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Wills--Revocation by Destruction

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Statutes concerning negligent offenses against the public safety, found in thirty-three states;

Statutes on negligent offenses against public justice, found in fifteen states.

The following statutory provisions relative to criminal negligence are recommended as desirable for general adoption:

1. In every crime or public offense there must exist a union or joint operation of act and intent, criminal negligence, or reckless and wanton misconduct. 24

2. Reckless and wanton misconduct is the intentional doing of an act, or failure to do an act which it is his duty to do, by one who knows or has reason to know of facts which would lead a reasonable man to realize that his conduct involves a high degree of probability that substantial harm will result therefrom. 25

3. Criminal negligence is the want of the care which would be exercised by a man of ordinary prudence under the same or similar circumstances.

4. Except in cases where it is otherwise provided by law, the court in passing sentence upon one who has been convicted of a crime or public offense shall take into consideration whether the criminal act was committed intentionally, or through reckless and wanton misconduct, or through ordinary criminal negligence, and shall adjust the sentence accordingly.

JOSEPH S. FREELAND.

WILLS—REVOCATION BY DESTRUCTION.

Mary Nish left her will in the possession of W. S. McCaul, her relative and attorney. Desiring to revoke a codicil of the will, she wrote McCaul and told him to destroy the codicil, which he did by tearing it into some thirty pieces, which he later reassembled and pasted to a piece of paper, thus restoring the codicil to its original legibility. The testatrix was advised of the destruction before her death. In an action to probate the will and codicil as if there had been no destruction, it was held that the codicil had been destroyed by the tearing by McCaul. 2 Thus, the Iowa court fairly and squarely held that a testator might, by a written letter, not executed with the formalities of a will, denote a third person his agent for the purpose of destroying his will, and that the destructive act need not be committed in the presence of the testator, and yet that the statutory requirements for revocation would be satisfied.

2 Re Estate of Mary Nish, —— Iowa ——, 261 N. W. 521 (1936).
The Iowa statute concerning revocation of wills is unique in that it does not specifically require the act of destruction to be committed in the presence of the testator, when done by any person other than himself. The vast majority of such statutes in the United States are patterned after the English Statute of Frauds, and the Statute of Victoria, both of which stated that the destruction of the will must take place in the presence of the testator. Kentucky’s statutory requirements for revocation are considered representative. However, Florida and Georgia both have statutes worded somewhat similarly to the Iowa statute, both being silent as to whether or not the destruction must be in the presence of the testator.” Several states have no statutory provision providing for revocation by destruction.

There were two possible means of revocation available to the testatrix: Cancellation or destruction. Under the Iowa statute there were specific requirements set forth for revocation by cancellation, to the effect that such revocation must fulfill the same formalities as a will, but there were no specific statutory requirements concerning revocation by destruction. The Iowa court evidently bent over backward in an effort to give effect to the apparent intent of the testatrix, and overlooked the fact that the letter instructing the attorney to destroy the will was testamentary in character, since it had the effect to increase the shares of the remaining legatees. While the testatrix probably intended to revoke her will by the manual act of destruction, and in fact there was an actual destruction of the will, still, her letter could at most be treated only as a new instrument, testamentary in contents, but falling far short of the well-established rule that a cancellation must be executed with the same formalities as a will. As

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1 Iowa Code (1931) Sec. 11855. “Wills can only be revoked in whole or in part by being cancelled or destroyed by the act or direction of the testator, with the intention of so revoking them, or by the execution of subsequent wills. When done by cancellation, the revocation must be witnessed in the same manner as the making of a new will.”

2 29 Car. II (1677) Sec. 6.
3 7 Wm. & 1 Vic. (1838) c. 26, Sec. 20.

4 Kentucky Statutes (1930) Sec. 4833. “No will or codicil, or any part thereof, shall be revoked, unless . . . 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, cancelling or destroying the same, or the signature thereto, with the intent to revoke.”

5 Rev. Gen. Statutes of Florida (1920) Sec. 3596. (Applies to realty only. No provision concerning personality.)
6 Parks Ann. Code (1914) Sec. 3919.
7 Tennessee and Louisiana, for example. For a discussion of the statutory requirements of the various states for revocation of wills, see Borden, The Statute Law of Wills (1929) 14 Iowa L. Rev. 283.
8 Rood on Wills (2d ed.) Sec. 320.
9 Iowa Code (1931) Sec. 11855, set out in full in n. 2, supra.
10 Evans, Testamentary Revocation by Subsequent Instrument (1934) 22 Ky. L. J. 469, at 472-473.
such a situation had never arisen in any of the other states having statutes similar to the one in Iowa,\textsuperscript{12} the Iowa court was unable to base its opinion on anything but its own ideas on the subject, which, it is submitted, are wrong, and lead to several undesirable results.

First, it is submitted that the Iowa court erred in the construction given the statute. Admittedly, the statute does not in so many words require that the destructive act be in the presence of the testator when done by another person at his direction. Such a construction as is given the statute by the Iowa court, however, leaves the field of fraud wide open in every case where the will is left in the hands of a third person; if the letter directing the destruction is to be held merely evidentiary—and that is the effect of the holding of the Iowa court—then other and weaker evidence will also suffice to establish the agency, and show the intent of the testator that the will or parts thereof should be destroyed. While it is not in the province of the courts to legislate, and in effect add the words “in the presence of the testator” to the statute, still it is argued that the court should have adopted as its common law, because of policy, that the destruction should take place in the presence of the testator, or that the designation of the agency for the specific purposes of destroying the will should comply with the statutory requirements for the execution of a will.

Second, it was unnecessary that the court even consider the part of the statute pertaining to destruction of wills. The statute specifically provides that when a will is revoked by cancellation, such an instrument must be executed with the same formalities as a will.\textsuperscript{2} Obviously the testatrix could not have written to her attorney and directed him to prepare, sign, and witness a will for her. Thus, it necessarily follows that she could not simply write to him and direct that the will be destroyed. Such a letter could be treated only as a subsequent testamentary instrument, and, unless it is witnessed in the same manner required of wills, it should have no effect on the will whatsoever. The holding of the Iowa court is plainly against the policy enunciated in the Iowa case of \textit{Gay v. Gay},\textsuperscript{14} which holds that revocation by subsequent instrument can be effective only when the instrument is executed with all the formalities of a will.

Third, the holding of the Iowa court was not in conformity with the apparent tendencies of the laws of wills. It has been held that a

\textsuperscript{12} Cf. Harris v. McDonald, 152 Ga. 18, 108 S. E. 448 (1921). The Georgia court, in construing a somewhat similar statutory provision, where there was a failure to comply with the request to destroy the will, said, “Under this section it is necessary that the will be actually destroyed or obliterated. Mere direction to destroy not followed by actual destruction, will not effect a revocation . . . .” This presupposes that had the will actually been destroyed, then, even though the destruction was not in the presence of the testator, the statute would have been complied with.

\textsuperscript{13} Iowa Code (1931) Sec. 11855, set out in full in n. 2, supra.

\textsuperscript{14} 60 Iowa 415, 14 N. W. 238 (1882). See also Dean v. Beall, 2 Ky. Op. 288 (1868).
will was not executed within the contemplation of the Wills Act when the testator could not have seen the subscribing witnesses while they were attaching their signatures in an adjoining room, or when the testatrix could not, because of her condition, and some intervening curtains, have turned and observed the attestation of her will, though it was completed in the same room with her. Is it not quite as important that, in order to prevent fraud, the destruction of a will should be executed with the same care and precaution? It is apparent that the law regards with suspicion and jealousy any act having effect on the will of a testator, when such an act does not take place either within his plain view, or where he might easily have seen the act. This is easily evidenced by the large number of states that require the act to be in the presence of the testator.

It is submitted that the court was in error in holding that the destruction need not be in the presence of the testatrix, and, as this was the sole point decided, the case must be wrong.

Samuel C. Kennedy.

CONFLICT OF LAWS—LEX LOCI OR LEX FORI TO GOVERN DAMAGES.

"The measure of damages for a tort is governed by the law of the place where the tort was committed", says Professor Beale in his work on Conflict of Laws. Beale, supported by the majority of cases, holds that where the right of action was created, there also the measure of damages was settled. In short, Beale and, seemingly, the majority of courts think that the measure of damages is part of the right and not the remedy; that it is part of substantive and not of procedural law; for if the measure of damages were a matter of procedure, then lex fori would apply instead of lex loci.

Upon an analysis of the theories upon which the differentiation between substantive and procedural law is based, it would seem to be more logical to say that the measure of damages is a part of the remedial side of the question—totally disconnected from the right. It is almost a waste of time to point out that in many cases there exists a well-defined and recognized cause of action, which because of exemption statutes or the Bankruptcy Act, the plaintiff is unable to carry into execution profitably to himself. Here we have a valid cause of action which, if prosecuted, will result in a judgment for the plaintiff; but

2 Tribe v. Tribe, 1 Rob. Eccl. 775 (1845).
3 2 Beale, Conflict of Laws (1935) Sec. 412.2.
4 American R. E. Co. v. Davis, 152 Ark. 258, 238 S. W. 50 (1922); Commonwealth Fuel Co. v. McNeil, 103 Conn. 390, 130 Atl. 794 (1925); Roseberry v. Scott, 120 Kan. 576, 244 Pac. 1063 (1926); L. N. R. R. v. Whitlow, 114 Ky. 479, 48 S. W. 711 (1897).