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Wills - Revocation of Second Will Reinstates the First One

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In France, the strong tendency, worked out mainly with regard to divorce, is to consider reciprocal fault as double reason for releasing the parties rather than no reason at all.[7] Certainly the majority of French writers favor this view.[8] It must not be forgotten, however, that particularly in the case of cruel treatment there is much to be said for the view that mutual recriminations due to the heat of provocation may tend to cancel one another.[9] Much must also be said for the French doctrine that where mutually intolerable offenses are not present, wide discretion should be left to the judge[10] to attempt a reconciliation.

This question of whether two wrongs can ever make a right has not been materially discussed in the Louisiana decisions. The court has insisted upon the preservation of the marital status, but the constant change in our customs and conventions may bring about further modification of the present doctrine and its effects. In the event of releasing the spouses from an impossible marital relationship, the question as to which spouse should be granted the decree is of no importance except as to alimony[11] and custody of children, the matter of primary consideration being the dissolution of the marriage relationship for the benefit of all parties concerned.

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WILLS—REVOCATION OF SECOND WILL REINSTATES THE FIRST ONE—Upon the death of the testatrix, two purported wills in olographic form were offered for probate, one dated August 27, 1927 and the other April 5, 1928. The will bearing the posterior date con-

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7. *"Lorsque le demandeur est lui-même coupable envers son conjoint, la seule conséquence de ce fait est que les causes du divorce existent en double, et qu'il y a deux raisons au lieu d'une pour le prononcer."* 1 Planiol, Traité Elémentaire de Droit Civil (12 ed. 1937) 422, nº 1205.

(Translation) "When the plaintiff is himself guilty towards his spouse, the only consequence of this fact is that the grounds for divorce are double, and that there are two reasons instead of one for pronouncing it." See also 1 Marcadé, Explication Théorique et Pratique du Code Napoléon (5 ed. 1852) 607, nº 769.

8. See 1 Colin et Capitant, Cours Elémentaire de Droit Civil Français (8 ed. 1934) 216, nº 189 (5).

9. Cass., 18 janv. 1881, Dalloz. 1881.1.125; Cass., 12 janv. 1903, Sirey.1903.1. 279.

10. 7 Aubry et Rau, Cours de Droit Civil Français (5 ed. 1913) 301-302, § 477.

11. See Mouille v. Schutten, 190 La. 841, 865, 183 So. 191, 198-199 (1938) (O'Niell, C.J., dissenting on the admission of testimony, not on the merits).

tained a revocatory clause and was torn into three pieces. Counsel admitted that the destruction of the second will had the effect of revoking it and so the only question at issue was the legal existence of the first will. *Held*, that the first will was never revoked. *Succession of Dambly*, La. Sup. Ct., Docket No. 34,952 (1938) (Rehearing denied, Jan. 10, 1939).

There has been no previous case in Louisiana jurisprudence establishing the time when the expressed revocation of the testator takes legal effect. The provisions of the Civil Code dealing with revocation,[1] except for a few immaterial changes, are the same as those of the Code Napoleon.[2] The earlier French commentators were of the opinion, and the jurisprudence was to the effect, that revocation of a posterior testament which itself had revoked an anterior testament only reinstated the earlier document to the extent provided by the testator in a formal expression of his intention.[3] But more recently there has developed a strong tendency to modify this doctrine to the effect that a revocation of the revoking will is in itself a sufficient manifestation of intention on the part of the testator to reinstate his former testament.[4] The underlying theoretical analysis is that the expression of the revocation has the immediate effect of revoking the substance of the earlier testament; but that nonetheless, the formal instrument remains in existence until the death of the testator and the revival of the substance may result from proof of the intention of the testator to reinstate the earlier document as his last will and testament.[5] The present Louisiana decision reaches the same re-

1. Arts. 1690-1696, 1710, 1559, 1589, La. Civil Code of 1870.

2. Arts. 1035-1039, 1047, 953, French Civil Code.

3. *"La révocation d'un second testament qui lui-même en avait révoqué un premier, ne fait revivre le premier testament, qu'autant que le testateur a manifesté cette intention dans l'acte de révocation."* (The revocation of a second will which itself had revoked a first one, only revives the first will insofar as the testator manifests this intention in the act of revocation.) Cass., 7 fév. 1843, Sirey.1843.1.513, Dalloz.1843.1.155. See also 22 Demolombe, Cours de Code Napoléon, Traité des Donations Entre-vifs et des Testaments, V (1876) 131-132, nº 162; Troplong, Droit Civil Expliqué, Des Donations Entre-vifs et des Testaments, III (3 ed. 1872) 565, nº 2065.

4. *"Quand la révocation est rétractée, le testament antérieur revit comme s'il n'avait jamais été révoqué."* (When the revocation is withdrawn, the former will revives as if it had never been revoked.) 5 Planiol et Ripert, Traité Pratique de Droit Civil Français (1933) 759, nº 710. See also Rennes, 1er juill. 1878, Sirey.1879.2.117, Dalloz.1879.2.15; Req., 26 mars 1879, Sirey.1879.1.253, Dalloz.1879.1.285; Paris, 1er mars 1929, D.H. 1929, 258; Cass., 15 mai 1878, Sirey. 1879.1.160, Ref. Sirey.1.696, Dalloz.1879.1.32. 11 Aubry et Rau, Cours de Droit Civil Français (5 ed. 1919) 514-515, § 725, adheres to the earlier strict view (see note 3, supra).

5. *"En effet, la révocation n'attaquant pas le corps et la substance du testament révoqué, et n'en altérant ni la forme ni la solennité, il n'est pas exact de dire qu'elle le mette entièrement au néant. Le testament continue à*

sult as that advanced by the late commentators and court decisions in France but is arrived at by a different legal analysis of the problem.

A testament is by its very nature alterable until the death of the testator, and this right of alteration is not susceptible to any restrictions, voluntary or otherwise.[6] To make an express revocation, the testator must do so by a formal declaration of intention in an instrument written in the form and clothed with the formalities prescribed for testaments.[7] A revocation is merely a provision incorporated into a will; or, when it stands alone, it is in reality nothing other than a will itself and is just as inactive and inoperative as a will until probated.[8] If the revocation took effect immediately upon being incorporated into the will, this would in reality be giving a fixed status or legal existence to a part of the will (the revocation) before the death of the testator, in violation of the provisions of the Civil Code which stipulate that no will can have legal effect unless it has been probated.[9] Employing the aforementioned premises, the Louisiana Supreme Court concluded that the revocation in the second will had no effect, as the will was never probated.

The language of the court in the principal case that "They [counsel] not only concede, but argue, that in the case at bar the revoking will was revoked,"[10] would lead one to believe that if the question of destruction had not been conceded, the court might

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subsister matériellement, et à constanter légalement la volonté que le testateur avait d'abord manifestée." (In effect, since the revocation does not attack the body or the substance of the revoked will, nor alter the form or solemnity, it is not exact to say that it [the revocation] makes it [the will] null and void. The will continues to exist materially, and legally to establish the wish that the testator had first manifested.) 11 Aubry et Rau, Cours de Droit Civil Français (5 ed. 1919) 515-516, § 725, note 12. See also 14 Laurent, Principes de Droit Civil (2 ed. 1876) 215, nº 197; 22 Demolombe, Cours de Code Napoléon, Traité des Donations Entre-vifs et des Testaments, V (1876) 134, nº 163; Troplong, Droit Civil Epliqué, Des Donations Entre-vifs et des Testaments,III (3 ed. 1872) 566, nº 2065.

6. Art. 1690, La. Civil Code of 1870; Succession of Boudreau, 10 La. Ann. 709 (1855); Succession of Gilmore, 157 La. 130, 102 So. 94 (1924); Succession of Nelson, 163 La. 458, 112 So. 298 (1927).

7. Arts. 1691-1692, La. Civil Code of 1870; Succession of Boudreau, 10 La. Ann. 709 (1855); Hollingshead v. Sturgis, 21 La. Ann. 450 (1869); Succession of Cunningham, 142 La. 701, 77 So. 506 (1918); Succession of Guiraud, 164 La. 620, 114 So. 489 (1927); Succession of Feitel, 187 La. 596, 175 So. 72 (1937). Contra: Fuselier v. Masse, 4 La. 423 (1832): A subsequent change of disposition of property, in a will which is invalid, shows such a sufficient change of mind as will revoke a former donation.

8. Saunders, Lectures on the Civil Code of Louisiana (1925) 339; Cross, A Treatise on Successions (1891) 103.

9. Art. 1644, La. Civil Code of 1870; Succession of McDermott, 136 La. 80, 66 So. 546 (1914); Succession of Feitel, 187 La. 596, 175 So. 72 (1937).

10. Succession of Dambly, La. Sup. Ct., Docket No. 34,952 (1938).

have concluded that the tearing of the will into three pieces was not a sufficient destruction to prevent the probating of the testament.

While an express revocation must be clothed with certain formalities,[11] a tacit revocation may either be made in the form of a valid posterior testament containing dispositions inconsistent with the previous testament,[12] or "from some act which supposes a change of will."[13] Under Article 1589 the court has recognized the existence of a third method of revocation, but this is applicable only in those cases in which the erasures destroy some part that is essential to the validity of the will.[14] The court has refused each time to recognize the intention of the testator unless it is established by some mode of active expression as provided in the Civil Code.[15]

Nowhere in the Code is it provided that the destruction of a will revokes it. This is no doubt due to the simple reason that after destruction of the testament there is no will in existence and the testator has placed himself in the same situation as though he had never executed a will.[16] To accomplish recovation by de-

11. Arts. 1691-1692, La. Civil Code of 1870, cited in note 7, supra.

12. Art. 1693, La. Civil Code of 1870; Succession of Bowles, 3 Rob. 31 (1842); Hollingshead v. Sturgis, 21 La. Ann. 450 (1869); Succession of Muh, 35 La. Ann. 394, 48 Am. Rep. 242 (1883); Succession of Hill, 47 La. Ann. 329, 16 So. 819 (1895); Succession of Race, 144 La. 157, 80 So. 234 (1918).

13. Art. 1691, La. Civil Code of 1870. In the Succession of Hill, 47 La. Ann. 329, 333, 16 So. 819, 821 (1895), it was said that " 'from some other act which supposes a change of will' is to be interpreted and explained by the following Article of the Code (1695). . . ." See also Hollingshead v. Sturgis, 21 La. Ann. 450 (1869); Succession of Muh, 35 La. Ann. 394, 48 Am. Rep. 242 (1883); Succession of Tallieu, 180 La. 257, 156 So. 345 (1934).

14. Art. 1589, La. Civil Code of 1870: "Erasures not approved by the testator are considered as not made, and words added by the hand of another as not written.

"If the erasures are so made as to render it impossible to distinguish the words covered by them, it shall be left to the discretion of the judge to declare, if he considers them important, and in this case only to decree the nullity of the testament."

In the Succession of Muh, 35 La. Ann. 394, 399, 48 Am. Rep. 242, 246 (1883), it was held that "Erasures of clauses in the body of the will affect only the dispositions erased. Erasure of the signature strikes at the existence of the instrument as a will."

15. The court cannot presume a change of intention for the testator, when he had done no act which supposed a change of will: Succession of Cunningham, 142 La. 701, 711, 77 So. 506, 510 (1918). A letter is not a revocation: Hollingshead v. Sturgis, 21 La. Ann. 450 (1869). The finding of a will among worthless papers in a valise does not raise the presumption that the intention of the testator was to revoke the testament: Succession of Blakemore, 43 La. Ann. 845, 848, 9 So. 496 (1891).

16. Succession of Hill, 47 La. Ann. 329, 16 So. 819 (1895). See also, Succession of Tallieu, 180 La. 257, 270, 156 So. 345, 349 (1934).

"Bien que le Code soit muet sur la question, on admet cependant la révocation en se fondant sur l'inexistence du testament." (Even though the Code

struction, if the inference conveyed by silence on the part of the Civil Code is to be given effect, the destruction must be so complete as to render it impossible to offer the whole will in court for probation. There must be some essential part or parts missing; otherwise, the court would be legislating judicially by presuming the revocation of a will in physical existence which had not been revoked by any of the forms designated in the Civil Code.

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be silent on the question, the revocation is nevertheless conceded on the basis of the inexistence of the will.) 5 Planiol et Ripert, op. cit. supra note 4, at 765, nº 714. See also 11 Aubry et Rau, op. cit. supra note 4, at 532, § 725.