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Article 10

Wills - Revocation by Cancellation - Use of Lead Pencil as Indicating Testator's Intent

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sale of the crop); and 2) The harsh rule as to time conditions adopted by the Court (upon the assumption that the law of contracts or sales and not licenses governed).

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Wills—Revocation by Cancellation—Use of Lead Pencil as Indicating Testator's Intent.—The will as found amongst the personal effects of the testatrix contained certain penciled notations in her handwriting. In the residuary clause, which left all the residue to three cousins, she drew a pencil line through the phrase "Nellie Curtis of Waupaca" and at the end of the paragraph she wrote the word "dead." She failed, however, to do anything to the last line of the clause which read, "the last three named legatees are my first cousins." The contention of the contestant was that the bequest to Nellie Curtis had been revoked. The lower court admitted the will to probate with the exception of the bequest to Nellie Curtis. *Held:* Reversed. Such markings do not raise a presumption of revocation by cancellation and therefore the residuary clause as admitted to probate should include the bequest to Nellie Curtis. *In re Holcombe's Estate, 259 Wis. 642, 49 N.W. (2d) 914 (1951).*

In general, because of the danger of fraud, the separate states have enacted statutes providing specific requirements necessary to revoke a will. These statutes are generally similar and provide for revocation by physical acts done to the will, by a subsequent revoking instrument, and by certain changes in circumstances.[1] The Wisconsin statute, so far as it applies to revocation by physical acts, provides:

> "No will nor any part thereof shall be revoked unless by burning, tearing, cancelling, or obliterating the same, with the intention of revoking it . . ."[2]

By express language of the statute both an act of destruction plus a concurrent intention to revoke by that act are required.

Thus once a will has been proven to have been validly executed, it will be presumed that it continued unrevoked and the primary burden of proving a subsequent revocation rests upon the one asserting it.[3] However, it is generally agreed that where the will is found amongst the testator's effects in such a state of mutilation or cancellation as would be a sufficient act of revocation if the intent to revoke were shown, then from the doing of such act the intent to revoke will be

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[1] ATKINSON ON WILLS, p. 368.
[2] WIS. STATS. (1949), Sec. 228.14.
[3] 2 PAGE ON WILLS, p. 718.

presumed.[4] This presumption, however, is rebuttable,[5] and does not arise at all where the mutilative act is of a slight, inconclusive or incomplete nature and can be accounted for as readily upon some other basis.[6]

> The Wisconsin Court says in the principal case that,
> "unless the intention of the testatrix to revoke the bequest to Nellie Curtis in her will is established by clear and satisfactory evidence the bequest must stand and be given effect."

Whether by requiring this standard of proof the court is doing away with the presumption of intent to revoke inferred from destructive acts is not clear. It would hardly seem that the evidence of intent to revoke is clear and satisfactory from the unexplained tearing of a will, or inked lines through parts of it, or from the inability to find a will which had been in the testator's custody prior to his death. Yet, a refusal to find a presumption of revocation in these situations would result in such a startling change of prior Wisconsin law[7] and the law of other jurisdictions,[8] that the court could not have intended to effect it by the single sentence quoted above. In a leading case, *Throckmorten v. Holt*,[9] the United States Supreme Court used similar language and at the same time recognized that the intention to revoke might be presumed from the destructive act.

Assuming then that Wisconsin will recognize a presumption of intent to revoke in a proper case the question arises whether a pencil cancellation will give rise to such a presumption.[10] The weight of authority in the United States is that there is no difference in effect

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[4] Michigan Trust Co. v. Fox, 192 Mich. 699, 159 N.W. 332 (1916); 2 PAGE ON WILLS, p. 724; 57 AM. JUR. 378; 165 A.L.R. 1202 and cases cited. Two Wisconsin cases, Will of Marvin, 172 Wis. 457, 179 N.W. 508 (1920) and Estate of Rauchfuss, 232 Wis. 266, 287 N.W. 173 (1939), recognize the rule stated. However, the Wisconsin Court in the principal case distinguishes it from these two cases pointing out there were other factors indicating an intent to revoke in each in addition to the cancellation.

[5] 2PAGE ON WILLS, p. 728.

[6] In Re Lord's Will, 106 Me. 51, 75 A. 286 (1909; Safe Deposit and T. Co. v. Thom, 117 Md. 154, 83 A. 45 (1912); 57 Am. Jur. 379.

[7] Will of Marvin, *supra*, note 4; Will of Byrne, 223 Wis. 503, 271 N.W. 48 (1937); Will of Mechler, 246 Wis. 45, 16 N.W. (2d) 373 (1944); In Re Estate of Rauchfuss, *supra*, note 4; In Re Valentine's Will, 93 Wis. 45, 67 N.W. 12 (1896); In Re Oswald's Will, 172 Wis. 345, 178 N.W. 462 (1920); Gavitt v. Moulton, 119 Wis. 35, 96 N.W. 395 (1903).

[8] 2 PAGE ON WILLS, pp. 720, 724; 62 A.L.R. 1367 and cases cited; 115 A.L.R. 711 and cases cited.

[9] 180 U.S. 552, 21 S.Ct. 474, 45 L.Ed. 663 (1901). The Court said, "The intention to revoke must be plain and without doubt," yet the Court went on to add, ". . . if it had been found among the papers or repositories of the deceased, a presumption would have arisen in favor of its revocation." (from the cancellation on the face of the will.)

[10] A full discussion of the subject under consideration appears in 62 A.L.R. 1372 (1929), and is supplemented in 115 A.L.R. 712 (1938) with an extensive review of the authorities.

between the use of pencil or ink[11] and that where a will is found in the custody of the testator with penciled cancellations a presumption of intent to revoke is inferred.[12]

On the other hand, the English Rule, which a few state courts have adopted, is that the use of a lead pencil is prima facie deliberative.[13] It is rather an indication that revocation is contemplated in the future and at the same time that it is not intended now.

Neither view is unreasonable. In support of what may be called the American view there is the formality of the document itself and of the circumstances surrounding its execution. Thus, it seems reasonable that one would not lightly draw pencil lines upon the will or use it as a mere worksheet while still intending it to retain its prior effect.

On the other hand, there is the argument that pencil lines can be erased leaving the original wording unmarred and that light pencil lines, as in the present case, can be erased leaving almost no trace upon hard-surfaced paper. Further, one contemplating changes, and faced with the problem of drawing up a draft from which his attorney is to prepare a new will, might well be tempted, rather than rewrite the whole will in longhand for the sake of a few alterations or changes, to indicate such changes upon the old will in the expectation that it will soon be superceded anyway. This reasoning is particularly applicable to an elderly person whose vision, muscular control, and other faculties are no longer acute and who thus might otherwise have to work out various contemplated alternatives through an intermediary. And if one had an unconditional intent to revoke would he not use a method which he could not erase—indicating clearly he was not contemplating a change of heart?

It would seem there is also an intermediate view that can be taken, rather than to raise a prima facie case either way merely from the use of pencil. That view is to adopt the most reasonable inference under the circumstances of each case paying particular attention to the character of the cancellation. Thus two heavy and dark pencil lines would tend to indicate an inference of intent to revoke,[14] while very light pencil lines might tend toward the opposite conclusion.[15]

It appears that, some of the language notwithstanding, the Wiscon-

[11] Michigan Trust Co. v. Fox, *supra* note 4; McIntyre v. McIntyre, 120 Ga. 67, 47 S.E. 501 (1904); Hilyard v. Wood, 71 N.J. Eq. 216, 63 A. 7 (1906).

[12] In perhaps the leading case on this subject, McIntyre v. McIntyre, *supra* note 11, the Supreme Court of Georgia states the rule, "Where a will is produced with lead-pencil cancellations, it will be presumed that they were done by the testator animo revocandi; and it is upon the party claiming that they were deliberative, and not final, to establish that fact."; 1 PAGE ON WILLS, p. 775.

[13] Meredith v. Meredith, 35 Del. 35, 157 A. 202 (1931); 1 PAGE ON WILLS, p. 776.

[14] Meredith v. Meredith, *Ibid.*

[15] ". . . on account of the light and delicate charcter of the erasing line and its entire absence between the words, it is almost unnoticeable. It is the kind of

sin Court adopts such an intermediate view in the instant case. The Court points out: that the testatrix failed to do anything to the phrase, "The last three named legatees are my first cousins" (one of whom is the deceased legatee through whose name she drew the line in question); that the pencil lines and notations on the instrument were lightly drawn; and that the testatrix was a good business woman who had had her will drawn by competent attorneys and would hardly have expected to accomplish its change in this way. The court decides that this is not indicative of a finality of decision, but is perfectly consistent with an intention to revise her will at a future time and that therefore no intent to revoke can be inferred.

LAWRENCE BINDER

Workmen's Compensation Act—Exclusive Remedy Provision—Effect on Husband's Action For Loss of Consortium — Action by Frederick Guse against the A. O. Smith Corporation to recover damages for loss of consortium. Plaintiff's wife, an employee of defendant corporation was injured through the negligence of defendant's employees during the course of her employment. Employer and employee both being subject to the Wisconsin Workmen's Compensation Act, Mrs. Guse was awarded compensation thereunder. Plaintiff, contending that his cause of action was independent of, and not derived from his wife's cause of action for her personal injury, claimed that the Act had not extinguished actions for loss of consortium by the husband of an injured employee and commenced this action. Defendant in its answer alleged that the wife's recovery of benefits under the Act constituted the exclusive remedy against the Defendant by her or her dependents, including Plaintiff, and further, that because of Plaintiff's failure to give written notice to Defendant of his injuries within the period prescribed in section 330.19 (5) Wisconsin Statutes, his action was not maintainable. Plaintiff appealed from a summary judgment dismissing his complaint. *Held:* Where employee and employer are subject to the provisions of the Workmen's Compensation Act, the liability of the employer for injuries sustained in the course of employment is solely under the Act, and there is no liability in tort. The husband's action per quod consortium amisit constituting an injury for which an employer might be liable at common law was abrogated by the provisions of section 102.03 (2), Wisconsin Statutes. The husband's action was further barred by reason of his failure to give written notice within the period

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mark much more likely to be made by an inexperienced person who was considering a revision or change and contemplated that these words should not be included in a new draft." City Nat. Bank v. Slocum, 272 F. 11, Certiorari denied 257 U.S. 637, 42 S.Ct. 49 (1921).