



# Intention in the Law of Property

THE LAW OF UNINTENDED CONSEQUENCES

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**I**NTENTION IS A PERVERSIVE concept in the law. Torts are traditionally divided into intentional and unintentional torts, although the meaning of the distinguishing characteristic requires some explanation; beginning law students are routinely baffled to discover that they can commit the “intentional” tort of trespass by entering land in the innocent but mistaken belief that they have a right to be there. Intention is also an essential element of criminal law, although it too requires some explanation; “malice aforethought” does not demand quite the amount of time or mental effort that one might think. Contract is probably the legal discipline in which intention is most prominent; agreement is of the essence of contract,

but the “meeting of the minds” is a legal, not a psychological, concept. “The law has nothing to do with the actual state of the parties’ minds,” Oliver Wendell Holmes reminded his audience: “In contract, as elsewhere, it must go by externals, and judge parties by their conduct.”<sup>1</sup>

Property law, too, must concern itself with intention, although it is generally more involved with the rights and responsibilities of ownership. Intention enters the law of property primarily when transfers of title are contemplated, particularly sales or gifts.<sup>2</sup> The sale of property is a matter of agreement and would properly be treated as part of contract law except that as to real property special doctrines are involved and a deed is required

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- 1 O.W. HOLMES, JR., *THE COMMON LAW* 242 (1881).
- 2 Intention is also an element in the acquisition of personal property by finding and of real property by adverse possession, but these involve relatively small amounts of property. Unintentional deprivations of title occur in cases of forfeiture and loss of title to adverse possessors; inheritance and escheat operate as unintentional gratuitous transfers. Condemnation, or the taking of property by the power of eminent domain, is an unintentional transfer for value (a forced sale) to the sovereign. As conceptualized ever since Blackstone, “[a]ll that the legislature does [in the exercise of the power of eminent domain] is to oblige the owner to alienate his possessions for a reasonable price,” substituting one form of property for another. 2 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 135 (1765).

to consummate the transaction.<sup>3</sup> Intention is a necessary element of the law of gifts. Every law student learns that the requisites of an inter vivos gift are intention, delivery, and acceptance.<sup>4</sup> Testamentary gifts are more complicated: the requisite intention, the *animus testandi*, must be expressed in certain stereotyped ways, usually in a writing, signed by the testator and attested by two witnesses.<sup>5</sup>

Intention was not always the lodestar in the law that it is today. As Professor Patrick Atiyah has reminded us, for much of the history of the common law, “giving effect to intentions” was not “the primary objective of the social order or of the law,”<sup>6</sup> but since the time of Lord Mansfield at the end of the eighteenth century, the steady triumph of individualism has reoriented many legal doctrines. In the modern world the biblical question, “Is it not lawful for me to do what I will with mine own?”<sup>7</sup> is generally considered to be unanswerable. So obviously desirable has the effectuation of intention become that it requires some effort to recall that there are

still legal rules, other than the criminal law, that are designed to frustrate it. Property law, in a sense the oldest part of the common law, remains the province of archaic and often intention-defeating rules.<sup>8</sup>

“[W]e sit here,” explained an influential English judge in an important wills case, “not to try what the Testator may have intended, but to ascertain, on legal principles, what testamentary instruments he has made.”<sup>9</sup> Or, putting it the other way around, in the words of a still earlier English judge, “after you have fixed the intention, it then becomes a question, whether such intention can be executed consistently with the established rules of law.”<sup>10</sup> The Rule in Shelley’s Case, where it still exists, means that a grant of a life estate to A followed by a remainder in fee simple to A’s heirs will be construed to convey the entire estate to A without regard to the grantor’s intention, making it possible for A to alienate or devise the property away from his or her heirs.<sup>11</sup> A joint tenant has nothing to devise in the jointly owned property, no matter

3 The lease of real property, historically characterized as the conveyance of a non-freehold estate, is also dependent on intention, but the requisite intention is stereotypically indicated by the delivery of a signed document. See 219 *Broadway Corp. v. Alexander’s, Inc.*, 387 N.E. 2d 1205 (N.Y. 1979).

4 RAY ANDREWS BROWN, *THE LAW OF PERSONAL PROPERTY* § 38, p. 84 (2<sup>nd</sup> ed. 1955).

5 THOMAS E. ATKINSON, *HANDBOOK OF THE LAW OF WILLS* § 62, p. 293 (2<sup>nd</sup> ed. 1953) (“no will is valid unless there is compliance with all of the statutory requirements. The fact that the testator intended to comply . . . is not ground for relaxing the rules.”). Many states recognize holographic (handwritten) wills and a few, nuncupative (oral) wills; again, the statutory requirements must be strictly complied with.

6 P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 122 (1979).

7 Matt. 20:15 (KJ).

8 The early common law has been described as “a primitive legal system which has a highly developed land law, but no theory of contract.” 2 WILLIAM S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 355 (4<sup>th</sup> ed. 1936). See also John V. Orth, *Contract and the Common Law*, in *THE STATE AND FREEDOM OF CONTRACT* 44, 45–49 (Harry N. Scheiber ed. 1998). Without attention to contract with its insistence on intention, it was easier to focus on hard-and-fast rules and ignore expectations.

9 *Croker v. Marquis of Hertford*, 4 Moo. P.C. 339, 369, 13 Eng. Rep. 334, 344–45 (P.C. 1844) (Lushington, Dr.). See S.M. WADDAMS, *LAW, POLITICS AND THE CHURCH OF ENGLAND: THE CAREER OF STEPHEN LUSHINGTON, 1782–1873* at 191–92 (1992).

10 *Perrin v. Blake*, 1 *Collectanea Juridica* 309, 310 (K.B. 1770) (Yates, J., dissenting). Sir William Holdsworth, the great legal historian, described Yates’ dissent as “a complete answer to the view that, in construing a will, only the intention of the testator must be regarded.” 12 WILLIAM HOLDSWORTH, *HISTORY OF ENGLISH LAW* 484 (1938).

11 See John V. Orth, *The Mystery of the Rule in Shelley’s Case*, 7 *GREEN BAG 2D* 45 (2003). See also John V. Orth, *Requiem for the Rule in Shelley’s Case*, 67 *N.C. L. REV.* 681, 692 (1989) (expressing the fervent hope

how clearly expressed the intention.<sup>12</sup> Nor are intentional restraints on alienation valid except in certain trusts.<sup>13</sup> At one time mortmain statutes empowered surviving spouses and children to set aside gifts to charity in death-bed wills,<sup>14</sup> and the ubiquitous statutes that today grant a surviving spouse an elective share in the estate of the deceased partner are obviously intended to defeat an intention to reduce or eliminate the survivor's share.<sup>15</sup> The Rule Against Perpetuities, of course, is the most celebrated check on intention, and its chief expounder, John Chipman Gray, seemed to glory in the Rule's intention-defeating potential:

The Rule against Perpetuities is not a rule of construction, but a peremptory command of law. It is not, like a rule of construction, a test, more or less artificial, to determine intention. Its object

is to defeat intention. Therefore every provision in a will or settlement is to be construed as if the Rule did not exist, and then to the provision so construed the Rule is to be remorselessly applied.<sup>16</sup>

Rules of construction, unlike rules of law, are supposed to effectuate intention. By raising a rebuttable presumption that specific words and phrases have certain meanings, they reduce the likelihood of disputes and increase the speed and efficiency of property transactions. The Doctrine of Worthier Title, where it still exists, raises a presumption that a limitation in a deed, including a deed of trust, creating a remainder in the grantor's heirs is actually intended to leave a reversion in the grantor, giving the grantor power to alienate or devise the property away from his or her heirs.<sup>17</sup> Ambiguous terms in conveyances are construed to avoid the possibility of forfei-

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that after the repeal of the Rule in North Carolina, the judges try to effectuate intention and do not simply "do the opposite of what they would have done under the Rule".

- 12 See 4 JAMES KENT, COMMENTARIES ON AMERICAN LAW 513 (12<sup>th</sup> ed., O.W. Holmes, Jr., ed., 1873) ("A joint tenant has not an interest which is devisable" because "the survivor claims under the first feoffor, which is title paramount to that of the devisee"). For a criticism of this rule and its rationale, see R.H. Helmholz, *Realism and Formalism in the Severance of Joint Tenancies*, 77 NEB. L. REV. 1, 29-30 (1998).
- 13 See Lewis M. Simes, HANDBOOK OF THE LAW OF FUTURE INTERESTS § 113, p. 238 (2<sup>nd</sup> ed. 1966) ("all disabling restraints are void" except "restraints on alienation incident to beneficial interests in spendthrift trusts").
- 14 For what appears to be the last remaining American mortmain statute, see GA. CODE § 53-2-10 (1998). For what may have been the next-to-last, see NEW YORK EST., POWERS & TRUSTS LAW § 5-3.3 (repealed 1981). The earliest mortmain statutes required the donor to seek permission by statute or royal license before land could be transferred to a corporation, usually at that time some arm of the Church. For an historical survey, see SANDRA RABBAN, MORTMAIN LEGISLATION AND THE ENGLISH CHURCH, 1279-1500 (1982). To this day, the bad name for intention that seeks to extend its reach too far is control by the "dead hand" (mortmain).
- 15 See, e.g., CONN. GEN. STAT. § 45a-436 (1998); N.C. GEN. STAT. § 30-3.1ff. (2000). Elective share statutes are found in all separate property states except Georgia. JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 480 & n. 1 (6<sup>th</sup> ed. 2000). In community property states the spouses own all acquisitions from earnings after marriage in equal undivided shares. Only the state of Louisiana, where the civil law rather than the common law forms the basis of the law of succession, protects children in some circumstances from intentional disinheritance. LA. CONST. art. 12, § 5; LA. CIV. CODE arts. 1493-1514.
- 16 JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES § 629, p. 599 (4<sup>th</sup> ed., Roland Gray ed., 1942). The Rule Against Perpetuities, in Gray's classic formulation, is "NO INTEREST IS GOOD UNLESS IT MUST VEST, IF AT ALL, NOT LATER THAN TWENTY-ONE YEARS AFTER SOME LIFE IN BEING AT THE CREATION OF THE INTEREST." *Id.* § 201, p. 191 (capitals in original). A simpler Uniform Statutory Rule Against Perpetuities has been adopted in many states. See, e.g., N.C. GEN. STAT. § 41-15 ff. (1995).
- 17 Although it began as a rule of law, the Doctrine of Worthier Title has, at least since Judge Benjamin

ture; in consequence, restrictive covenants are preferred to conditions subsequent, and fees subject to conditions subsequent to determinable fees.<sup>18</sup> Pretermisison statutes are designed to carry out the testator's presumed intention by providing for a neglected spouse or child.<sup>19</sup> The same may be said of so-called anti-lapse statutes, substituting gifts to issue for gifts to deceased family members,<sup>20</sup> and statutes revoking testamentary gifts in favor of divorced spouses.<sup>21</sup>

While rules of construction are intended to effectuate intention, they may in some cases actually defeat it. Not only are mistakes in application possible, but the presumption in favor of one construction over another will resolve or preclude disputes in cases in which evidence is lacking or inconclusive. There are, in addition, rules of construction that, under the guise of effectuating intention, are in fact designed to make it more difficult to accomplish certain ends, permissible in themselves but viewed as undesirable or unlikely to be

the product of informed choice. The butcher's (or, rather, the judge's) thumb weighs more heavily in some determinations of intention than in others. The strong presumption in favor of marketable title in contracts for the sale of land means that an agreement to convey land that is silent as to the title to be conveyed, even an agreement to convey by means of a quitclaim deed, is construed to be an agreement to convey a full marketable fee simple.<sup>22</sup> Public policy in favor of an implied warranty of habitability in the sale of residential real estate is so strong that for a waiver to be effective the contract of sale must explicitly refer to the "warranty of habitability" *in ipsissima verba*.<sup>23</sup> The class-closing rule in the law of trusts creates so powerful a presumption that the settlor would prefer a class to close as soon as any member thereof can demand distribution that it has been confused with a rule of law.<sup>24</sup> The presumption against agreements among cotenants not to partition means that an agreement to do "nothing to

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Cardozo's landmark opinion in *Doctor v. Hughes*, 122 N.E. 221 (N.Y. 1919), been generally regarded as a rule of construction, therefore rebuttable by evidence to the contrary. Not to be seen to interfere with intention even to this limited extent, a number of states have abolished the Doctrine of Worthier Title. See JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 776 (6<sup>th</sup> ed. 2000) (listing ten states).

18 RESTATEMENT OF PROPERTY § 45, comment m.

19 See, e.g., FLA. STAT. § 732.301 (1993) (pretermitted spouse); N.H. REV. STAT. ANN. § 551:10 (1974) (pretermitted child).

20 See, e.g., TEX. PROBATE CODE § 68 (1997). Statutes such as this one do not actually prevent lapse; rather, they substitute one gift for another under certain circumstances.

21 See, e.g., MASS. GEN. LAWS ANN. ch. 19I, § 9 (1997).

22 See *Wallach v. Riverside Bank*, 100 N.E. 50 (N.Y. 1912). See also UNIFORM LAND TRANSFER ACT § 2-304(d) ("adopting ... the rule of *Wallach*").

23 See *Board of Managers v. Wilmette Partners*, 760 N.E.2d 976 (Ill. 2001) (holding waiver of "warranties of fitness for particular purpose and merchantability" insufficient to waive implied warranty of habitability); VA. CODE ANN. § 55-70.1 (permitting waiver of warranties in the sale of new homes "only if the words used to waive, modify or exclude such warranties are conspicuously ... set forth on the face of the contract in capital letters which are at least two points larger than the other type in the contract and only if the words used to waive, modify or exclude the warranties state with specificity the warranty or warranties that are being waived, modified or excluded ..."). In leases the implied warranty can often not be waived at all. See *Javins, Saunders, and Gross v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1082 (D.C. Cir. 1970); N.C. GEN. STAT. § 42-42(b).

24 See *Re Wernher's Settlement Trusts*, [1961] 1 All Eng. Rep. p. 184. Expert observers have conceded that the class closing rule is "adhered to more closely than any other rule of construction." JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 778 (6<sup>th</sup> ed. 2000).

defeat the common tenancy” may not be interpreted as intended to prohibit partition,<sup>25</sup> and the rule (usually statutory) in favor of tenancy in common means that a grant to two or more to hold “jointly” will not be construed to create a joint tenancy.<sup>26</sup>

Legal words are presumed to be used with their legal meanings, which is just a specific application of the general rule that where written words have what appears to be a plain meaning, that meaning is to be preferred over all others.<sup>27</sup> This seemingly simple rule may have unintended consequences. A scrivener may not translate the grantor’s intention into the right legal words. Instructed to draft a deed conveying title in joint tenancy with right of survivorship, the drafter might neglect, out of ignorance or inadvertence, to use the form of words necessary in the jurisdiction.<sup>28</sup> Legal words may be used in a will, but the testator, if not the lawyer, may have understood them in another, less specific sense. The word “heirs,” for example, may be thought to include relatives such as in-laws and stepchildren not provided for in the rel-

evant statute of descent.<sup>29</sup>

Rules concerning the manifestation of legal intention have the effect of making some manifestations final, “privileging,” to use a modern expression, the intention of one time over another or of one form of expression (usually certain types of writing) over others. Inter vivos gifts are irrevocable once “completed,” and oral revocation of wills is not allowed. But the intention that originally supported the gift may have changed. In such cases there is ordinarily no remedy – unless the donor reserved a power of revocation, as in a conditional gift or revocable trust, or unless the law treats the act as inherently revocable as, for example, a gift causa mortis. Nor is the discernment of intention simple. It is notorious that fact-finders, both judges and juries, are capable of manipulating rules concerning mental capacity, undue influence, and fraud to upset unpopular or unconventional dispositions in wills, so much so that one scholar has dismissed freedom of testation as no more than a “myth.”<sup>30</sup>

Formal requirements are meant to ensure

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- 25 See *Michalski v. Michalski*, 142 A.2d 645 (N.J. 1958) (reversing trial court’s finding that the agreement did not prohibit partition but refusing to enforce it anyway because of “changed circumstances”).
- 26 See *Mustain v. Gardner*, 67 N.E. 779 (Ill. 1903); In re *Estate of Hillyer*, 664 So.2d 361 (Fla. 1995). See also John V. Orth, *Joint Tenancies in 4 THOMPSON ON REAL PROPERTY: THOMAS EDITION* § 31.06(d), pp. 20–21 (1994). If two grantees are married to one another, there may be a presumption that they are to hold as tenants by the entirety. This was the common law rule, see John V. Orth, *Tenancies by the Entirety in 4 THOMPSON ON REAL PROPERTY: THOMAS EDITION* § 33.06(a), pp. 102–04 (1994), and it has been adopted by statute in some states. See, e.g., ALASKA STAT. § 34.15.110(b); N.C. GEN. STAT. § 39–13.6(b).
- 27 *Suffolk Business Ctr. v. Applied Digital Data*, 581 N.E.2d 1320, 1322 (N.Y. 1991) (construing a deed). See also THOMAS E. ATKINSON, *HANDBOOK OF THE LAW OF WILLS* § 146, p. 811 (2nd ed. 1953) (“If the testator employed a draftsman skilled in the use of technical words these must be given their technical meaning”). The practical effect of the plain meaning rule is to exclude evidence of other possible meanings.
- 28 See n. 26, *supra*. The Pennsylvania Supreme Court has observed that in that state “[t]o create a right of survivorship the normal procedure is to employ the phrase [as] joint tenants, with a right of survivorship, and not as tenants in common.” In re *Estate of Michael*, 218 A.2d 338, 342 (Pa. 1966) (italics in original). In Michigan the same form of words has been held to create an estate for joint lives with alternative contingent remainders in the survivor. *Jones v. Green*, 337 N.W.2d 85 (Mich. App. 1983).
- 29 Cf. *Mahoney v. Grainger*, 186 N.E. 86 (Mass. 1933) (rejecting proffer of evidence that testatrix understood “heirs” to mean her first cousins, when she had a surviving aunt who was her actual heir under the relevant statute).
- 30 Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235 (1996) (examining cases on undue influence and will formalities). There is a distinction between the intention that a transaction be

that intention properly expressed is given effect,<sup>31</sup> but they may operate in some cases to defeat intention. Although donative intent may be established, a gift may nonetheless fail for want of delivery.<sup>32</sup> Perhaps the most troubling cases concern attempted testamentary gifts: failure to satisfy certain formal requirements, typically involving a writing, signature, and witnesses, may result in the frustration of the obvious intention of a person now deprived by death of the ability to cure the defect.<sup>33</sup> The remedy most commonly proposed for the frustration of testamentary intent by failure to comply with the proper forms is simply to devolve upon legal decision-makers discretion to accept as wills documents that do not in fact comply with the statute.

As amended in 1990, the Uniform Probate Code (UPC), in a section adopted in half a

dozen states, provides:

Although a document ... was not executed in compliance with [the formalities required of wills], the document ... is treated as if it had been executed in compliance ... if the proponent of the document ... establishes by clear and convincing evidence that the decedent intended the document ... to constitute ... the decedent's will ... .<sup>34</sup>

There exists some confusion about the exact nature of this provision. The UPC itself treats the section as if it merely excused "harmless error," but at least one court has described it as adopting a "doctrine of substantial compliance,"<sup>35</sup> while commentators generally admit that it confers on the courts a plenary "dispensing power," that is, the power to dispense with the statutory requirements altogether if necessary to effectuate intention.<sup>36</sup>

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effective and intention with respect to the meaning of some of its terms, but in practice a fact-finder can negate the substantive intent by failing to find the operative intent.

- 31 In their classic analysis of the role of formal requirements in the law of testation, Gulliver and Tilson identified ritual, evidentiary, and protective functions, while insisting that the forms "should not be revered as ends in themselves, enthroning formality over frustrated intention." Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L. J. 1, 3, 5-13 (1941). Frequent failure to comply with formal requirements may indicate that the requirements are not congruent with common expectations.
- 32 *Foster v. Reiss*, 112 A.2d 553, 560 (N.J. 1955) (gift causa mortis) ("Although the writing establishes her donative intent at the time it was written, it does not fulfill the requirement of delivery of the property, which is a separate and distinct requirement ...").
- 33 The same dilemma arises in the law of inter vivos gifts when litigation over donative intent occurs after the death of the donor.
- 34 UNIFORM PROBATE CODE § 2-503 (harmless error).
- 35 *In re Will of Ranney*, 589 A.2d 1339, 1343 (N.J. 1991). Substantial compliance seems to require at least some compliance or attempted compliance.
- 36 JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 251-52, 259-61 (6<sup>th</sup> ed. 2000). Harmless error, as its name implies, seems to admit some error, however minor, in compliance; a dispensing power, on the other hand, suggests no need to comply (or attempt to comply) at all. To the historically minded, there is something more than a little odd in the candid recognition of a judicial power to "dispense" with the requirements of a statute. The King of England's claim to such a power in the seventeenth century precipitated a constitutional crisis, and in response the English Bill of Rights specifically forbade the practice. 1 W. & M., st. 2, ch. 2, § 1, clauses 1-2 (1689). The threat still seemed real enough a century later so that the generation that made the American Revolution included in several state constitutions an express prohibition against "the power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people." See, e.g., N.C. CONST. of 1776, Declaration of Rights § 5. Indeed, it is still there in some constitutions today. N.C. CONST. art. I, § 7 (same). Where the UPC section conferring the dispensing power is adopted by statute rather than judicial fiat, the constitutional requirement of the "consent of the representatives of the people" would seem to be satisfied.

Thus does intention trump form; or, more precisely, thus does the judicial determination of intention trump the legislative prescription of form.

A troubling illustration of the problem is provided in *Johnson v. Johnson*, a 1954 wills case from Oklahoma.<sup>37</sup> Dexter Johnson, himself a lawyer who had prepared many wills in proper form for his clients, left at his death a typed document appearing to be his own will but neither signed nor witnessed.<sup>38</sup> At its foot appeared a handwritten and signed statement leaving a nominal gift to his brother and reciting the seemingly obvious fact that “[t]his will shall be complete unless hereafter altered, changed or rewritten.”<sup>39</sup> *Devisavit vel non?* Local law permitted holographic wills and codicils, so the handwritten part could be probated, assuming testamentary intent was found. But what of the typewritten part? The lower courts rejected the entire document, but the Oklahoma Supreme Court reversed in a confused opinion relying largely on the argument that the

typewritten “will” had been “republished” by the handwritten “codicil.”<sup>40</sup>

Associate Justice Nelson S. Corn concurred in the result and authored a precocious statement of the doctrine of substantial compliance: “It was not the intent of our law-makers, in enacting these statutes, if substantially complied with, to ever allow a miscarriage of justice by a wrongful disposition of the testator’s property contrary to his intent.”<sup>41</sup> Not interested in technical subtleties, Justice Corn would have held simply that “[i]n the instant case, the intent expressed by the testator ... is clear and beyond any question.”<sup>42</sup> One might applaud the justice’s opinion as the triumph of substance over form if the evidence was as unequivocal as he said it was – and if the justice himself had not been one of America’s most corrupt judges!<sup>43</sup>

Students and commentators alike too often assume that the choice is between a regime of rules with the potential to defeat intention and the simple effectuation of intention without regard to rules. In fact, the

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37 279 P.2d 928 (Okla. 1954).

38 No lawyer who has ever supervised the elaborate ceremony of executing a written attested will could possibly think that he had executed his own will without signature or witnesses. For the recommended method of executing a will, see 1 A. JAMES CASNER, *ESTATE PLANNING* § 3.1.1 (6th ed. 1998 with Jeffrey N. Pennell).

39 279 P.2d at 933 (photocopy of original document). As every lawyer knows, wills are inherently revocable and ambulatory. THOMAS E. ATKINSON, *HANDBOOK OF THE LAW OF WILLS* § 1, p. 2 (2nd ed. 1953).

40 “Publication” of a will is defined as “the signification by the testator to the witnesses that the instrument is his will.” THOMAS E. ATKINSON, *HANDBOOK OF THE LAW OF WILLS* § 68, p. 327 (2nd ed. 1953). Since the typewritten part had never been “published” in the first place, it necessarily follows that it cannot have been “republished.” It is at least arguable that the handwritten part was not a holographic codicil but a holographic will that incorporated the typewritten part by reference.

41 279 P.2d at 932 (Corn, J., concurring).

42 *Id.* The evidence did not seem so clear to the judges of the district and county courts or to the three Supreme Court justices who dissented in the case.

43 See *Johnson v. Johnson*, 424 P.2d 414, 416 (Okla. 1967) (describing bribe-taking by Justice Corn over more than twenty years but finding no evidence that bribery influenced the decision in this particular case). Justice Corn’s defense of judicial discretion unfortunately brings to mind a famous outburst by Lord Camden, himself a distinguished judge:

the discretion of a Judge is the law of tyrants; it is always unknown; it is different in different men; it is casual, and depends upon constitution, temper, and passion. In the best it is often times caprice, in the worst it is every vice, folly, and passion to which human nature is liable.

*Doe v. Kersey* (C.P. 1765), quoted in 2 JAMES OLDHAM, *THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY 1356* (1992). A more sinister example can

choice is between rules to guide decision-makers and entrusting them with still more discretion. Granting judges the authority to accept less than the prescribed formalities in the law of wills, while perhaps reducing the likelihood of intention-defeating decisions, will also have the necessary consequence of requiring extensive fact-finding in many cases that do not eventually result in the “clear and convincing” establishment of the decedent’s intention.<sup>44</sup> And – in light of the evidence that fact-finders already

manipulate the rules in order to defeat substantive dispositions – it will only increase the opportunity for abuse. Without fidelity to rules to use as a standard by which to review judicial performance, judges may escape effective oversight: faulting “judgment calls” is far more difficult than detecting lapses in the application of rules. In the end, the commendable intention to effectuate intention may instead lead only to consequences that are as unfortunate as they are unintended. *§*

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hardly be imagined than the fate of the German “free law movement” (*Freirechtsbewegung*). Founded by well-meaning academics Eugen Ehrlich and Hermann Kantorowicz in the early twentieth century, it was a reaction against an excessively strict application of the German Civil Code, such as the invalidation of a will that was not “subscribed” because signed on the same line as the date. Kantorowicz recommended that in such a case a judge ought to be free to reach a result in keeping with social values. Unfortunately during the Nazi era the idea of departing from the language of the Code in favor of the “spirit of the law” was taken to horrifying extremes. See J.M. KELLY, A SHORT HISTORY OF WESTERN LEGAL THEORY 359–61 (1992).

- 44 Judges actually prefer to work with rules, both to ensure fairness and to economize their time and effort, and in the absence of rules generate them spontaneously. In certain Australian states that have given judges a dispensing power, the cases have “produced a ranking of the Wills Act formalities . . . , devaluing attestation while insisting on signature and writing.” John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia’s Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1, 52–54 (1987). In other words, the judges have simply amended the Wills Act.