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Wills--Holographic Cancellation of Life Estate Also Cancels Remainder

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of its existence or could have been made aware of its existence by an inspection of the land.

The *Simmel* case offers a good example of the trend in some jurisdictions toward imposing a greater burden of care on the landowner in regard to infant trespassers. While such an extension of the landowner's liability may be practical in highly urbanized jurisdictions, it would not seem to be desirable or necessary to impose this additional duty on a landowner in a jurisdiction such as West Virginia, which has few densely populated centers.

Nevertheless, the instant West Virginia case suggests the need for a redefining of the dangerous instrumentality rule. The court, while consistently repudiating the attractive nuisance doctrine, has applied a dangerous instrumentality rule which is in essence little more than a modification of the doctrine itself. This basic anomaly results in uncertainty, not only as to the extent of the landowner's duty of care and liability, but also as to the elements and proof the plaintiff must show in order to recover.

It would seem then, that a modern dangerous instrumentality rule should not only reflect an intention to keep the landowner's liability within reasonable limits, but should also incorporate and set out more definite standards regarding duty of care, liability, and recovery. It is submitted that this two-fold purpose could best be effected by adoption of the rules set out in RESTATEMENT, TORTS § 339 (1934).

D. L. McC.

WILLS—HOLOGRAPHIC CANCELLATION OF LIFE ESTATE ALSO CANCELS REMAINDER.—By holographic will, T left a life estate in the sum of twenty thousand dollars to each of five named beneficiaries, and at the death of each, the principal to a charity. Before his death, T lined out the names of two of the designated life tenants. *Held*, that inasmuch as the will must be given effect as it appeared at T's death, deletion of the life estates also deleted the dependent remainders. *Sheltering Arms Hospital v. First and Merchants Nat'l Bank*, 100 S.E.2d 721 (Va. 1957).

By nearly identical statutes, holographic wills—those wholly in the handwriting of the testator—are valid in the Virginias. W. VA. CODE c. 41, art. 1, § 3 (Michie 1955); VA. CODE ANN. § 64-51

(Michie 1950). A holographic will may be altered in the same manner as it was executed; and after alteration or amendment, as by obliteration or cancellation, or by interlineation, the part that remains is the testator's valid will. W. VA. CODE c. 41, art. 1, § 7 (Michie 1955); VA. CODE ANN. § 64-59 (Michie 1950). Stated otherwise, a testator may make any change which he desires in his holographic will, so long as he makes the change in his own handwriting; such a change re-executes the will as altered without the necessity for rewriting the instrument or signing it again. *LaRue v. Lee*, 63 W. Va. 388, 60 S.E. 388 (1908); *Moyers v. Gregory*, 175 Va. 230, 7 S.E.2d 881 (1940).

A valid revocation or alteration of a will requires both an actual physical defacement by the testator joined with his intent to revoke or alter. *Nelson v. Ratliffe*, 137 W. Va. 27, 69 S.E.2d 217 (1952); *Franklin v. McLean*, 192 Va. 684, 66 S.E.2d 504 (1951). There is a presumption that alterations in a holographic will remaining in the testator's possession were made by him. *Wilkes v. Wilkes*, 115 Va. 886, 80 S.E. 745 (1914); cf. *Canterberry v. Canterberry*, 120 W. Va. 310, 197 S.E. 809 (1938). Apparently this presumption is broad enough to also infer that such alterations were made with the intent to alter.

The intent of the testator, if not in conflict with a rule of law, is controlling in construing a will. *Hedrick v. Hedrick*, 125 W. Va. 702, 25 S.E.2d 872 (1943); *American Nat'l Bank & Trust Co. v. Herndon*, 181 Va. 17, 23 S.E.2d 768 (1943). His intent must, however, be determined from what he actually said in the will, and not from what he might have intended to say, or what he should have said. *Hunt v. Furman*, 132 W. Va. 706, 52 S.E.2d 816 (1949); *Chavis v. Myrick*, 190 Va. 875, 58 S.E.2d 881 (1950). The courts will not interpret a will if its words are clear and unambiguous. *Wilcox v. Mowrey*, 125 W. Va. 333, 24 S.E.2d 922 (1943); *White v. White*, 183 Va. 239, 31 S.E.2d 558 (1944).

Provided that physical alteration by the testator and his intent to so alter are established, and not rebutted if established by presumption, the amended will stands re-executed as altered, and its former content can not be used to aid in its construction. *Ruth v. Jester*, 198 Va. 887, 96 S.E.2d 741 (1957). Thus in the instant case, deletion of the names of two life tenants left the will reading as though there had been a life estate to each of three named beneficiaries with remainder to charity after the death of each, even

though it may have been the testator's actual intention to leave a gift of one hundred thousand dollars to the charity with a number of intervening life estates rather than a number of twenty thousand dollar life estates with remainders following. After the cancellation of two names there were no estates to carry the remainders with respect to the deleted gifts, nor were there any words to indicate that the remainders were still existent so that they could be accelerated. Reading the re-executed will, it stands clear and unambiguous as altered, presenting no reason for inquiry into the testator's intent.

Even had there been sufficient ambiguity on the face of the instrument to justify inquiring into the testator's intent, it is probable that the same result would have been reached, since the court would have been limited in construction to the written words. If the testator had intended that the charity receive the remainders after the cancelled life estates, he could have interlined such an intention in his own handwriting at the time of the cancellation, or at any other time prior to his death. Failing this, it is a fair inference that he intended to cancel the remainders as well as the life estates.

By limiting itself to consideration of words remaining after a valid revocation of part of the will, when the words remaining are clear and unambiguous, the Virginia court has reached a sound result which should be followed in West Virginia and other jurisdictions having similar statutory provisions.

R. G. D.