) L.R. 15 Eq. 247 (conveyance of land); \textit{Welman v. Welman} (1880) 15 Ch.D. 570 (settlement); \textit{Collett v. Morrison} (1851) 9 Hare 162 (policy of life insurance); \textit{Druiff v. Parker} (1854) 19 Beav. 305 (lease); \textit{United States v. Motor Trucks Ltd. [1924]} A.C. 196; cf. \textit{Evans v. Chapman} (1902) 86 L.T. 381, \textit{Scott v. Scott} [1940] Ch. 794 (articles of association can only be altered pursuant to the \textit{Companies Act}); the added requirement of witnesses adds nothing in principle.

\textsuperscript{139} For in Hohfeldian terms the analogy is direct, as in each case the process of rectification is designed to give legal rights that were otherwise defeated by mistake.

\textsuperscript{140} The fact that the instrument is unilateral, bilateral or multilateral is of no relevance: \textit{Wright v. Goff} (1856) 22 Beav. 207; \textit{Killick v. Gray} (1882) 46 L.T. 583; \textit{Bonkote v. Henderson} [1895] 1 Ch. 742; \textit{Van der Linde v. Van der Linde} [1947] Ch. 306.


\textsuperscript{142} \textit{Mackenzie v. Coulson} (1869) L.R. 8 Eq. 368, 375 per James V-C; see also \textit{Rose v. Pim} [1953] 2 Q.B. 450, 451 per Denning L.J.
sacrosanct, there is no obstacle to reform in the face of the formalities for the will is proved and executed in conformity with the statute: the error is simply one of manifestation.