UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 13 | Number 4 Article 16

6-1-1935

Wills -- Requirements for Holographs -- Printed Forms

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Once he has exercised his power of disposition, the life tenant is under no obligation to account for the proceeds,[22] but at his death any of the proceeds which remain in his possession, whether in the form of money or other property, will pass to the remainderman.[23]

As a whole these conclusions are satisfactory. By permitting the life tenant to transfer a fee and yet protecting the remainder by the regulations attendant upon the disposition of the proceeds, the courts have succeeded in giving full effect to the apparent intention of the testator. Furthermore, substantial justice has resulted as the rights of all interested parties are amply protected.

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Wills—Requirements for Holographs—Printed Forms.

The testatrix's will, attested by two witnesses, was written by her own hand in the blanks of a printed will form, a part of which was torn

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Reeside v. Annex Building Ass'n, 165 Md. 200, 167 Atl. 72 (1933); Selig v. Trost, 110 Miss. 584, 70 So. 699 (1916). If the power of disposition is absolute the life tenant's mortgage on the fee is valid. Kent v. Morrison, 153 Mass. 137, 26 N. E. 427 (1891); Whitfield v. Lyon, 93 Miss. 443, 46 So. 545 (1908); Grace v. Perry, 197 Mo. 550, 95 S. W. 875 (1906); Lord v. Roberts, 84 N. H. 517, 153 Atl. 1 (1931); Rose City Co. v. Langloe, 141 Ore. 242, 16 P. (2d) 22 (1932); see Hamilton v. Hamilton, 141 Iowa 321, 128 N. W. 380 (1910). However, there is some conflicting authority. Downie v. Downie, 4 Fed. 55, (C. C. Ind. 1880); see Thrall v. Spear, 63 Vt. 266, 22 Atl. 414 (1891). In Rhode Island a mortgage of the fee by a life tenant who has a power of disposal is good provided the proceeds are used to erect improvements on the property. *In re* Jenks, 21 R. I. 390, 43 Atl. 871 (1899).

[22] Keniston v. Mayhew, 169 Mass. 612, 47 N. E. 612 (1897); Redman v. Barger, 118 Mo. 568, 24 S. W. 177 (1893); see Alford v. Alford, 56 Ala. 350 (1876).

[23] Bynum v. Swope, 201 Ala. 19, 75 So. 170 (1917) (the proceeds from the sale of the property had been invested in other real estate); Walker v. Pritchard, 121 Ill. 221, 12 N. E. 336 (1887) (the life tenant still retained some of the money received as the purchase price of the property); Barton v. Barton, 283 Ill. 388, 119 N. E. 320 (1918); *In re* Beatty's Estate, 172 Iowa 714, 154 N. W. 1028 (1915) (the proceeds of the sale were traced to a bank deposit); Olson v. Weber, 194 Iowa 512, 187 N. W. 465 (1922) (the proceeds from the sale were used to buy another tract of land which was exchanged for a third); *In re* Eddy's Adm'r, 134 Misc. Rep. 511, 236 N. Y. S. 275 (1929) (the money received from the sale of the property was traced to certain stocks and bonds); see *In re* McCullough's Estate, 272 Pa. 509, 116 Atl. 477 (1922); *cf.* Davis v. Badlam, 165 Mass. 248, 43 N. E. 91 (1896). *Contra:* McMurray v. Stanley, 69 Tex. 139, 6 S. W. 412 (1887); Feegles v. Slaughter, 182 S. W. 10 (Tex. Civ. App., 1916).

In some instances the life tenant is only entitled to a share of the proceeds coexistent with his life estate with the residue immediately becoming the property of the remainderman. Darden v. Mathews, 173 N. C. 186, 91 S. E. 835 (1917); see *In re* Meldrum's Estate, 149 Minn. 342, 183 N. W. 835 (1921).

This problem was raised in a recent North Carolina case, Fletcher v. Bray, 201 N. C. 763, 161 S. E. 383 (1931), in which the life tenant was given the power to dispose of the growing timber. In holding that the proceeds from the sale of the timber belonged to the life tenant's heirs rather than the remainderman the court distinguished the case of Darden v. Mathews, 173 N. C. 186, 91 S. E. 835 (1917) on the ground that it involved a bare power of sale and not an absolute power of disposal.

off, destroying portions of the writing on both sides of the sheet. The instrument was admitted to probate as a holographic will. *Held,* the mere presence of printed words on the sheet will not invalidate the instrument as a holographic will if the printing is not essential to the meaning of the handwriting, and the writing itself contains dispositive words sufficient to make a complete will in itself. In such a case the printed words are disregarded as being mere surplusage.[1]

Requirements for the valid execution of holographic wills are prescribed by statutes in the various states, which usually provide that the will must be entirely written, dated and signed by the testator in his own handwriting.[2] The construction of such wills in which printed matter appears has been based on two theories:[3] (1) whatever the testator intended to include as a part of the instrument is a part of the will,[4] and (2) whatever is not essential to the meaning of the written words is mere surplusage and is not to be construed with the will.[5]

Under the intent theory, any printed word which the testator intended to include as a part of the will invalidates it;[6] the mere presence of printed words on the sheet is immaterial only if they are entirely dissociated from the will and not intended as a part thereof.[7] For instance, a will in which part of the year date was printed was denied probate even though the instrument had also been dated entirely in the handwriting of the testator.[8] However, in a later case from the same jurisdiction another will of this nature was held to have been properly executed where the testator subsequently dated the instrument in his own handwriting.[9] Various cases have held instruments invalid which were entirely in the testator's handwriting except for part of the figures in the year date.[10]

[1] *In re* Will of Parsons, 207 N. C. 584, 178 S. E. 78 (1934).

[2] However, some states do not require that the instrument be dated, and two states (N. C. and Tenn.) make the additional requirement that the purported will be found among the valuable papers of deceased to show that some importance is attached to it as a testamentary disposition. For a compilation of state statutes, see Bordwell, *Statute Law of Wills* (1928) 14 IOWA L. REV. 1, 25. In North Carolina the will must be entirely written, but not necessarily dated, in the handwriting of the testator, with his name inserted in some part thereof, and the handwriting must be proved by three credible witnesses; in addition the document must be found among the valuable papers of the deceased, N. C. CODE ANN., (Michie, 1931), §§4131, 4144 (2).

[3] Mechem, *Integration of Holographic Wills* (1934) 12 N. C. L. REV. 213.

[4] *In re* Thorn's Estate, 183 Cal. 512, 192 Pac. 19 (1920); *In re* Francis' Estate, 191 Cal. 600, 217 Pac. 746 (1923).

[5] Gooch v. Gooch, 134 Va. 21, 113 S. E. 873 (1922).

[6] Estate of Billings, 64 Cal. 427, 1 Pac. 701 (1884).

[7] *In re* Oldham's Estate, 203 Cal. 618, 265 Pac. 183 (1928) (the will was written on a letterhead).

[8] *In re* Francis' Estate, 191 Cal. 600, 217 Pac. 746 (1923).

[9] *In re* Whitney's Estate, 103 Cal. App. 577, 284 Pac. 1067 (1930).

[10] Estate of Billings, 64 Cal. 427, 1 Pac. 701 (1884).
In re Plumel's Estate, 151 Cal. 77, 90 Pac. 192 (1907); *In re* Francis's Estate,

The following cases are not clearly within either the intent or surplusage theories:[11] In Mississippi, where the whole will was written except for the caption "My Will" the court said that the printed words would not affect the validity of a will unless without them the meaning and purpose were in some may materially affected.[12] In Louisiana a will containing a printed year date was rejected, since a date was necessary under the statute;[13] but in a subsequent case a will containing two immaterial words in another's handwriting was admitted to probate on the ground that the presence or absence of the words would not change the meaning or alter the provisions made by testator in his own handwriting.[14]

Under the surplusage theory, the will will be allowed to stand if the written portions are sufficient to make a testamentary disposition of the property without the aid of the printed words.[15] Few cases are clearly within this theory,[16] but in *Gooch v. Gooch*[17] the Virginia court upheld a will written on a printed form, and allowed it to revive a previously revoked will, saying that if the written portions of the will are complete and entire in themselves the printed portions may be regarded as surplusage.

Where the instrument is typewritten, even by the testator himself, it is not good as a holographic will under either theory.[18] Typewriting is essentially a process of printing, and "writing" means a mannerism in the formation of letters, by which the testator may be identified with the instrument offered for probate.

The North Carolina statute provides in effect that the will and every part thereof must be in the testator's own handwriting,[19] and it is said

191 Cal. 600, 217 Pac. 746 (1923); Succession of Robertson, 49 La. Ann. 868, 21 So. 586 (1897). But see *In re* Whitney's Estate, 103 Cal. App. 577, 284 Pac. 1067 (1930); Jones v. Kyle, 168 La. 728, 123 So. 306 (1929). In these two cases a date subsequently written in the testator's own handwriting was sufficient even where the previous date was printed.

[11] The surplusage theory condones any writing sufficient to stand alone as a testamentary disposition. These cases, while not depending entirely on the testator's intent, do not follow the liberal surplusage theory announced by the North Carolina court, and the result—something of a cross between the intent and surplusage doctrines—is based on the holding that printed matter, even where it is intended to be included in the will by the testator, will invalidate the will only if it materially affects the meaning of the written words.

[12] Baker v. Brown, 83 Miss. 793, 36 So. 539 (1904).

[13] Succession of Robertson, 49 La. Ann. 868, 21 So. 586 (1897). But see Jones v. Kyle, 168 La. 728, 123 So. 306 (1929) (a subsequent dating in the testator's handwriting was sufficient even where the previous date was printed).

[14] Heirs of McMichael v. Bankston, 24 La. Ann. 451 (1872).

[15] *In re* Lowrance's Will, 199 N. C. 782, 155 S. E. 876 (1930).

[16] See note 11, *supra*.

[17] 134 Va. 21, 113 S. E. 873 (1922).

[18] *In re* Dreyfus' Estate, 175 Cal. 417, 165 Pac. 941 (1917); Adams' Executrix v. Beaumont, 226 Ky. 311, 10 S. W. (2d) 1106 (1928); see Langfit v. Langfit, 108 W. Va. 466, 151 S. E. 715 (1930).

[19] N. C. CODE ANN. (Michie, 1931) §§4131, 4144 (2).

that the provisions of the statute are mandatory, not directory;[20] yet the court in the instant case has effectively changed the statute to read "every portion thereof which is in the handwriting of the testator and testamentary in its nature may be admitted to probate."[21] Other courts under substantially the same statute, have held purported holographic wills written on printed forms invalid.[22] Only the Virginia case, *Gooch v. Gooch*,[23] sustains the extreme position taken by the North Carolina court. Considered academically the instant case seems to have been wrongly decided, but as a matter of practical policy the decision may be correct on principle if not on the facts. The legislature was obviously attempting to protect the testator from fraud practiced after his death, on the theory that handwriting may be sufficiently identified to connect the testator with anything he himself might write.[24] There is nothing about the printed form of a will which can be altered to change the testator's wishes, and he is just as much connected with the form through his writing in the blanks as in a paper written entirely by himself, for the dispositive portions of the will are entirely in the handwriting of the maker of the will. However, the court holds that the printed portions of a purported will must be disregarded for the purposes of the statute where the writing is sufficient to stand alone. It is doubtful if this instrument shows any testamentary intent on its face without the aid of the printed portions, as the testatrix merely writes "I give etc.," which is entirely consistent with the idea of a gift *inter vivos*, invalid because not completed by delivery during the lifetime of the donor.[25] Parol evidence was admitted in the case, not to explain the language used by the testatrix, and to prove that she intended it to operate as a posthumous disposition of her property, but to show that the instrument actually disposed of her property in accordance with the expressed wishes of the testatrix. In fact, no evidence was disclosed by the opinion relating directly to this instrument itself, but the court apparently is influenced by the subsequent declarations of the testatrix

[20] "The provisions of the statute are, of course, mandatory, and not directory, and therefore there must be a strict compliance with them, before there can be a valid execution and probate of a holographic script as a will; but this does not mean that the construction of the statute should be so rigid and binding as to defeat its clearly expressed purpose. It must be construed and enforced strictly, but at the same time reasonably." *In re* Jenkins' Will, 157 N. C. 429, 435, 72 S. E. 1072, 1074 (1911); *In re* Will of Lowrance, 199 N. C. 782, 155 S. E. 876 (1930).

[21] See Estate of Rand, 61 Cal. 468, 44 Am. Rep. 555 (1882).

[22] *In re* Wolcott's Estate, 54 Utah 165, 180 Pac. 169 (1919) ("The fact that the matter written by deceased in her own hand, standing alone, might constitute a complete testamentary disposition of the property, does not alter the case." Such writing is not what testatrix prepared as her will), Estate of Rand, 61 Cal. 468, 468 Am. Rep. 555 (1882).

[23] 134 Va. 21, 113 S. E. 873 (1922).

[24] Alexander v. Johnson, 171 N. C. 468, 88 S. E. 785 (1916).

[25] Adams v. Maris, 213 S. W. 622 (Tex. Com. App., 1919).

in deciding that the language shows a testamentary intent. It might be considered useless to examine the question of intent when the paper was written on a will form which clearly shows such intent, but all the printed portions of the form must be disregarded[26] and the testamentary intent must appear on the face of the instrument itself.[27]

The will was attested by two witnesses who did not testify at the probate proceedings and who apparently did not appear in the case at all after signing the document. However, that would not affect the validity of the script as a holograph since the attestation of witnesses is not regarded as a part of the will.[28] Also, a large portion of the instrument was cut out, whether by the testatrix or by someone else does not appear, but the question of revocation was not raised.

While the case seems wrong from a technical viewpoint, the court apparently reaches a desirable result by an extremely liberal application of the surplusage theory.

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[26] Jones v. Kyle, 168 La. 728, 155 S. E. 876 (1930); *In re* Will of Lowrance, 199 N. C. 782, 155 S. E. 876 (1930).
[27] Wooten v. Hobbs, 170 N. C. 211, 86 S. E. 811 (1915).
[28] Harrison v. Burgess, 8 N. C. 384 (1821).

BOOK REVIEW

For My Grandson. Remembrances of an Ancient Victorian. By the Rt. Hon. Sir Frederick Pollock, Bt., London: John Murray: pp. xx, 233. 10 shillings 6 pence.

Sir Frederick Pollock will be 90 this year. He is a few years junior to the venerable justice who retired from the Supreme Court of the United States three years ago, and who died recently at the age of 94. Now that Holmes is gone, the name of no other living man, perhaps, is so well known in Anglo-American legal history and jurisprudence. The former Corpus Professor of Jurisprudence at Oxford, the co-author, with Maitland, of the great *History of English Law,* the author of two classical treatises, on *Torts,* and on *Contracts* (now in their thirteenth and ninth editions, respectively), and of half-a-dozen volumes of essays on law and politics, and the first editor of the *Law Quarterly Review;* he needs no introduction. Coming of a distinguished family of lawyers, he has done faithful homage to "our lady the Common Law," but he has been much more than her knight. He has lived a life so varied in its interests, he has been so much a part of all that he has met, that to think of him only as lawyer is to miss the essence of a rich personality. For this book will prove delightful to all.