STATIONERS' WILL FORMS: RE PHILIP AND OTHER CASES

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In the past few years there has been a spate of cases involving stationers' will forms: Re *Chamberlain*[1], *Re Shortt*[2], *Douet* v. *Budd*[3], *Kennedy* v. *Mac Eachern*[4], *Re Riva*[5], *Re Philip*[6], and *Re Forest*[7]. Four of these cases, namely *Re Chamberlain*, *Re Shortt*, *Re Philip*, and *Re Forest*, deal with a similar problem: A will - maker more or less completes a stationer's will form in his or her handwriting and then to execute it simply signs the document without having the signature witnessed. The question is whether such a document, or at least some or all of the handwritten portions of it, can be admitted to probate as a valid holograph will. In two of the other cases, *Kennedy* v. *Mac Eachern* and *Re Riva*, the propriety of the signing of the will-maker was in question. *Douet* v. *Budd* was a construction case. I shall deal briefly with the last three mentioned cases first.

Pre - Re Philip

In *Kennedy* v. *Mac Eachern* the testator in the presence of several people, including Mr. Kennedy whom the testator wished to name as his sole beneficiary, took out of his pocket a blank will form which he proceeded to sign in the appropriate place. Then, pursuant to the testator's instruction, Mr. Kennedy wrote his name in the space provided in the appointment of executor clause and in the space provided in the disposition clause for naming a beneficiary or beneficiaries. Finally, two of the other people present signed as witnesses. The Nova Scotia Court of Appeal upheld the refusal of the Probate Court to admit the will to probate. Although the result of the decision is unfortunate, the reasoning is sound. On a strict interpretation of the Wills Act[8], the will was not signed at its end in a temporal sense and testamentary provisions which follow signatures, as in this case in a temporal sense, cannot be part of the will. To say that at least the will was signed at its end in a spatial sense is beside the point in this case. No precedent for the execution of blank wills should be allowed to germinate.

The *Kennedy* case points to the need for the enactment of a substantial compliance doctrine in our wills legislation. At this juncture only one jurisdiction, South Australia, has followed Professor John Langbein's suggestion in this regard[9]. It is understood that the Law Reform Commissions of British Columbia and Manitoba are currently considering following suit. Armed with such a doctrine the Nova Scotia courts might well have been able to validate the will in the Kennedy case by concluding that on the facts of the case there had been substantial compliance with the requirements of the Wills Act.

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1. [1976] 1 W.W.R. 464 (Sask. Surr. Ct.).
2. (1977), 4 Alta. L. R. (2d) 152 (Alta. Surr. Ct.).
3. [1978] 2 W.W.R. 345 (B.C.C.A.).
4. (1978), 27 N.S.R. (2d) 329 (C.A.).
5. (1978), 3 E.T.R. 307 (Ont. Surr. Ct.).
6. [1978] 4 W.W.R. 148 (Man. Surr. Ct.); rev'd. [1979] 3 W.W.R. 554 (Man. C.A.).
7. [1980] 1 W.W.R. 470 (Sask. Surr. Ct.).
8. R.S.N.S. 1967, c. 340, s.6.
9. See J. Langbein, "Substantial Compliance with the Wills Act". (1975), 88 Harv. L. Rev. 489 and J. Langbein, "Crumbling of the Wills Act: Australians Point the Way" (1979), 65 A.B.A.J. 1192.

Re Riva had to do with a stationer's will composed of a single leaf folded in half to make four pages, with the attestation clause appearing on the third page. Although the witnesses signed the will in the appropriate place on the third page, the testatrix did not. Rather, her signature appeared on the fourth page in a printed rectangle containing the printed word "Dated". The question for the court was whether the testatrix had put her name on page four for the purpose of signing the will or for the purpose of identifying the document. The court felt that there was insufficient space provided on the form for the testatrix's signature and held that the signature on the fourth page constituted a valid execution of the will. This is not a remarkable case, except perhaps for the length to which the judge went to justify his conclusion, which, it is submitted, must have been fairly obvious at the outset.

In *Douet* v. *Budd*, the details concerning the execution of the will form are not given. Presumably the will was signed by both the testator and witnesses for its validity as a document admissible to probate was not in question. In completing the form, the testator named an executor. However, in the space provided for stating to whom his property was to go, he listed his property but named no beneficiary. The question for the court was whether the testator died intestate insofar as his property was concerned or was the person whom he named to be his executor his sole beneficiary. The British Columbia Court of Appeal, reversing the chambers judge, held that the named executor was the sole beneficiary. The Court refused to follow a decision of Middleton J. In *Re Leblond*[10] concerning a very similar fact situation. The court referred to the section in the Wills Act which provides that, where a person has appointed an executor but has not disposed of his property, the executor does not take the property beneficially but rather as a trustee for those who will take on an intestacy, unless a contrary intention is expressed in the will[11]. The Court concluded that the listing of his property was an expression of a contrary intention. The Court also relied upon Lord Esher's famous golden rule of construction or presumption against intestacy[12].

This brings me to the *Re Philip* and *Re Forest* kind of case. Prior to *Re Philip* and *Re Forest* the last major case of this kind was *Re Austin*; *Sunrise Gospel Hour* v. *Twiss*[13] in which by a 2 - 1 majority the Alberta Court of Appeal decided in favour of admitting a portion of the handwriting as a valid holograph will. There was a strong dissent by McDermid J. A. A similar result recently occurred in *Re Shortt*, a decision of the Alberta Surrogate Court. In *Re Chamberlain*, another recent case, the issue was able to be circumvented because subsequently the testator completed another entirely holograph document which incorporated by reference the stationer's will form.

10. (1914), 7 O.W.N. 398 (H.C.).
11. The Wills Act, R.S.B.C. 1960, c. 408, s. 33(1).
12. *Re Harrison; Turner v. Hellard* (1885) 30 Ch.D. 390(C.A.), at 393-94.
13. (1967), 59 W.W.R. 321; 61 D.L.R. (2d) 582 (Alta. C.A.).

There were four decisions which led up to the *Re Austin* case: *Re Rigden*[14], *Re Griffiths*[15], *Re Ford*[16], and *Re Laver*[17]. Looking at all of the cases, *Re Ridgen* through to *Re Forest*, the will-makers have utilized in diverse ways the blank spaces of various printed clauses, including the identification clause at the beginning, the personal representative appointment clause, the specific devise and bequest clause, and the residuary bequest clause. Perhaps two of the cases may be put in a separate category from the others, namely *Re Ford* and *Re Philip*. George Ford completed the identification clause and then in the executor appointment clause space he wrote out "To my brother William Herbert Ford of Magreth everything I own on 31 December, 1952", and signed his name immediately below these words. Mr. Ford did not use or fill in any of the other clauses and he did not sign the will again in the space provided. Similarly, Norah Sarah Philip did not fill in the identification or personal representative clauses. She completed only the dispositive clauses and then signed the will in the space provided immediately below these clauses. Therefore, it is arguable that the *Ford* and *Philip* cases differ from the other cases, in that the testators did not utilize the entire printed form.

The points upon which the courts have variously focused in cases of this kind are: the intention of the will-maker to adopt and incorporate into the handwritten portions the printed words of the document; the legal authority for the court to ignore and to delete the printed portion of a stationer's will form or in other words the power of the Court to focus its attention on only the handwritten portions as opposed to the whole document; the meaning of the holograph will section in the Wills Act which states in part that "a person may make a valid will wholly in his own handwriting"[18]; the relevance of the presumption against intestacy; and the applicability of Scottish case law.

In *Re Ridgen* and *Re Griffiths,* the judges put their minds to the documents, not just to the handwritten portions, and considered whether the documents could be admitted to probate. Both judges answered this question in the negative on the basis of the wording of the holograph will section of the Wills Act. The documents were not wholly in the handwriting of the will-maker.

In *Re Ford,* Chief Judge Sissons admitted the handwritten portion in the personal representative appointment space to probate. There are three comments to be made about this case. Firstly, Judge Sissons was a colourful, maverick judge who never allowed the law or legal principle to get in the way of what he considered to be the just decision to be made. Secondly, as mentioned earlier, the way in which the testator used the will form in this case was significant. One can understand how a court would view the handwritten portion in the executor appointment space as severable from the rest of the form and thus admissible to probate as a holograph will in itself. Finally, it was in this judgement that the ill-conceived reference to Scottish case law was first made.

14. [1941] 1 W.W.R. 566 (Sask. Surr. Ct.).
15. [1945] 3 W.W.R. 46 (Sask. Surr. Ct.).
16. (1954), 13 W.W.R. 604 (Alta. Dist. Ct.).
17. (1957), 21 W.W.R. 209; 10 D.L.R. (2d) 279 (Sask. Q.B.).
18. The Wills Act, R.S.M. 1970, c. W-150, s. 7.

Re Ford was approved in *Re Laver*. The testator completed the indentification and personal representative clauses. In the space provided in the devises and bequests clause the testator wrote words, duplicating in part the words of the clause, that by themselves would make sense as a will: "I give devise, and bequeath all my estate both real and personal to James William Tandy". The Court, in admitting to probate only the handwritten portion of the document disposing of the testator's property, based its decision not only on the *Ford* case, but also on the Scottish case law to which Judge Sissons referred.

The majority judges in *Re Austin* based their decision on the presumption against intestacy and on the Scottish case law by reference to the *Ford* and *Laver* decisions. McDermid J. A., in dissent, addressed his mind to the document in the light of the wording of the holograph will section, as had the judges in the *Rigden* and *Griffiths* cases, distinguished the Scottish case law, and applied the law that the court does not have the power to delete words from a testamentary document, in this case the printed words, when there is no lack of knowledge, mistake or fraud involved.

Re Philip

Chief Judge Philp in a thoughtful and soundly reasoned judgment in *Re Philip,* reviewed the decisions from *Re Ridgen* through *Re Austin* and concluded that the *Ford, Laver* and *Austin* cases were wrongly decided. In holding that the Philip will did not meet the statutory requirements of a holograph will, Judge Philp relied on reasons which had been articulated well in *Re Rigden* and *Re Griffiths* and by McDermid J. A. in *Re Austin.* After referring to the law stipulating the absence of power in the court to delete words which were not introduced through lack of knowledge, mistake or fraud, Chief Judge Philp found that the testatrix intended to adopt or incorporate at the very least the printed words preceding the handwritten disposition of her property. He then strictly applied the wording of s.7 of The Wills Act and found that the will was not entirely in the deceased's own handwriting.

Chief Judge Philp's analysis of the applicability of Scottish case law is the strongest feature of his judgement. He points out, as had McDermid J. A. in *Re Austin,* that in Scotland there are no statutory rules as to wills and in Scottish common law a holograph will is admissible to probate if the will is wholly or *in its essential parts* in the handwriting of the will-maker. If a holograph will meets this test in Scotland then the entire will (that is the portions in the handwriting of the will-maker and all other portions) is admitted to probate. Scottish judges are not faced with the problem of having to ignore and to delete part of the document. The statutory definition of a holograph will in Canada is quite different from Scottish law. More clearly than McDermid J. A. in *Re Austin,* Chief Judge Philp rejected the applicability of Scottish law.

Influenced by Scottish law Chief Judge Sissons in *Re Ford* and the majority judges in *Re Austin* vetted the printed clauses in the will forms on the basis of whether they were *non-essential* or superfluous and therefore able to be omitted from probate. This is a difficult, if not impossible, test to apply. Unless one can be absolutely certain that there are no earlier wills, a revocation clause may be an essential clause. Similarly, the personal

representative clause may be *the* essential clause to a will-maker; it may well be more important to a given will-maker than the dispositive clauses. McDermid J. A. in *Re Austin* preferred the test of *formal* or superfluous. Although this may be a more workable test, it is submitted that Chief Judge Philp was correct in the *Philip* case in holding that neither test is supported by the authorities.

A three member panel of the Court of Appeal of Manitoba in a split decision reversed Chief Judge Philp's decision[19]. The Court of Appeal's decision in *Re Philip* is reminiscent of its decision in *Re Tachibana*[20], another holograph will case. In both cases it appears that the Court was determined to bring about what it considered to be the just result. In both cases the legal basis for the decision is very questionable. By comparison to Chief Judge Philp's thorough judgement, the majority decision in *Philip* is disappointing, to say the least. Writing for the majority, O'Sullivan J. A. very briefly indicates that he based his decision on the conclusion that Mrs. Philip did not intend to adopt any of the printed words of the form. In this respect he described Mrs. Philip as an "intelligent woman" and a "literate testatrix" who would not have completed the form in the manner she did if she intended to adopt and incorporate the printed words. Judging from the photocopy of the actual will form in issue, which Monnin J. A. reproduced in his dissenting judgement[21], it is difficult to see how the majority judges could characterize the effort to be that of a literate, intelligent person. One would expect a literate and intelligent person either to utilize the entire form and also to do so in a neater manner, or to write out his or her entire will in longhand without resorting to a will form. In any event, it would seem that at least in regard to the residuary bequest, if not the specific bequests and devises, Chief Judge Philp's conclusion that Mrs. Philip was incorporating the printed wording is inescapable.

In his decision, Mr. Justice O'Sullivan drew assistance from the presumption against intestacy, the presumption that citizens know the law, and the maxim that constructions of documents are to be made liberally on account of the simplicity of the laity. Aside from the total irrelevance of the maxim and the presumptions to the question of the validity of a document and its admissibility to probate, it seems that in one respect the learned justice fell afoul of the old "suck and blow" principle. It appears inconsistent to bring to the assistance of an intelligent, literate testatrix the construction maxim concerning the simple laity.

The most recent decision in this area is that of Judge Walker in *Re Forest*[22]. Notwithstanding his frankly stated sympathetic attitude, he held against admitting anything to probate, for the document was not a holograph will in whole or in part. He distinguished both *Re Laver* and *Re Philip*. The former decision, which was potentially binding on him, he distinguished on the basis that there the testator had inserted in handwriting

19. *Supra*, n. 6.

20. (1968), 63 W.W.R. 99; 66 D.L.R. (2d) 567 (Man. C.A.).

21. Monnin J. A.'s dissent is simply based upon the wording of s. 7, namely that a holograph will is one wholly in the handwriting of the deceased. Interestingly, he refers to the historical adoption of the holograph will section in The Wills Act of Manitoba. He says that it was taken from Quebec and that Scottish trained lawyers in Manitoba at the time fully appreciated the significance of the wording.

22. *Supra*, n. 7.

a complete dispositive clause. Similarly, he distinguished *Re Philip* on the basis that there the testatrix had not utilized the form, but had written her will with little reference to the printed portions.

Conclusion

In all these cases, although the courts have articulated it in different ways, the key issue is the same. In view of the legislation requiring a holograph will to be wholly in the handwriting of the will-maker, the question is whether the will-maker intended to adopt or incorporate the printed words of the form. To refer to the court's jurisdiction to focus its attention on only the handwritten portion or to refer to the court's power to ignore and delete the printed words is simply another way of stating the same issue.

Of the above decisions, the writer can agree with the judgements of only Chief Judge Philp and McDermid J. A. It is submitted that the only case involving a stationer's will form in which it would be proper to admit to probate the handwritten portion would be where the will-maker in one space only on the form wrote and signed a self-contained, testamentary provision. Although such a case has not yet come before the courts, Chief Judge Philp acknowledged that he might well admit to probate such a handwriting.

The facts in these cases vary sufficiently that even if a case eventually goes to the Supreme Court of Canada, the judgement may not be definitive. There are three legislative solutions that could be pursued: amend the holograph will section to incorporate into the definition of a holograph will the Scottish case law; enshrine a substantial compliance doctrine into The Wills Act, which might be helpful in this kind of case as well as in regard to other matters concerning formalities; or prohibit the printing and sale of stationers' will forms. The writer has no preference.