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FORGED WILLS AND CODICILS IN CERTAIN STATES

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If the laws of certain states do not actually encourage forgery of wills and codicils to wills, they certainly make success easier for those who seek to profit by fraudulent documents of this kind. This encouragement comes now and then through the formal approval at the end of a contest in court of documents of a very peculiar and surprising character "found" in some strange place. Fraud of this kind is, however, more frequently successful because no action is taken to contest a highly suspicious document where the undertaking appears to be hopeless. Crime is rewarded through "settlements" that would not have been made in other jurisdiction: where forgery is more dangerous.

The laws favorable to forgery and fraud of this kind are those regarding holograph wills and codicils, also the physical form and binding, or separated sheets, of wills, and the legal presumptions which make it difficult to prove the fraudulent character of erasures and changes in wills and codicils, and certain old precedents and prejudices in certain states that make it difficult to prove the facts about any disputed document, and, finally, the requirement of the law that difficult technical problems of this kind must be submitted to an ordinary jury. With these surrounding conditions almost any case in certain jurisdictions has at least a fighting chance to win and many cases are brought into court that would never be tried in other states.

A will is made to do what the law, without the will, would, as a rule, do differently; it represents the wish, the will of the testator. By means of a written document a desire is projected into the future and the law then, when life is ended, carries out the wish. In some states it is a legal maxim that in considering a will the law, or an officer of the law, "should not strain for probate," for the law all the time stands ready to distribute any estate as though there was no will. It is well known, however, that juries do "strain" and in effect at least endeavor to make wills for those who died intestate, or, on the other hand, validate questionable wills

† Author of *Questioned Documents* (2d ed., 1929) and *The Problem of Proof* (1922).

that they decide do "substantial justice" and that supersede genuine wills that are displeasing to certain more or less distant relatives.

It has been demonstrated many times that one man and two or three women, or two men and one attractive woman, with the aid of her sympathetic friends, can plunder an estate in many jurisdictions of this land where all classes of crime flourish as in no other civilized country. This dramatic performance, a raid on an estate, is staged in court-houses, with all the formal legal trappings, and the property of a decedent is distributed according to the terms of a document that he never saw. With only a fairly good forgery, supported by plausible perjury, and a relationship, or sentimental companionship of a claimant, and a will or a codicil that arouses the sympathy of certain members of a community, the fraudulent attempt succeeds. When aided by certain of the old laws and legal presumptions, still in force in numerous states, the task of capturing an estate is made comparatively easy.

Where the distribution of hundreds and thousands or, in some instances, even millions, of dollars is entrusted to the cohesion of paper fibers and the permanent visibility of certain marks made by a staining agent, it is inevitable that this easy means of transferring property should be taken advantage of by the dishonest. The world's business and the world's wealth are represented by documents carrying at the end these validating symbols, like those on packages of tea, or those more familiar to us that we go to school to learn to make. Money also represents wealth, but in comparison with signed documents money is only the small change in world affairs.

Forgery is an ancient crime, and when, even in ancient banks, value was represented by notched and whittled sticks there no doubt were those with sharp knives and available lumber who sought what did not belong to them. But it is with sharp pens that crimes were committed yesterday and will be committed today and tomorrow. The total amount of forgery of commercial paper each year now reaches an almost unbelievable total. Forged wills and codicils are less numerous but usually represent much larger individual amounts. When, however, even this great amount of forgery of checks and deeds and wills and codicils is compared with the enormous sum represented each year by all of these various documents, it is some ground for optimism for it then appears that honesty is the rule and dishonesty the exception. The exception should not, however, be protected and aided by law. While it is true that

among the great mass of documents forgery is the exception, one may appear anywhere at any time, and bank balances, or whole estates, may thus be lost.

Sooner or later every law office is called upon to investigate written papers that are forgeries. This problem of forgery is of course a fact problem and forgery is made less dangerous to the criminal because some of those called upon to consider it in the first instance, or later at a trial, are almost wholly uninformed on the subject. They have never given any study or thought to the problem but prepare a case for trial, and try it, and then submit a difficult technical problem to the untrained members of an ordinary jury! This legal farce is staged in no other land than this America of ours.

In many instances forgery is a crude and unskilful performance, or a typewriter may have been used that had not been manufactured on the date of the document, or, as in one instance, the document unintentionally was dated by the words "for care and service rendered up to and *including my last illness*," or, as, once happened, the name of a dead witness is put upon the paper who on the exact date of the document was on the Atlantic Ocean on the way to Europe. In some instances a watermarked paper appears that had not been made on the date of the document, and other important matters often are overlooked. When, however, these careless errors are avoided, or plausibly excused by skilful advocates, the crime is successful and is much safer and more profitable than burglary and is not so unpleasantly frowned upon in the higher social circles. Except in Canada and England, one who fails in an attempt of this kind, unlike the "second-story" intruder, as a rule is not prosecuted for the attempted fraud, and the sympathizing friends who aided in the attempt gather around and express sorrow at the failure and in some instances devise a new and better planned raid.

In the interest of safety it is of course important for those who forge wills not only to avoid these common errors but to select a proper state where the law is most favorable. This favorable territory would not be in the State of New York, although it occasionally succeeds even there, and above all would not be in the State of New Jersey. Among the safest states for these undertakings, to mention only a few, are Pennsylvania and Iowa and Michigan. The law in Iowa and Michigan has said plainly that if witnesses testify to having seen a document signed that forgery cannot be proved by "mere" expert testimony. This is saying in effect that

alleged "eyewitness proof" can only be disproved by a witness who was present and saw the forgery written. Will cases are much more frequent in Pennsylvania than just across the Delaware River in New Jersey. (The laws of New Jersey should "cross the Delaware"!)

These fraudulent attacks upon estates are much rarer and more dangerous in Canada than in this country, and are almost unknown in England, because in those countries where judges have power and where the laws are not hospitable to fraud and forgery, the unsuccessful litigant is at once prosecuted and imprisoned and, what is more discouraging, in England the expenses may be "taxed," including the expenses of the opposition, upon those who fail in the criminal attempt. This unpleasant ending is provided for in advance by a bond with proper sureties before the trial begins. The rule would greatly reduce the amount of this litigation in this country and in connection with many other kinds of cases would be an effective means of relieving crowded court calendars, but of course would greatly interfere with the law as a business. This restrictive procedure is so unpopular that it is not even discussed in this land of opportunity.

The State of New York has an excellent statute on the subject of wills, and suspicious documents are carefully scrutinized by the courts and are not easily proved. In an opinion in the case of *In re Gregson's Estate*,¹ this finding is recorded: "Unattested separate writing appended to holograph will by brass clasp is not entitled to probate." This is recognized as a safe and sensible conclusion, but in Pennsylvania a codicil on a scrap of paper or postal card, even if not "appended by a brass clasp," may be declared to be a part of a will, and a holograph will, no matter if consisting of only three or four words, requires neither date nor witnesses. The door is thus wide open to forgery and forgery goes in. Codicils in numerous states may be in the form of letters, or postscripts to letters, or postal cards, or any old scrap of paper large enough to contain the writing. In the Pennsylvania case of *Hinman v. Hinman*,² a few words in pencil writing over a signature on a regular printed check form were probated as a will covering a large estate.

Twenty of the forty-eight states recognize the validity of holograph wills without witnesses, and in none of these states does there

¹ 136 Misc. 769, 242 N. Y. Supp. 228 (1930).

² 293 Pa. 29, 128 Atl. 654 (1925).

appear to be a requirement that the document should contain any particular number of words. In Pennsylvania, West Virginia, and several other states, a genuine signature with the words "Mary my heir" in the alleged handwriting of the testator, with no date and no witnesses, answers the purpose and is admitted as a valid holographic will.

The law regarding holographic wills was based on the correct idea that it is much more difficult to forge a whole, extended document than simply a signature, and wills of a few paragraphs would many times be more effectively protected if they were all written in the handwriting of the testator, than a will written by some other person and validated by the kind of witnesses often selected, and bearing only an alleged signature of the testator. It is easy to understand that the protection of a holograph document by the handwriting alone is ineffective, especially if pencil written, if the document contains only a few words. It may be impossible to show conclusively that "Mary my heir" is a forgery over a genuine signature.

American courts could learn some good law regarding holograph documents from Scotland, where certain legal documents must be entirely in the handwriting of the notary. The law regarding holograph documents in this country, in some measure at least, probably harks back to the frontier days when witnesses were not always easily obtainable, and writing materials were scarce, and circumstances were such that all formalities could not easily be observed. There even now are parts of this country where nearly all bank checks are pencil written but pens and ink are in use in most places.

Easy-going requirements in many states regarding the physical form of wills also open the door to fraud. In certain states a will may be made up of several disconnected, undated and unnumbered pieces of paper. One of these may be found in an old trunk, another received by mail from an unknown sender, and another in a pencil-written notebook of the testator. An interesting typical case of this kind has recently been passed upon by the Supreme Court of Maine. *Appeal of Sleeper et al.*³ The majority of the court in this case, decided that twenty-eight separate sheets of paper, individually unidentified, constituted a valid will. A dissenting opinion, written by the Chief Justice, indicates the unreasonableness of the majority decision:

³ 129 Me. 194, 151 Atl. 150 (1930).

"There is absolutely no evidence of identification. The witnesses were agreed that aside from the sheet which bore the attestation clause, it was impossible to identify a single sheet. They saw a 'pile of papers,' the papers 'look alike' or 'looked exactly like,' those offered for probate. In other words, they resembled the ordinary note paper in common use in every home in Maine. . . .

"The case stands then, unique in the history of loose leaf wills admitted to probate in jurisdictions where a statute such as ours governs, no physical connections of the parts, no coherence or continuity of thought to join together the separated portions and no pretense even of identifying a single sheet save that which bore upon it the attestation clause alone. To permit the probate of such a will, to even entitle this collection of disjointed, disconnected fragments, to be considered a will, is to do violence to all precedent and to open wide the door of opportunity to fraud."

The door of opportunity to fraud stands much wider open in many states than in Maine, and invites disappointed friends and relatives to bring forward documents, or alleged pieces of documents, that are altogether too easily proved, which in some instances may have some moral justification but which nevertheless are fraudulent.

As examples of the practice of numerous states the following cases are cited: In *Buffington v. Thomas*,⁴ a Mississippi case, a letter containing the request to "Answer at once" and the notation "This is private" was probated as a will. In the North Carolina case of *Peace v. Edwards*,⁵ four papers were found, three undated and unsigned, and one signed with the words "Last Will" written under the signature. The four papers were probated as a will.

Many wills and codicils are disfigured by suspicious erasures and changes of important parts, and this condition provides another open door to fraud. In ancient legal documents where changes were made a notation usually appeared in the margin, signed or initialed, by the one who executed the document, but, in these later careless days of typewriters and chemical erasing agents, wills and documents showing erasures and changes on nearly every page are declared valid. A few vigorous opinions in the various states similar to the dissenting opinion in the Maine case, previously discussed, would have a wholesome influence. Many of the opinions now in force tend to excuse erasures and alterations of all kinds.

⁴ 84 Miss. 157, 36 So. 1039 (1898).

⁵ 170 N. C. 64, 86 S. E. 807 (1915).

In some states these fraudulent changes are successfully attacked, as in the important New York case of *In re Jackson's Estate*.⁶ The forceful opinion of the surrogate in that case states emphatically: "It was conclusively established by the evidence that the alleged legacy to Harry H. Jackson in the disputed paper had been fraudulently altered by raising the amount from \$5,000 to \$505,000."

Another recent case, *Matter of Wells Estate*,⁷ is an example of New York practice regarding wills. The will in this case was received by mail anonymously by the Surrogate of Suffolk County (Long Island), N. Y., at Riverhead, L. I. The document was suspicious in many ways and was at once attacked as a forgery. After an extended trial the Surrogate, without a jury, admitted the will to probate as a genuine document. The case was at once appealed to the Appellate Division of the Supreme Court, Second Department, and this court unanimously decided, in a strong opinion, that the will was "an obvious forgery." The Court did not order a new trial but, following a special law on the subject, entered a final decree that "on the facts" the will was not entitled to probate. The case was then appealed to the Court of Appeals, New York's highest court, and the decree of the Appellate Division was unanimously affirmed. This is an example of a will that in a majority of states would have been declared genuine.

As an example of the opposite tendency of the law on the subject of alterations, the Supreme Court of Iowa, in *Council Bluffs Savings Bank v. Wendt*,⁸ held that "The burden is upon the party alleging the material alteration to show that it was made after delivery." It is nearly always impossible to show conclusively the date of an alteration consisting of only a few words or a few figures, and this presumption of the law tends to aid crime and protect fraud. The law of wills in numerous states needs revision.

⁶ 127 Misc. 187, 215 N. Y. Supp. 230 (1926).

⁷ 248 App. Div. 191, 288 N. Y. Supp. 449 (1936).

⁸ 203 Iowa 972, 213 N. W. 599 (1927).