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Wills—Revocation by Writing on Unexecuted Copy

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governmental capacity. They maintained that when the government engages in activity indistinguishable from private conduct, it should be held to the same standard of care as that of private persons under like circumstances.

The cases holding the government liable for any negligence occurring once discretion has been exercised follow a sounder approach as discretion should not include the right to act negligently. It is submitted that the court's refusal to adopt this reasoning in the instant case may have been prompted by the enormity of the damages involved and a reluctance to set a precedent of government liability for its part in a large scale disaster.

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WILLS—REVOCATION BY WRITING ON UNEXECUTED COPY

Upon the death of testatrix an unexecuted carbon copy of her original will was found at her home. In the blank space above the typewritten words of this copy, she had written "Null and Void" and signed her initials. *Held* (5-1): This was a sufficient writing to revoke her original will. In re *Kehr's Estate*, ___ Pa. ___, 95 A. 2d 647 (1953).

The Statute of Wills provides that a written will can be revoked:

(1) by being burnt, torn, obliterated or destroyed with the intent and for the purpose of revocation by the testator himself, or
(2) by some other writing of the testator declaring the same and executed in the manner required of wills, or
(3) by a subsequent will. PA. WILLS ACT OF 1947, 20 P. S. § 180.5; N. Y. DECEDENT ESTATE LAW § 34.

Where the revocation is by obliteration of the document, words indicating an intent to revoke which are written across the will, in such a manner that many words are crossed, effectuates cancellation of the will. In re *Barnes Will*, 76 Misc. 382, 136 N. Y. Supp. 940 (Surr. Ct. 1912). However, words written upon the will which do not in any way physically obliterate the same are ineffective as a cancellation of the will. *Howard v. Hunter*, 115 Ga. 357, 41 S. E. 638 (1902); *Dowling v. Gilliland*, 286 Ill. 530, 122 N. E. 70 (1919).

Writing across the words of an unexecuted copy of a will is ineffective as a cancellation of the original. In re *D'Agostino's Will*, 9 N. J. Super. 230, 75 A. 2d 913 (1950). However, where a

copy of a will is executed and thereby considered a duplicate, cancellation of the one revokes the other. In re *Holmberg's Estate,* 400 Ill. 366, 81 N. E. 2d 188 (1948); In re *Robinson's Will,* 257 App. Div. 405, 13 N. Y. S. 2d 324 (4th Dep't 1939).

Admittedly in the instant case it is unimportant whether the phrase "Null and Void" crossed the words of the copy as the copy was unexecuted. For this reason the court dealt with the question of whether these words were sufficient to constitute a revocation by another writing.

The revocation of a will by another writing requires compliance with the statute and an expression of intent. In re *Tremain's Will,* 282 N. Y. 485, 27 N. E. 2d 19 (1940). Even words expressing a clear intention to revoke are ineffective where this declaration of revocation fails to meet the statutory requirements of an execution in the manner required of wills. In re *Aker's Will,* 17 App. Div. 461, 77 N. Y. Supp. 643 (1st Dep't 1902), *aff'd,* 173 N. Y. 620, 66 N. E. 1103 (1903); In re *Probate of the Will of Ladd,* 60 Wis. 187, 18 N. W. 734 (1884). In the instant case it was conceded by the parties that the declaration was executed in the manner required of wills, *i.e.,* it was signed and witnessed. PA. WILLS ACT OF 1947, 20 P. S. §§ 180.2, 180.4. Although the law in Pennsylvania requires only the oaths of two competent witnesses, it should be noted that in New York the signatures of these witnesses are needed. N. Y. DECEDENT ESTATE LAW § 21 (4).

Whether the words "Null and Void" were a sufficient declaration for revocation was in dispute. It has been stated that the declaration should refer to the original will in such a manner that its identity will be unmistaken. In re *Smith's Estate,* 31 Cal. 2d 563, 191 P. 2d 413 (1948). The declaration need not be express, but may be by necessary implication. In re *Gray's Estate,* 365 Pa. 411, 76 A. 2d 169, 171 (1950). It can be any sort of writing. In re *Harrison's Estate,* 316 Pa. 15, 173 A. 407 (1934). Recently a California case held that the words, "I . . . do hereby revoke this will, it is null and void (null and void)", written on an unexecuted copy of the will and signed, constituted a sufficient declaration of intent to revoke the original will. In re *Smith's Estate, supra.*

Although the phrase in the California case expressly refers to the original will, it is submitted that the court in the instant case correctly concluded that the words "Null and Void" alone when written on an unexecuted copy were a sufficient declaration of intent to revoke the original will under the section of the Statute of Wills referring to revocation by another writing.

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