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THE INTEGRATION OF HOLOGRAPHIC WILLS

PHILIP MECHEM*

The subject of the integration of wills, including so-called "incorporation by reference" has received its classic treatment in Dean Evans' well-known paper.1 He deals for the most part, however, with attested wills; it is proposed here to discuss certain special aspects of the problem arising when the will is holographic.2

Integration, according to Dean Evans, raises the question "which of given papers offered for probate are to be regarded as constituting the will."3 Since it is often necessary to discriminate between different paragraphs, sentences, words, and even letters or figures on a given paper, the question, with reference to holographic wills, may be rephrased: what writings constitute the will?

Practically speaking, the question comes up most commonly in one or more of three somewhat distinct forms: (a) Is some writing not in testator's hand a part of the will so as to invalidate it in toto? (b) Is some writing "covered" or validated by the signature or date which appears superficially to be appended to some other writing? (c) May a holographic will incorporate by reference some writing not in testator's hand? Or, to express the same ideas more compactly:

(a) What must be included?

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1Evans, Incorporation by Reference, Integration, and Non-Testamentary Act (1925) 25 Col. L. Rev. 879.
2Confusion is caused by the two meanings of "holographic." WEBSTER, NEW INTERNATIONAL DICTIONARY (1932) defines holograph as "A document . . . wholly in the handwriting of the person . . . whose act it purports to be." In this literal sense a will in any jurisdiction may be holographic in fact; its holographic character is of no legal significance save possibly from an evidentiary standpoint. See Matter of Turell, 166 N. Y. 330, 59 N. E. 910 (1901). In nineteen states, however, the statues sanction a special type of will, often referred to in the statute itself as a holographic or olographic will, which needs no attesting witnesses and derives its validity from the fact that it is wholly in the handwriting of the testator. The statutes usually provide that such a will be signed, often that it be dated, and, in two states that it be found after testator's death among his valuable papers or have been lodged in the hands of another for safe-keeping. For a compilation and analysis of these statutes see Bordwell, Statute Law of Wills (1928-9) 14 Iowa L. Rev. 1, 172, 283, 428, at 25. It is with the second sort of holographic wills (i.e., those given a special sanction by statute) that this article deals.
4By "writing" it is meant here to include printing, typewriting, stamping or any other method of making marks on paper; the writer is not aware of any word that covers them all. As a matter of fact it is most commonly printing that is the form of "writing" causing the difficulty.
(b) What may be included?
(c) What may be incorporated?6

A California case, Estate of Francis,6 will serve as a concrete instance. The will offered for probate consisted of a paper and the envelope in which it had been found. The paper contained testamentary provisions, was signed and dated, and was wholly in testator's handwriting except that in the date two numerals (here italicized) were printed, thus: "1919". The envelope was dated in testator's handwriting. Clearly, effect cannot be given to the printed numerals. Can they be disregarded? This is question (a). If they cannot, i.e., if it must be held that they are a part of the will, then the whole will fails; it is not entirely in the hand of the testator. If they can be ignored, there are two alternatives. The date on the paper, minus the printed numerals, might be used, thus: "October 22, 19." Or entire reliance might be placed on the holographic date on the envelope. This raises question (b): do the envelope and the paper together comprise the will? If so, it is dated; it is not, if the paper alone be regarded as the will.

Question (c) was probably not raised by the case. If, however, the will had been regarded as valid,7 and if it had given the residue equally "to the persons named in a typewritten list I have made and left with this will," question (c) would clearly have been raised.

It is proposed to consider briefly the authorities on each of these questions.

(A) What must be included?

Reflection, and the cases, show two different theories. One may be called the intent theory: foreign matter becomes (fatally) a part of the will when ever it appears that testator intended to make it, or regard it as, part of his will. The second, which may be called the surplusage theory, will, if necessary, ignore anything that may be left out without affecting the sense or completeness of the document. To use the Francis case again as an example: the intent theory would hold the printed numerals a part of the will because testator so obviously meant them to be such; the surplusage theory might disregard

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6 This form of statement is adopted here as being non-controversial, altho it is suggested (infra) in section (c) that the whole idea of incorporation by reference may be inapplicable to holographic wills.
7 The court held that the printed numerals, while superfluous, had been made a part of the will by testator and so rendered it one not wholly in testator's handwriting. The opinion is brief and relies wholly on Estate of Thorn, 183 Cal. 512, 192 Pac. 19 (1920), discussed infra.
them, ignoring testator’s frame of mind, and having regard only to the fact that “19” is, under the circumstances, an adequate abbreviation of “1919.”

At first blush it would seem that the former of these theories was the most, perhaps the only, logical one. If testator starts out to make a will, writes a few paragraphs on the typewriter and then a few by hand, neither logic nor policy suggests calling the last few paragraphs “his will”; they are obviously part of his will. This must be equally true if typewritten sentences or words rather than typewritten paragraphs are involved. Analogies, nevertheless, for a different view are not wholly lacking. And experience shows that however logical the intent theory may be, it has in practice two serious disadvantages. First, it leads to the rejection of wills for what must seem very trifling reasons. Second, its operation depends upon a finding as to an intent which is often obscure and in some instances probably nonexistent.

California has been the chief exponent of the intent theory; its experience illustrates these disadvantages. Estate of Thorn is probably the leading case. Testator devised “my country place Cragthorn consisting of . . .”, the italicized word being inserted by a rubber stamp. The court admitted that the property was adequately described without the stamped word but rejected the will, saying: “We know of no rational theory upon which it can be held that words

8 The most striking analogy is to be found in a situation sometimes arising under statutes requiring wills to be signed at the end. Where some “unessential” provision follows the signature there is authority that it may be ignored and the part preceding the signature be treated as “the will” thus making it signed at the end. See, e.g., Ward v. Putnam, 119 Ky. 889, 85 S. W. 178 (1905). The English practice seems to be to admit what precedes the signature, irrespective of the materiality of what follows it. See Millward v. Buswell, 20 T. L. R. 714 (1904). A slight analogy may be found in the practice of omitting from probate portions of the will induced by fraud, or, under the English doctrine, by mistake. Again, under some circumstances, part of a lost will may be admitted to probate where it is impossible to prove it all.

9 Supra note 7.

10 Apparently the first California case on the point, though one not so often cited as the Thorn case, is Estate of Rand, 61 Cal. 468 (1882). The will was written in a printed form. Disregarding the printed words, those written by testator would have constituted a complete expression of testator’s intent, save for the naming of an executor. The court, however, said: “It was strenuously urged before us that the portions of the paper which were written by deceased should be admitted to probate, omitting the printed portions. We are not at liberty to so hold. We should thereby, in effect, change the statute, and make it read that such portions of an instrument as are in the handwriting of the deceased constitute an holographic will. The instrument, in its entirety, is before us. It was not entirely written by the hand of the deceased.” Cf. Estate of Soher, 78 Cal. 477, 21 Pac. 8 (1889).
deemed by the testator himself essential to a description of the property devised, and inserted by him or under his direction as a part of such description in the dispositive clause of the will devising the property, do not constitute part and parcel of the will itself, notwithstanding that evidence might show the property to be sufficiently identified without the presence of such words."

The rule of the Thorn case was reiterated in several later decisions but in Estate of Oldham, the court was moved to take a slightly more liberal position. Testator used paper with a printed letter-head; he wrote the date immediately after the printed words "Los Angeles, California" and "approximately on the same line." Here the intent theory posits an unanswerable question: did testator regard the printed words "Los Angeles" as part of his will? Could he have answered the question himself? The court, sustaining the will, said that the location of the date was too slight a fact to "warrant the conclusion" that testator meant to make the printed words part of his will. This seems to mean that where there is any doubt as to intent, it will be resolved in favor of the will. The Oldham case was followed in Estate of DeCaccia on very similar facts; in Estate of Whitney the court went so far as to say that the Thorn and other earlier cases were "distinguished, if not in effect overruled" by the Oldham and DeCaccia cases.

Two Utah decisions applying the intent theory show a similar history. Experience shows it to be one apt to work harshly, difficult of application, and prolific of litigation; it is significant to note the


22 Estate of Francis, supra note 6; Estate of Bernard, 197 Cal. 36, 239 Pac. 404 (1925).
23 203 Cal. 618, 265 Pac. 183 (1928).
24 205 Cal. 719, 273 Pac. 552 (1928).
26 Estate of Wolcott, 54 Utah 165, 180 Pac. 169 (1919); Estate of Yowell, 75 Utah 312, 285 Pac. 285 (1930). The first of these cases contains a very careful analysis of the problem and a quite explicit repudiation of the surplusage theory. The later case (on its facts one of the most extraordinary and picturesque to be found) illustrates the difficulty of applying the intent theory; very persuasive is the dissenting opinion of STRAUP, J., to the effect that the court is in fact doing just what it repudiated in the Wolcott case, i.e., admitting to probate a will "which was not the document as prepared by the deceased as his will, but was one which was sheared and trimmed by the court so as to make what was thought to be a valid will for him."
27 A striking parallel is afforded by the cases dealing with the problem whether testator's name, written at some other than the usual place, was intended as and can be regarded as, his signature. The California decisions on
tendency to modify it in the state which originally applied it most rigorously.18

Of the cases adopting the surplusage theory (more often implicitly than explicitly) the most-cited has been *McMichael v. Bankston.*19 The facts are meagerly reported; it is said that the word “acres” in one line and the word “to” in another were not written by testator; also, that other provisions of the will make the meaning amply clear without regard to these foreign words. The court says: “It is very manifest that the presence or absence of the two words can have no material effect upon the meaning or contents of the will... We may safely, under the first clause of article 1589, R. C. C.20 Consider them as not written and not impair the validity or effect of the will. We cannot say that the law requires the will to be annulled for so unimportant and trifling a cause.”

On any view the words would be immaterial unless adopted by testator; the decision then is only explicable on the ground that testator did intend to adopt the words and that the court nevertheless held they could be disregarded as surplusage. Subsequent Louisiana decisions appear to justify this interpretation. Thus in *Jones v.*

the point show very much the same history: a very strict early decision resulting in a rule harsh, difficult to apply and prolific of litigation which eventually is distinguished practically to the point of extinction. Cf. *Estate of Manchester,* 174 Cal. 417, 163 Pac. 358 (1917) with *Estate of Bauman,* 114 Cal. App. 551, 300 Pac. 62 (1931). For detailed discussion of these cases, see Mechem, *The Rule in Leinayne v. Stanley* (1931) 29 MicH. L. Rev. 685 (the California cases are treated at pp. 697-699.)

38 In the new California Probate Code, which took effect in August, 1931, the following was added (§53) to the statute authorizing holographic wills: “No address, date or other matter written, printed or stamped upon the document, which is not incorporated in the provisions which are in the handwriting of the decedent, shall be considered as any part of the will.” The note of the Code Commissioners indicates that this is regarded as a codification of the rule in *In re DeCaccia’s Estate,* supra note 14; quaere, whether it adds anything to the existing statute. See Evans, *Comments on the Probate Code of California* (1931), 19 CALIF. L. Rev. 602. Professor Evans, the draftsman of the Code, in discussing various changes in the law that were suggested but not made, says (at 609): “The effect of a holographic will is destroyed if any word is incorporated which is not in the handwriting of the testator. Why should not the statute be liberalized so as to ignore any word or phrase not in the handwriting of the decedent which makes no difference in the meaning of the will, that is, if the will must be given the same interpretation and effect whether the printed or stamped words are in the will or not... Such liberalization of the statute would prevent any future will being denied probate upon such an aimless technicality as upset the Thorn will.”

39 Supra note 11.

40 *Viz.,* "Erasures not approved by the testator are considered as not made; and words added by the hand of another, as not written." On the interpretation suggested, this provision was really irrelevant.
the will as apparently originally written bore a date in which
the numerals 191 were printed; five years later testator had added
another date in his own hand and had had the will witnessed. It was
admitted to probate, the court saying: "It is clear that all which is
not in the handwriting of testator must be disregarded. R. C. C.
1588, 1589. McMichael v. Bankston. . . . Nor does the fact that there
are subscribing witnesses to the holographic will affect in any way its
validity. That is mere surplusage and to be disregarded."22

The most extreme instance of the application of the theory is
doubtless a Virginia case where testator made a will by writing in
the blanks of a printed form;23 the most explicit statement of it has
been made by the Supreme Court of North Carolina: "Where all the
words appearing on a paper in the handwriting of the deceased person
are sufficient, as in the instant case, to constitute a last will and testa-
ment, the mere fact that other words appear thereon, not in such hand-
writing, but not essential to the meaning of the words in such hand-
writing, cannot be held to defeat the intention of the deceased, other-
wise clearly expressed, that such paper-writing is and shall be his
last will and testament."24 Cases from several other states more
or less clearly adopt the same view.25

The disadvantages of the intent theory are a matter of actual ex-
perience; those of the surplusage theory may be said to be as yet
latent. In none of the cases operating under the latter view does
there seem to have been a gross violence done to the statute. Such a

21 168 La. 728, 123 So. 306 (1929).
22 Cf. Succ. of Walsh, 166 La. 695, 117 So. 777 (1928) (the court quoted
with approval DURANTON, COURS DE DROIT FRANCAIS (at 27) as follows:
"The testament must be written entirely by the hand of the testator; so that a
single word in a foreign hand would vitiate the whole, even though that word
were superfluous for it would be true to say that the testament has not been
written entirely in the hand of the testator, as the law requires; that word
therefore, would vitiate not only the clause or the disposition in which it
occurred, but the act in its entirety.")
23 Gooch v. Gooch, 134 Va. 21, 113 S. E. 873 (1922). In support of the
decision it may be pointed out that the holograph was brief and, in a sense
complete. It did not, that is, incorporate any of the printed matter. It may
be doubtful however, whether testamentary intent would have appeared suffi-
ciently but for the printed exordium.
24 In Will of Lowrance, 199 N. C. 782, 155 S. E. 876 (1930). The will be-
gan: "Will of Mrs. S. A. Lowrance made 2 March, 1928 West Center Avenue,"
the italicized words being part of the printed letterhead. The court pointed
out that the statute did not require dating and said further: "The words in
print appearing on the sheets of paper propounded in the instant case are sur-
plusage."
25 See, e.g., Sneed v. Reynolds, 166 Ark. 581, 266 S. W. 686 (1924); Baker
v. Brown, 83 Miss. 793, 36 So. 539 (1904); In re Noyes' Estate, 40 Mont. 190,
105 Pac. 1017 (1909).
case can readily be imagined; it is a short step from ignoring an awkward printed date to accepting as holographic a will which is "substantially" all in the handwriting of the testator, and so on. Whether such a step will be taken is a matter as yet purely speculative.

A digest of the cases on this point, grouped on the basis of typical fact situations, is appended in the note.28

(B) What may be included?

Disregarding any legal requirements, and speaking in a purely lay or factual sense, we should probably say something like this: the will is the sum total of testamentary writings intended by the testator together to constitute his will. The law, however, sets limitations of two sorts. First, the will and its parts must satisfy certain formal requirements.27 Second, the fact that the documents offered are

26 Attestation: The cases are unanimous that an otherwise valid holographic will is not invalidated by the fact that testator has it witnessed. Estate of Soher, supra note 10; Harl v. Vairin, 175 Ky. 468, 194 S. W. 546 (1917); Andrews v. Andrews, 12 Mart. N. S. 713 (La. 1823); Succ. of Roth, 31 La. Ann. 315 (1879); Jones v. Kyle, supra note 21; Harrison v. Burgess, 8 N. C. 384 (1821); Brown v. Beaver, 48 N. C. 516 (1856); see In re Cole's Will, 171 N. C. 74, 87 S. E. 962 (1916).

Employment of printed figures in date: As suggested in the text, discussing the Francis case, this situation presents a double problem. Are the holographic numerals, by themselves, a sufficient date—and, if so, may the printed numerals be ignored? No case has answered both questions in the affirmative. Where the will is only dated once, and a part thereof is printed, the will has uniformly been held invalid. Estate of Billings, 64 Cal. 427, 1 Pac. 701 (1884); Estate of Plumel, 151 Cal. 77, 90 Pac. 192 (1907); Estate of Zollikoffer, 167 Cal. 196, 138 Pac. 995 (1914); Succ. of Robertson, 49 La. Ann. 868, 21 So. 586 (1897); In re Noyes' Estate, supra note 25. Several cases have been willing to ignore a partially printed date where another date, wholly holographic, appears on the will. Estate of Whitney, supra note 15; Jones v. Kyle, supra note 21; Estate of Yowell, supra note 16. Contra, Estate of Francis, supra note 6. In Sneed v. Reynolds, supra note 25, a partially printed date was ignored, the statute not requiring dating.

Printed name of place in letterhead: As appears from the text, this has proved to be a perplexing problem under the intent theory; under the other theory courts have found no difficulty in disregarding the printed name as surplusage. See Estate of Bernard, supra note 12; Estate of Oldham, supra note 13; Estate of DeCaccia, supra note 14; Succ. of Robertson, 49 La. Ann. 868, 21 So. 586 (1897); Succ. of Heinemann, 172 La. 1057, 136 So. 51 (1931); In re Noyes' Estate, supra note 25; In re Will of Lowrance, supra note 24.

Will written in a printed form: Only one case of this sort has been found sustaining the will, Gooch v. Gooch, supra note 23. Contra: Estate of Rand, supra note 10; Estate of Wolcott, supra note 16.

Words in handwriting other than that of testator: Estate of Behrens, 130 Cal. 416, 62 Pac. 603 (1900); McMichael v. Bankston, supra note 11; Succ. of Walsh, supra note 22; Baker v. Brown, supra note 25; Reeves v. Cameron, 2 Quebec Q. B. 232 (1893).

27 In the preceding section handwriting was the formality in issue; the question was as to the propriety of ignoring certain writing that unmistakably could not meet the formal test. In this section different formalities are involved; we assume that the writings under discussion all meet the handwriting test, and ask which of them are signed (and, usually, dated) as required by the statute.
those intended to be the will and that they satisfy the formal requirements must be shown by evidence of a certain sort.

These limitations, particularly those of the first sort, make the legal will and the factual one not necessarily the same. This is markedly so in the case of the attested will. From the nature of the formalities required it results that the unity and identity of the will is less something inherent or subjective than something arbitrarily imposed from outside. Papers having previously no legal significance are made into a will by the performance of a certain ceremony called "execution". The will is the papers that are executed as such. This means, apparently, such papers as are present and within the ambit of the parties' intent when some one of the papers is marked (i.e., "signed" and "attested") as evidence of the intent thereby to give life to the whole. 28

It is immaterial whether this is an intended result of the statute or merely a by-product. The result in fact is to create an all-important technique, first for simultaneously creating and integrating a will, i.e., for gathering the separate papers and giving them a collective significance and validity, and second for enabling a subsequent identification and proof of the will so integrated.

The technique of the holographic will is utterly different. The attested will may be likened to a package, the execution serving as the wrapper; in the case of the holographic will the package has no wrapper. The statute makes its validity something largely inherent rather than something imposed. There are no witnesses; no collective ceremonial act giving life to papers hitherto inert. True, the will must be signed and, under most statutes, dated, but these acts serve few of the integrating purposes served by the execution of an attested will. The date quite naturally goes at the beginning of the will; many cases allow a testator to "sign" at the beginning of the will by readily inferring that his name at the beginning was meant to be an executing signature. 29 Even if we assume that testator "ratifies" his will in 28 This statement, of course, excludes any consideration of the technique known as "incorporation by reference," discussed at length in the following section; it is also, obviously, very much simplified and abbreviated. It ignores such variations as that testator need not sign in the presence of the witnesses but may merely acknowledge a previously-made signature or even (under some decisions) a previously-signed will, and as that under most statutes the witnesses need not attest in the presence of each other. It also perhaps states dogmatically some things which are not much more than suggested or implied by the cases. It is believed, however, that the statement is in substance accurate. For a detailed analysis, see Evans, supra note 1.
29 See, e.g., Peace v. Edwards, 170 N. C. 64, 86 S. E. 807 (1915); Lawson
such a case, when he is finished, a mental ratification is of no practical importance. No one sees it; it leaves no impress on the paper. Thus a holographic will may be duly made altho the body thereof has never been signed or dated (in the ceremonial sense) since both the signature and date were made before there was any body to sign or date.

How far will this process be carried? If testator makes a (then) complete holographic will in San Francisco in 1920 and fourteen years later in New York writes an undated and unsigned memorandum containing a new testamentary provision, it may shock one's sense of fitness to say that the New York memorandum is signed and dated because testator had fourteen years before signed and dated a paper and now meant the New York memorandum to go with it. Yet if testator starts a will today and finishes it tomorrow we should have little difficulty in thinking of it as one will, dated today and signed tomorrow. The difference between the cases is purely one of degree. And neither the statute nor common sense seems to forbid testator the privilege of putting three thousand miles and many years between different paragraphs of his will. If an attested will were in question, common sense would not be involved; the statute would simply say that the New York memorandum was not and could not be part of the San Francisco will since it was not in existence and present when that will was executed.

Shall we say then, that in the case of the holographic will, legal unity is identical with lay or factual unity as hitherto defined? Shall we say, that is, that if the papers are all holographic and there is a dating and signing somewhere among them, it is immaterial when or where the dating and signing was done, so long as it may be shown or reasonably inferred that testator meant all the papers together to constitute his will?30

Such a test seems reasonable in at least a negative sense: it is hard to suggest a better one, nor is this one over-technical and apt to induce litigation. And such a test will in fact satisfy most of the cases.31

v. Dawson, 21 Tex. Civ. App. 361, 53 S. W. 64 (1899). For further citations and analysis of the cases, see Mechem, supra note 17.

30 Distinguishable from the cases discussed herein are those in which several obviously complete but more or less inconsistent wills are found and the problem is to determine which, if any, is entitled to probate as the "last" will. See, e.g., Estate of Cook, 173 Cal. 465, 160 Pac. 553 (1916); Peace v. Edwards, supra note 29; Whittle v. Roper, 149 Va. 896, 141 S. E. 753 (1928); cf. Estate of Love, 75 Utah.342, 285 Pac. 299 (1930).

31 See Estate of Skerrett, 67 Cal. 585, 8 Pac. 181 (1885); Estate of Merryfield, 167 Cal. 729, 141 Pac. 259 (1914); Estate of Johnston, 64 Cal. App. 197, 221 Pac. 382 (1923); Hays v. Marschall, 243 Ky. 392, 48 S. W. (2d) 540 (1932);
Estate of Skerrett is typical. The will offered for probate consisted of two holographic sheets found in an envelope addressed to testator's sister. The first sheet was a copy of a deed to the sister; the original had never been delivered. The copy contained the usual date. The second sheet was a letter to the sister, signed but not dated. It referred to the copy of the deed, and after expressing an intention to provide for the sister, said: "... if it should please God to call me away, you will have your own property to depend on...." There was no evidence as to the relative time of making the two instruments. The court said: "The instrument proposed... was written entirely by the hand of the deceased, it was signed by him, and a date appears at the commencement. Neither the copy of the deed nor the letter, taken by itself, constitute a will; the one is not testamentary in character, the other has no date; but taking them together as the deceased left them, forming one document, it is complete. The first part furnishes the date, and the latter the testamentary character."

In the Skerrett case, integration appears to be deduced from the internal coherence of the two documents and the juxtaposition in which they had been left by testator. In Estate of Johnston, juxtaposition was lacking. The codicil in question was on two sheets, the first ending abruptly with the word "over", the second beginning: "Continuation of the codicil...." The sheets were found in different rooms but were probated together because the "circumstances" (unspecified) showed that the two parts made a "consistent whole." A few cases nominally impose a time test. In Lagrave v. Merle what appeared to be the will proper ended formally with a signature and date. Immediately following was a brief paragraph, signed but not dated, revoking prior wills and expressing a wish concerning burial. It was argued that this appended paragraph was void for lack of a date, i.e., that it was not part of the will, which clearly was dated. This, the court conceded, quoting French authorities, would be


"Supra" note 31.

"Supra" note 31.

"Supra" note 31.

The court said: "The second part of the codicil plainly connects with the first part and all the circumstances of the case demonstrate that the two parts together make a consistent whole. No more is required to satisfy the testator's use of the expression '(over)'." 05 La. Ann. 278, 52 Am. Dec. 589 (1850). For an interesting contrast, cf. Will of Miller, 194 N. Y. Supp. 843 (1922) (though not involving a holographic will, raises a similar problem).
true if the concluding paragraph were not written "immediately after the first and on the same day that the first was written." The court held, however, that since the various parts appeared to be "congruous and continuous" it was bound to presume they had all been made at the same time.

While later Louisiana cases have repeated this rule, it is difficult to say that they have followed it. It has been held that a will may be dated five years after it was written and signed. The subsequent dating, it is said, indicates testator's intention to "persist" in the disposition hitherto made; after that he had "which he had not before, an instrument purporting to be his last will, and entirely written, dated and signed in his own handwriting, which is all the law required." In Succession of Cunningham, it was held that a will may be dated five years after it was written and signed. The subsequent dating, it is said, indicates testator's intention to "persist" in the disposition hitherto made; after that he had "which he had not before, an instrument purporting to be his last will, and entirely written, dated and signed in his own handwriting, which is all the law required." In Succession of Cunningham, there was a beginning, unsigned, to which testator nearly a year later added a new paragraph, dated and signed. The whole was held good, since where there are several dates, it is satisfactory "so long as the signature applies to all the dates equally." A late case seems to lay down the rule that so long as there is a date at the beginning and a signature at the end, everything spatially between will be conclusively presumed to have been written on the named date.

The time limitation has received recognition in several California cases. In Estate of Taylor the will was on two sheets and there was a strong appearance that some time after original execution the second sheet had been destroyed and a new one substituted. The court conceded "for present purposes alone" that if this was true the will would be void, as the first sheet was dated but not signed and the second was signed but not dated. However, the finding of the lower court, based on no stated evidence, that the will was "one continuous instrument" and "a single document" was sustained.

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17 142 La. 701, 77 So. 506 (1918); see Succ. of Sanders, 171 La. 563, 131 So. 672 (1930).
19 Succ. of Guiraud, 164 La. 620, 114 So. 489 (1927); see Succ. of Dyer, 155 La. 265, 99 So. 214 (1924) (apparently really based on the theory that the signature must be at the end).
20 126 Cal. 97, 58 Pac. 454 (1899).
21 There are dicta of similar tenor in Estate of Hartley, 181 Cal. 469, 184 Pac. 950 (1919) and Estate of Moeller, 199 Cal. 705, 251 Pac. 311 (1926); see Estate of Keith, supra note 31 and Estate of Finkler, 21 Pac. (2d) 681 (Cal. App., 1933). In Estate of Olssen, 42 Cal. App. 656, 184 Pac. 22 (1919), the court sustains the will on the ground that the trial court "was justified in arriving at the conclusion that the instrument in question was written all at one time, and was to be construed as a single instrument expressive of the will of the testator." But in Estate of Henderson, 196 Cal. 623, 238 Pac. 938 (1925)
It may be noted that neither in Louisiana nor in California does a will seem ever actually to have been rejected on this basis; the rule has simply served to encourage will contests.\textsuperscript{41} And elsewhere no such limitation appears to have been thought of.\textsuperscript{42}

One group of cases deserves special mention: that where sheets containing testamentary provisions are put in an envelope or other container, and the signature or date or both appear only on the envelope. \textit{Alexander v. Johnston}\textsuperscript{43} is typical. Testatrix wrote a brief provision, dated but unsigned, and enclosed it in an envelope on which she wrote “Julia W. Johnston Will.” This was held to be a valid will, with the envelope as a part thereof, the name on the envelope serving as a signature. The problem is a double-edged one. Was the envelope meant to be part of the will? The name to be a signature? Neither question can well be answered independently of the other; an affirmative answer to one strongly suggests an affirmative answer to the other: The court’s decision seems to be a sensible and practical one; on the whole, however, the authorities tend in the other direction.\textsuperscript{44}

what was obviously a postscript, which was signed but not dated, was admitted to probate as part of the will, the court saying: “It is sufficient to know that the deceased intended that both paragraphs were to be taken together as constituting her last will and testament.” See also Estate of Clisby, 145 Cal. 407, 78 Pac. 964 (1904).

\textsuperscript{42} A little moralizing on one aspect of the judicial process may be not unwarranted. It is reasonable to think that the habits of testators are much the same everywhere. Only in California and Louisiana have cases of the sort under discussion appeared conspicuously. Does this not justify the surmise that the early statement by the court of last resort of a narrow and unreasonable rule has encouraged lawyers to contest wills that elsewhere pass unchallenged? Compare the California cases, more numerous than in any other jurisdiction, on the question where in a holographic will testator’s name must appear to qualify as a “signature.” See \textit{ supra} note 17.

\textsuperscript{44} See Sleet v. Atwood, 186 Ky. 241, 216 S. W. 352 (1919); \textit{La Rue v. Lee, 63 W. Va. 388, 60 S. E. 388 (1906)}; \textit{Triplett v. Triplett, supra note 31.} See also \textit{Porter v. Ford, 82 Ky. 191 (1884); Gregory v. Oates, 92 Ky. 532, 18 S. W. 231 (1892)}; cf. \textit{Sawyer v. Sawyer, 52 N. C. 134 (1859).}

\textsuperscript{171} N. C. 468, 88 S. E. 785 (1916).

\textsuperscript{43} In Alexander v. Johnston, the court relies strongly on the well-known case of Fosselman v. Elder, 98 Pa. St. 159 (1881), in which an envelope on which testatrix had written “Dear Bella, this is for you to open,” and the paper inside, were held together to constitute a valid will. Although the Pennsylvania statutes do not recognize holographic wills, they do not in the ordinary case require attesting witnesses [see \textit{Estate of Dawson, 277 Pa. 168, 120 Atl. 828 (1923)}] so that in a case like Fosselman v. Elder the problem is virtually the same as it would be in the case of a holographic will. See also \textit{Estate of Harrison, 196 Pa. 576, 46 Atl. 888 (1900)}; cf. \textit{In re Jacoby’s Estate, 190 Pa. St. 382, 42 Atl. 1026 (1899)}; \textit{In re Willing’s Estate, 212 Pa. St. 136, 61 Atl. 812 (1905).} No holographic will case has been found in accord with Alexander v. Johnston. In \textit{Estate of Francis, supra note 6,} and \textit{Estate of Poland, 137 La. 219, 68 So. 415 (1915)} there is language favorable to the idea that the envelope might be
If, as suggested, the test of integration is chiefly a subjective one, the question of evidence would seem to be of prime importance. How prove that the papers offered were intended together to constitute the will? The authorities are sketchy indeed. Often the court talks of the "coherence" of the papers or of their being "continuous" or "congruous" or the like; there seems to be, however, little inclination to state what these words mean or what the test may be. That the papers were found together seems to be sufficient, except for the tendency to hold the contrary in the envelope cases. In several instances evidence of testator's declarations seems to be regarded as admissible and probative, altho here as elsewhere in the law of holographic wills the rules of evidence appear to be largely uncrystallized.

(C) What may be incorporated?

Let us refer back to the hypothetical question asked in connection with Estate of Francis: a holographic will, otherwise valid, gives the residue equally "to the persons named in a typewritten list I have made and left with this will." If such list is found, is proved to have been in existence when the will was made, and is regarded as sufficiently identified, is the list "incorporated by reference"?

considered part of the will, although the will was rejected on other grounds. In Warwick v. Warwick, 86 Va. 596, 10 S. E. 843 (1890), where testator had written on the envelope "My Will—Abraham Warwick, Jr." the court held that the name was clearly written as a label and not as a signature. See Estate of Tyrell, 17 Ariz. 418, 153 Pac. 767 (1915); Estate of Manchester, supra note 17; Estate of Sullivan, 94 Cal. App. 620, 271 Pac. 753 (1928). In all three cases the court seems definitely averse to treating the envelope as part of the will. See also Maris v. Adams, supra note 31.

65 See Estate of Johnston, supra note 31; Estate of Love, supra note 30; Hays v. Marschall, supra note 31.

66 See Estate of Skerrett, supra note 31; Estate of Merryfield, supra note 31.

67 See Hays v. Marschall; Estate of Miller; Estate of Skerrett, all supra note 31; Alexander v. Johnson, supra note 43.

The very conspicuous weakness of holographic wills in general is the inevitable difficulty of determining intent in several important regards. There is seldom much doubt as to the genuineness of the papers propounded, i.e., as to the fact that they are in testator's handwriting, but there is often grave doubt as to whether he meant them to take effect after his death as a will, which papers he meant so to take effect, whether he meant his name written in a certain place as a signature, and so on. This difficulty doubtless explains the tendency of courts, often inarticulate, to be extremely liberal where the admission of evidence is in question. The statutory provisions found in North Carolina and Tennessee that the will must have been found after testator's death among his valuable papers or have been lodged in the hands of another for safe-keeping are presumably intended to help eliminate some of these doubts as to intent.

68 Supra note 6.

69 I.e., assuming the case fits the ordinary requirements for incorporation in the case of an attested will. See Evans, supra note 1, at 881-882.
The obvious answer is no. The letter of the statute seems to require it; it says the will must be one "wholly in the handwriting of the testator." Can something be incorporated without making it a part of the will? If so, whence its validity? It is not an independently valid will; it is not part of an attested will; it cannot be part of a holographic will. And the apparent policy of the statute seems to lead to the same result. For the ceremonial and non-evidentiary values of the attested will, it substitutes values which are not ceremonial but largely evidentiary, arising, or thought to arise, from the use of testator's handwriting. Anything not having this evidentiary value must be disregarded; there is, under the statute, no other kind of value it can have.

Incorporation by reference fits readily into the metaphysics of the attested will. Any one's handwriting will do; it is not necessary that testator and witnesses sign on every sheet. If they sign on page one, page two, which is present, is also "executed"; the ceremony has been performed over it, though no trace of it is visible. It is logically an easy step to say that page three, which is not present, may be regarded as sufficiently executed if referred to in page two, which is present. But it is not logically an easy step to say that a non-holographic page is "executed" by reference to it in a holographic page. On the contrary, it is logically an impossible step; it is using terms which have no meaning in such a connection. Where one holographic page refers to another, it makes the integration clearer; that is all that can be said for it.

Care must be taken to distinguish some superficially similar cases of identification. In Will of Thompson, 196 N. C. 271, 145 S. E. 393 (1928) testator wrote on the back of a promissory note he owned: "I asigen thee with note over to my wife at my death..." This was held to be a valid holographic codicil. The case has been cited as "supporting the doctrine of incorporation by reference in a holographic will" [Malone, Incorporation by Reference of an Intrinsic Document into a Holographic Will (1930) 16 VA. L. Rev. 571, at 583, note 29] but it is believed that the case has nothing to do with such a process. The note was simply described as the subject of gift; what it said did not become a testamentary disposition in any possible sense. If a will bequeaths "the cows in my red barn" it would hardly be said that the will "incorporated" either the red barn or the cows. Of course the rules as to describing persons or things are the same for a holographic will as for any other kind.

On principle it would seem that where a holographic page refers to one non-holographic (and not independently valid) in such a way as to show an intent to make the latter part of the will, the result might be to invalidate the holographic page. On neither the intent nor the surplusage theory is it clear how the non-holographic page can be disregarded. No case, however, seems to have carried theory to this logical extreme. See Estate of Shillaber, 74 Cal. 144, 15 Pac. 453 (1887); Estate of Soher, supra note 10, and discussion thereof, infra note 64.
It may be suggested that in the first section of this paper it was found desirable to abandon a view theoretically inevitable (the intention theory) in favor of one theoretically untenable but practically workable (the surplusage theory); may it be true that practical considerations suggest a similar compromise here?

Any such compromise involves substantially this: recognizing a third way of making wills, i.e., by incorporation. Thus, it would be said that a disposition could have testamentary effect because (a) it was signed and attested, or (b) because it was holographic, or (c) because it was incorporated in a valid will, even though it could never be a part of that will. This, it could be said with some plausibility, is a realistic way of explaining the process of incorporation in the case of an attested will; it would tend to eliminate difficulties that are awkward under the theoretical explanation, as, e.g., the difficulty of showing that "the will" is signed at "the foot or end thereof." On the other hand, it could be said with just as much plausibility that such an analysis would have the extraordinary consequence of permitting either an attested or a holographic will to incorporate a merely verbal statement.

Irrespective of plausibility, there seems to be one fatal practical objection to this "practical" view: it accords so very ill with the cases discussed, supra, in section (a). If a printed figure in the date invalidates the whole will, how distinguish the case in which a will not only tolerates but validates a whole page of printed figures? In

Professor Costigan seems to take this view: "Integrated papers can constitute a holographic will only if all the papers are holographic, but courts may well permit a holographic paper to incorporate by reference a paper not in testator's handwriting, and may permit a will not in his handwriting to be brought down to the date of a holographic codicil by such codicil. If a will may incorporate other writings and may republish and revive prior wills, it may well be held that it is because it is a valid will, regardless of whether it is holographic or attested, that it has all these effects." COSTIGAN, CASES ON WILLS, (2d ed., 1929) 267, note. Professor Costigan, however, does not say how integration and incorporation may be distinguished; in fact, elsewhere (262, note) he seems to suggest that there is virtually no distinction.

Consider the Virginia statute [VA. CODE ANN. (Michie, 1930) §5229]: "No will shall be valid unless it be in writing and signed by the testator . . . ; and moreover, unless it be wholly in the handwriting of the testator, the signature shall be made by him or the will acknowledged by him in the presence of at least two competent witnesses . . . ; and such witnesses shall subscribe . . . " This statute does not any more clearly forbid verbal wills than it does written wills not either holographic or attested. If there is any process giving testamentary significance to writings neither holographic nor attested, it is one wholly of judicial invention and finding no sanction in the statute; as far as the statute (and logic) goes, the same process could equally well be applied to merely verbal dispositions.
Estate of Bernard, where the will was rejected because of printed words in the heading, the court said: "The printed words are incorporated in and doubtless were intended to be made a part of the heading of the document." The court, that is, uses the word "incorporate" as descriptive of the process which, far from permitting the inclusion of printed words, on the contrary renders the rest of the will void because of the mere attempt. Aside from the inconsistency in the use of the word, how can we handle a process which has two diametrically opposed effects. If we call x the process by which the attempt to use ("incorporate") a printed word or figure invalidates the whole will, and y that by which the will may validate ("incorporate") printed words or figures, how know whether to use x or y? Shall we say that x applies to printed matter on the same sheet, and y to printed matter on another sheet? But why not extend y to printed matter on the other side of the same sheet? And then how refuse to extend it to printed matter in another paragraph?

The difficulty may be illustrated by the Virginia case of Gibson supra note 12.

Attention may also be called to the new provision of the California Code (supra note 18) providing that printed matter, &c., shall not be considered part of the will (so as to invalidate it) unless "incorporated in the provisions," and so on. Quaere, as to whether this was inadvertent or was intended to prevent further "incorporation by reference."

In the leading case of Estate of Plumel, supra note 26, there was a will on one side of a sheet of paper, and a brief codicil (at least it was so denominated by testator although it really appeared to be an independent conditional will) on the other. Both were dated and signed, and both were holographic except that two of the figures in the dating of the will were printed. The court held that the will was invalid because of the printed figures but that it was incorporated by the valid codicil! The effect of the decision is that printed figures can be incorporated if they are on the other side of the sheet; not if they are on the same side. It may be suggested that the desired result could have been achieved, without going beyond the bounds of what is reasonable, by holding that the provisions on both sides together constituted the will; the first attempt at dating could then plausibly be ignored as surplusage.

28 Grat. 44 (Va. 1877). Probate of the whole was refused. The members of the court disagreed and the opinion is not wholly clear; all agreed however, that the second paragraph could not be "taken in connection with" the first "as that is not in the hand-writing of decedent." In a later case, Gooch v. Gooch, supra note 23, the same court held that a revoked will, not wholly in the hand of testator, could be "revived" by a holographic codicil; the Gibson case was not mentioned. A very late Virginia case, Triplett v. Triplett, supra note 31, illustrates the difficulty of distinguishing between incorporation and integration. New provisions subsequently interlined in the first will were held valid by "re-execution"; other new provisions on a separate page were held void as not "incorporated." The application of the simple test of integration suggested herein (supra) would have rendered the case much simpler and apparently led to a result more in accord with the intention of the testator. Maris v. Adams, supra note 31, is another case illustrating the same point; the several opinions, confused and inconclusive, show the difficulties which the court was led into by the attempt to apply the doctrine of incorporation.
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v. Gibson. At the top of a sheet was written a brief (purported) will, not in testator's handwriting, signed but not attested. Immediately below was written in testator's handwriting, dated and signed:

"As Margaret [a legatee in the unattested will] is dead,
I give her share to my niece, L. L. Gibson."

Cases could easily be cited for treating this as a case for integration, i.e., for treating the two provisions as together constituting a will. As such, it would probably fail. But authorities could as easily be cited for treating it as a case for incorporation, i.e., for treating the second provision as an independent testamentary document incorporating the first. And then, under the "practical" view, it would all be valid.

The envelope cases furnish another illustration. Those discussed herein have chiefly treated the problem as one of integration, but several English decisions (involving, of course, attested wills) seem inclined to consider the envelope as incorporating the enclosure. These alternative theories offer no difficulties in the case of attested wills since they are not necessarily inconsistent; in the holographic cases, the difficulty is acute and seems to indicate that there is a fundamental error in attempting to apply the technique of incorporation to holographic wills at all.

Text writers disagree on the point; the cases likewise are split. Two things are noteworthy about the cases holding that there may be incorporation: Estate of Cunningham, supra note 37; Estate of Henderson, supra note 40.

incorporation. First, none of them discusses the real issue. This seems to indicate either that the court did not see the problem at all or that it was unwilling to try to justify its decision. Second, all of them are cases in which the document to be incorporated was an earlier complete will, now or ab initio invalid. This has a double importance. It is the case which looks least like integration. And it is possible that to some extent there has developed an independent doctrine, based in part on statutes, that a valid codicil may "republish" an earlier invalid will.

The cases which refuse to allow incorporation are explicit. Sharp v. Wallace is the best known. On facts not unlike those in the Gibson case, supra, the court said: "... where the preceding instrument has never been completed, it and the codicil, which has the effect to give it validity that it never before had, must be taken together and make but one will, not merely for the purpose of construction but as to their execution; and it seems to us that such must be the logical and necessary result of imparting to the codicil the legal effect of making valid as a will an instrument having no efficacy without."

This, it is submitted, is the sound result; sound from the standpoint of analysis as well as from the standpoint of providing a tolerable and workable rule.

There is a rather full discussion of the matter in Estate of Soher, supra note 10. There testator wrote a brief holographic codicil at the foot of his duly attested will, which was not in his handwriting. It was urged that the whole was void on the ground that the will became a part of the codicil. The court admitted the argument was "plausible" but said that "as a matter of physical fact" the two documents were not one. "The law for some purposes—mainly of construction—regards one as a part of the other. But this fiction ought not to be extended to absurd or unjust consequences." See Estate of Atkinson, 110 Cal. App. 499, 294 Pac. 425 (1930). Under the surplusage theory, this problem seems readily soluble; since the will is independently valid, it may be ignored as no necessary part of the holographic codicil.

As distinguished, e.g., from the case where the will attempts to incorporate a list, and the process, whatever it be called, is obviously one of creating a testamentary disposition out of two parts, each of which is palpably incomplete by itself.

While it is logically difficult to see how the "republishation" by codicil of a will either never before valid or once valid and now revoked can operate except as a form of integration or incorporation by reference, there seems to be a tendency on the part of courts to treat this as an independent doctrine. Vide the New York rule that a will once valid but revoked by operation of law may be republished, although incorporation in general is not recognized. See In re Emmons' Will, 96 N. Y. Supp. 505 (1906). And of course the logical difficulty is eliminated where there is an express statute. In a few states there are statutes (see Bordwell, supra note 2, at 308-310) of a somewhat ambiguous nature, providing for the "republishation" of a will or the "revival" of a revoked will, by codicil. For the bearing of these statutes, see Estate of Plumel, supra note 26; Gooch v. Gooch, supra note 23; Barney v. Hays, supra note 63.

Supra note 63.