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WILLS - HOLOGRAPHIC REVOCATION - REFERENCE TO NONTESTAMENTARY ACT TO DETERMINE WILL TO WHICH REVOCATION REFERS

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WILLS — HOLOGRAPHIC REVOCATION — REFERENCE TO NONTESTAMENTARY ACT TO DETERMINE WILL TO WHICH REVOCATION REFERS — Testator deposited his last will and testament with a trust company for safekeeping and received a receipt acknowledging the deposit. Several years later he wrote on the bottom of the receipt: "The Will and Testament above referred to I hereby declare void." The writing was signed and dated.[1] On his death his widow alleged that he had died intestate and the probate court entered a decree recognizing the widow as sole distributee of the estate, valued at twelve million dollars. The legatees in the will instituted the present proceedings against the widow for a rule to show cause why she had not produced the will for probate. The widow answered that the will had been revoked. In reply plaintiffs pleaded that the will to which the revocation referred could be identified only if the receipt were incorporated into the revocation and that the receipt could not be incorporated by reference because it was not in the testator's handwriting. *Held*, that the will was revoked. Reference may be made to a nontestamentary act for the purpose of rendering certain the will to which the revocation refers. *Hessmer v. Edenborn*, 196 La. 575, 199 So. 647 (1941).

All the formal requirements necessary to incorporate the safety deposit receipt into the revocation were present in the principal case: the receipt was sufficiently identified; it was referred to as existing at the time of the revoca-

[1] La. Civ. Code (Dart, 1932), art. 1692: "The act by which a testamentary disposition is revoked, must be made in one of the forms prescribed for testaments, and clothed with the same formalities." Sec. 1588: "In order to be valid [holographic wills] —must be entirely written, dated and signed by the hand of the testator."

tion; and it was in fact then existing.[2] But Louisiana,[3] in common with a number of other jurisdictions,[4] does not permit documents which are not in the handwriting of the testator to be incorporated into a holographic will or revocation. Therefore, in the principal case, the safety deposit receipt could not be incorporated into the revocation in order to identify the will which was intended to be revoked. However, it is well settled that a beneficiary may be designated [5] or the amount of a legacy determined [6] by a past act of the testator or of a third party, provided that the act is one which has independent significance apart from its effect upon the disposition of the property. There is no reason why the will in the principal case could not likewise be identified. It is obvious that the deposit of the will by the testator and the issuance of the receipt by the trust company were nontestamentary acts. Therefore the court could look to the deposit receipt to identify the will which the testator intended to revoke. But it is submitted that it was unnecessary to refer to the receipt for this purpose. Disregarding the phrase "above referred to," the revocation reads: "The Will and Testament I hereby revoke." Since a testator normally has only one will, the revocation is perfectly clear. It should not be necessary to identify the document further unless the testator has more than one unrevoked will at the time of the revocation.

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[2] Eschmann v. Cawi, 357 Ill. 379, 192 N. E. 226 (1934); Fickle v. Snepp, 97 Ind. 289 (1884); Bemis v. Fletcher, 251 Mass. 178, 146 N. E. 277 (1925); Ray v. Walker, 293 Mo. 447, 240 S. W. 187 (1922).

[3] Jones v. Kyle, 168 La. 728, 123 So. 306 (1929).

[4] Hewes v. Hewes, 110 Miss. 826, 71 So. 4 (1916); Gibson v. Gibson, 28 Gratt. (69 Va.) 44 (1877); Sharp v. Wallace, 83 Ky. 584 (1886). Incorporation was allowed in Barney v. Hays, 11 Mont. 571, 29 P. 282 (1891); In re Soher, 78 Cal. 477, 21 P. 8 (1889); In re Thompson's Will, 196 N. C. 271, 145 S. E. 393 (1928).

[5] Metcalf v. Sweeney, 17 R. I. 213, 21 A. 364 (1891); Reinheimer's Estate, 265 Pa. 185, 108 A. 412 (1919); Abbot v. Lewis, 77 N. H. 94, 88 A. 98 (1913); Dennis v. Holsapple, 148 Ind. 297, 47 N. E. 631 (1897); Bosserman v. Burton, 137 Va. 502, 120 S. E. 261 (1923).

[6] Hastings v. Bridge, 86 N. H. 172, 164 A. 906 (1933); Creamer v. Harris, 90 Ohio 160, 106 N. E. 967 (1914); Gaff v. Cornwallis, 219 Mass. 226, 106 N. E. 860 (1914).