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Wills-Revocation

WILLS—REVOCATION.—Testator wrote "void" on the margin of his will and across the envelope containing it, and drew intersecting diagonal lines across the writing of the will. These lines started just below the title and extended through the body of the will, through testator's signature, through the attestation clause, and stopped just above the signatures of the witnesses. It was conceded that the testator intended thereby to revoke the will. The only question in the case was whether or not testator's acts were sufficient, under the Indiana statute, to effect a revocation. Held, the will had not been revoked.[1]

The English Statute of Frauds provided that a will could be revoked only by burning, canceling, tearing, or obliterating, or by another writing.[2] This statute served as a model for the statutes in most of our states, in that those statutes generally specify several methods of revocation.[3] Neither the Statute of Frauds nor the statutes of any of the states attempted to define the specific acts that a testator must perform in order to revoke his will by one of the methods prescribed. Consequently, in the development of the law on the subject there was much litigation, and a proportionate amount of confusion of thought in the early cases. The Statute of Victoria, which repealed parts

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18 State, ex rel. Nyberg v. Milwaukee Board (1926), 190 Wis. 570, 209 N. W 683.

19 There seems to be no valid objection to the tenure contracts on the ground that they are for an indefinite duration, because the contracts were to continue in force until terminated by a method provided in the statute. The Court did not have any trouble in granting the teacher the remedy of mandamus before the Act of 1933. See State, ex rel. Black v. Board of School Commissioners (1933), 205 Ind. 582, 187 N. E. 392; Kostanzer v. State, ex rel. Ramsey (1933), 205 Ind. 536, 187 N. E. 337; Elwood v. State, ex rel. Griffin (1932), 203 Ind. 626, 180 N. E. 471.

20 Hall v. Wisconsin (1880), 103 U. S. 5, 26 L. Ed. 302. See, also, Carondelet Canal & Nav. Co. v. Louisiana (1913), 233 U. S. 362, 34 S. Ct. 627.

21 State, ex rel. Anderson v. Brand (Ind. 1937), 5 N. E. (2d) 913. See, also, Opinions of the Attorney General of Indiana (1933), pp. 100, 139.

1 Tinsley v. Carwile (Ind. App., 1937), 5 N. E. (2d) 982.

2 29 Car. II, Ch. 3.

3 14 Iowa L. R. 283.

of the Statute of Frauds relating to wills, was probably responsible for the confusion that arose over the meaning of the words "obliteration" and "cancellation," for it expressly provided that no obliteration or cancellation would be given effect if the original words were still apparent.[4] The words were still "apparent" if they could be read with the aid of a microscope. However, it is now settled that cancellation will effect a revocation of a will even though the writing is still legible.[5] The word "destroy," though commonly used in the statutes, has been defined less frequently. Usually the statutes contain other words, such as "cancellation," "tearing," and "burning," and the courts have taken the easy way out through one of these words when confronted with a question of revocation. However, the Supreme Court of Indiana has said that "destroy" does not mean a destruction in a literal sense of the fabric upon which the words are written, that the instrument is sufficiently destroyed if the legal force thereof is divested or extinguished.[6]

The original Indiana statute was to all practical purposes identical with the English Statute of Frauds. It provided: "No will or testament in writing * * * shall be revoked, unless by burning, tearing, canceling, or obliterating the same with the intention of revoking it * * *."[7] In the Revised Statutes of 1852 these particularizing words were omitted and the statute was made to read: "No will in writing * * * shall be revoked, unless the testator * * * with intent to revoke shall *destroy,* or *mutilate* the same * * *"[8]

The question as to what acts are sufficient to constitute a destruction or mutilation under the Indiana statute has come before our Supreme Court in only one case. That was the case of Woodfill v. Patton,[9] in which the testator had drawn several lines through his signature with the intent thereby to revoke his will. In holding the will revoked, the court declared that the policy of our statute is to enlarge, rather than to limit, the methods of revocation; that the language of the present statute is more comprehensive than that of the former; that, unlike the English statute, it contains no restrictive or particularizing words; that it embraces all acts amounting to a mutilation or destruction, whether or not the acts are such as former statutes or common law rules recognized as effective acts of revocation. "Mutilate," said the court, "means something less than total destruction. It means to render imperfect—to take from the instrument an element essential to its validity. Purposely taking from a will the signature of the testator deprives it of an essential part, and makes it so imperfect that it loses all legal force and effect." The court further said that the manner in which the mutilation or destruction is effected is not of controlling importance; that the act of marking out the signature with a pen, pencil or other instrument which erases, cancels, or obliterates it, is not less a mutilation than an act

[4] 7 Wm IV & 1 Vict., Ch. 26.

[5] Michigan Trust Co. v. Fox (1916), 192 Mich. 699, 159 N. W 332; In Re Love's Estate (1923), 186 N. C. 713, 120 S. E. 479; Stuart v. McWhorter (1931), 238 Ky. 82, 36 S. W (2d) 842; Noesen v. Erkenswich (1921), 298 Ill. 231, 131 N. E. 622; Meredith v. Meredith (Del., 1931), 157 A. 202; Page, Wills, vol. 1, sec. 406.

[6] Woodfill v. Patton (1881), 76 Ind. 575.

[7] R. S. 1843, Ch. 30, sec. 29.

[8] 2 R. S. 1852, Ch. 11, sec. 19.

[9] 76 Ind. 575 (1881).

of tearing the signature from the instrument or removing it by a chemical preparation.

The testator's signature in the Patton case was still "quite perceptible and legible," said the court in its opinion. This fact is particularly notable and pertinent because of the emphasis which the Appellate Court has placed on the matter of legibility in the instant case. After quoting the definition of "mutilate" from the Patton case, the Appellate Court stated.

"It can readily be seen in this case that the will is yet in its entirety, all of it is entirely legible, no part has been destroyed, no element essential to its validity has been removed therefrom, therefore, the legal force of the will is not divested or extinguished."

And the court further said that the trial court correctly stated his conclusions of law, and that the judgment was in all things affirmed. Part of the conclusions of law of the trial court are as follows:

"3. * * * That to revoke a will there must be an intent by the testator to destroy the whole of it or to destroy a material part of it by erasure or removal, that a cancellation thereof is not sufficient even though the testator intended that such will be thereby voided. There must be an intent to render the will illegible in some material part thereof, even though the act partially fails to so render it.

"4. * * * That the Indiana statute, prescribing the manner in which and by which wills can be revoked, was intended to prevent revocation by cancellation * * *"

It seems evident that the court did not comprehend the significance of the decision of the Supreme Court in Woodfill v. Patton, in which a revocation was effected by lines drawn through testator's signature only, leaving the signature entirely legible.[10] In the instant case the testator drew lines through his signature and through every other part of the will except the title and the signatures of the witnesses.[11] This action certainly took from the will an element essential to its validity, and constituted a mutilation within the declared meaning of that word.

The writer submits that the decision of the Appellate Court in this case is not in harmony with the decision of the Supreme Court in Woodfill v. Patton and that both decisions cannot stand as the law in Indiana.

R. H. N.

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[10] The Supreme Court in Woodfill v. Patton said. "His (testator's) signature thereto was much blackened by a considerable number of parallel and circular lines and some cross-marks made by a common lead pencil * * *, and the said signature, as a whole, still remained quite perceptible and legible through said pencil marks * * * If the signature were cut or torn from the paper; if all traces were removed by a chemical preparation there would be no room for controversy, it would plainly be a mutilation of the will. It can not be any less a mutilation if the signature is marked out with pen, pencil or other implement which *erases, cancels* or *obliterates* it."

Page, Wills, vol. 1, sec. 409· "Where the statute provides that if a will is 'mutilated' with intent to revoke it, such will is revoked; drawing pencil lines across the signature, so as to deface it, but still leaving the signature legible, constitutes a 'mutilation'" (citing Woodfill v. Patton).

[11] See photostatic copy of will with the words and marking thereon, which is incorporated in the opinion.