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Wills--Informal Revocation

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group of cases relief has been refused even though the products were quite similar.¹⁷

The tendency in the trade-mark cases is to give the owner of the trade-mark a limited "monopoly". Its application in the principal case reflects a recognition by the courts that in this day of ever-increasing competition protection must be granted to the owner of the mark on all goods which he might naturally be supposed to produce.

—HOUSTON A. SMITH.

WILLS — INFORMAL REVOCATION. — On an issue of *devisavit vel non*, the instrument offered was in proper form but upon the back of the manuscript cover, in the handwriting of the attorney, was the inscription, "This will null and void and to be only held . . . as a memorandum for another will . . .", followed by the date and the signature of the testatrix. Admitting this to be ineffectual as a revocation by subsequent writing, the contestants claimed it to be a revocation by cancellation and the intent to revoke was established by the evidence. The jury found it to be a valid will and error was brought. *Held*, affirmed. The notation could not be a revocation by "some writing declaring intention" for it was unattested. It was not a revocation by cancellation for there was no physical mutilation. *Thompson v. Royal*.¹

"Cancellation", in its original and proper meaning is the annulment of a writing by drawing lines across it in the form of lattice work.² Today the same legal effect could be accomplished by scratching out or erasing the signature of the testator,³ by obliterating or erasing a material clause,⁴ or, by writing the words "can-

Cedar Products Co., 11 F. (2d) 205 (App. D. C. 1926); and cigars and drugs, Peninsular Chem. Co. v. Levinson, 247 Fed. 658 (C. C. A. 6th, 1917).

¹⁷ The cases, while seemingly conflicting with those in the preceding note, are not necessarily inconsistent since other factors entered into the decisions. The products were ice cream and milk, Borden Ice Cream Co. v. Borden's Condensed Milk Co., 201 Fed. 510 (C. C. A. 7th, 1912); canned salmon and canned fruits, George v. Smith, 52 Fed. 330 (C. C. A. 2d, 1892); character in detective story magazine and character in motion picture, Atlas Mfg. Co. v. Street & Smith, *supra* n. 7; wheat flour and prepared pancake and buckwheat flour, France Milling Co. v. Washburn-Crosby Co., 3 F. (2d) 321 (D. C. N. Y. 1925); and food products and tobacco, Beech-Nut Packing Co. v. Lorrillard Co., *supra* n. 7.

¹ 175 S. E. 748 (Va. 1934).

² Warner v. Warner's Estate, 37 Vt. 356, 362 (1864).

³ Sanderson v. Norcross, 242 Mass. 43, 136 N. E. 170 (1922); *In re Kuntz*' Will, 140 Misc. 598, 251 N. Y. Supp. 403 (1931). This signature must be the one, or only one, attested to. Bethell v. Moore, 19 N. C. 311 (1837).

⁴ Dammann v. Dammann, 28 Atl. 408 (Md. App. 1894); Oetjen v. Oetjen,

celled" or other words of like intent across the written matter on the face of the instrument.⁵ In other words, to effect a revocation by cancellation, there must be some physical defacement⁶ with that equivocal act⁷ being accompanied by the intent to revoke.⁸

The contention of the appellant in the instant case has often been made, but seldom with effect. For, with but few exceptions,⁹ a declaratory writing which neither satisfies the statutory requirements for revocation nor physically cancels the instrument has been held to be insufficient as a revocation.¹⁰ The principal decision is the first of the Virginia court on this question.¹¹ It was, however, simply a clear application of the written law, which presumably would be followed in West Virginia, where a like statute exists. Courts of equity, in particular, have been too prone to relax such statutes as the statute of wills and the statute of frauds. It is refreshing to notice that hard cases have caused but few courts to finch in dealing with the problem of the principal case.

—ROBERT W. BURK.

155 Ga. 1004, 42 S. E. 387 (1902). There is a split of authority as to partial revocation by cancellation. *Coghlin v. Coghlin*, 79 Ohio St. 71, 85 N. E. 1058 (1908); *Wood's Estate*, 247 Pa. 377, 93 Atl. 483 (1915). But where permitted its effect is determinedly the testator's intention, *Olmstead's Estate*, 122 Cal. 224, 54 Pac. 745 (1898).

⁵ *Re Barnes*, 76 Misc. 382, 136 N. Y. Supp. 940 (1912).

⁶ *Noesen v. Erksnwick*, 298 Ill. 231, 131 N. E. 622 (1921).

⁷ "The act, however, of cancellation or destruction necessarily presents enquiries calling for or permitting the examination of parol proofs to a very considerable extent." *Malone's Adm'r v. Hobbs*, 1 Rob. 366, 400 (Va. 1842). 1 SCHOULER ON WILLS (6th ed. 1923) § 597.

⁸ Where a will is regularly made, the intent to revoke must be plain and without doubt. *Harris v. Wyatt*, 113 Va. 254, 74 S. E. 189 (1912). Acts of cancellation, *prima facie*, import an intent to revoke, but this weighs lightly. *Burton v. Wylde*, 261 Ill. 397, 103 N. E. 976 (1913).

⁹ *Warner v. Warner's Estate*, *supra* n. 2; *Evans Appeal*, 58 Pa. 238 (1868). The rationale of these cases, that the writing was on the back of the actual pages of the will and a revocation because inseparable, has been severely criticized in *Will of Ladd*, 60 Wis. 187 (1884). See *Billington v. Jones*, 108 Tenn. 234, 66 S. W. 1127 (1901) (permitting revocation in absence of statute).

¹⁰ The writing does not physically cancel where it is on the back of a will, *Will of Ladd*, *supra* n. 9; on the margin, *Lewis v. Lewis*, 2 Watts & S. 455 (Pa. 1841); *Re Akers Will*, 173 N. Y. 620, 66 N. E. 1103 (1903); or on the face but touching only an immaterial part, *Dowling v. Gilland*, 286 Ill. 530, 122 N. E. 70 (1919).

¹¹ The pertinent part of the Virginia statute provides: "No will or codicil, or any part thereof, shall be revoked unless by a subsequent will or codicil, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is required to be executed, or by the testator or some person in his presence and by his direction cutting, tearing, burning, obliterating, canceling, or destroying the same, or the signature thereto, with the intent to revoke." VA. CODE ANN. (Michie, 1919) § 5233. The subsequent writing in the handwriting of the testator would revoke a holographic will though not attested. *La Rue v. Lee*, 63 W. Va. 388, 60 S. E. 388 (1908).

¹² W. VA. REV. CODE (1931) c. 41, art. 1, § 7. The cases cited in the preceding notes all arose under statutes substantially the same as this one.