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Kentucky Law Journal

Volume 42 | Issue 4 Article 4

1954

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Recommended Citation

Atkinson, Thomas E. (1954) "Probate of a Part of a Will," *Kentucky Law Journal*: Vol. 42 : Iss. 4 , Article 4.
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Probate of a Part of a Will

By THOMAS E. ATKINSON*

At the outset it should be noticed that some objections to a will are determined on probate while others are litigated at distribution or in the course of other proceedings, including those brought for construction of the instrument. The matters of execution, testamentary capacity, undue influence, fraud, mistake and revocation are adjudged on probate or general contest and normally cannot be raised in any other manner.[1] This paper is confined to situations where these objections go to a part but not all of the will, although it also includes those wherein there is failure of proof as to some of the contents of the will. Problems of partial internal validity, or of partial failure of the will due to election of the spouse or pretermitted children, or to excessive charitable devises are beyond the scope of the discussion since these matters do not arise upon probate. There may be interesting parallels between these two general categories but the latter must abide some later study.

The disparity in the holdings, or at least in the expressed attitude, of the courts as to partial probate may be seen by a comparison of two decisions selected more or less at random. In *Matter of Kent's Will*[2] the instrument presented for probate in New York had been mutilated; paragraph 6, apparently making one or more legacies, had been cut out, as had also a part of paragraph 10, the remainder of which disposed of half of the residue. It was fairly clear that the excisions had been made by the testatrix with the intent to revoke only the missing portions of the will, but since New York did not permit partial revocation by mutilation there was, as such, no revocation. The estate of $30,000 was sufficient to pay all the general legacies and leave

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[1] AMERICAN LAW OF PROPERTY secs. 14.35, 1437 (1952).

[2] 169 App. Dis. 388, 155 N.Y. Supp. 894 (1915), *reversing*, 89 Misc. 16, 152 N.Y. Supp. 557 (1915).

over half for the residue. The Surrogate found that paragraph 6 had contained legacies of $2,500 to two persons, each of whom was also named as a beneficiary of one fourth of the residue in the missing part of paragraph 10, and accordingly probated the will including the missing parts. However, the Appellate Division regarded the proof of the missing parts as insufficient and directed that if proper proof was not supplied the will minus the omissions should be probated, with the result that whatever was originally included in paragraph 6 would go into the residue and the testatrix would be deemed to have died intestate as to half of her residuary estate. The upper court declared that it was permissible to probate a part of a will, "unless it can be seen that the missing parts would affect or alter the remaining parts." Thus, while purporting to follow its rule forbidding partial revocation by physical act, the decision in effect permits it when the missing portions cannot be shown.

A recent Kansas case[3] reaches a different conclusion upon similar facts. There the will was contested by collateral heirs. The first four clauses were not dispositive and the fifth clause devised certain real property to one charity while the seventh clause left the residue of the estate to another charity. The sixth clause had been obliterated so that it could not be read. The opinion notes that it could not be assumed that the sixth clause did not affect the property passing under the residuary clause, and declared that if proof of the contents of the sixth clause could not be made the instrument should be rejected in toto since it was not the will executed by the testator.[4]

With these contrasting viewpoints in mind, it is proposed to examine the cases in each of the five principal situations wherein the problem of partial probate may arise, and then hazard a conclusion.

Manner of Execution of Will

Cases may fall in this category for several different reasons. Sometimes a will has been validly executed so far as dispositions of personal property were concerned, but not in the manner re-

[3] In re Johannes' Estate, 170 Kan. 407, 227 P. 2d 148, 24 A.L.R. 2d 507 (1951).

[4] Proof of contents of the missing portions was later made with the assistance of a laboratory technician and handwriting experts. In re Johannes' Estate, 173 Kan. 298, 245 P. 2d 979 (1952).

quired to pass land. Of course this was true under the English Statute of Wills, 1540, and the Statute of Frauds, 1677. Formerly in some American jurisdictions a larger number of witnesses were necessary for devises than for bequests, or no attestors at all were required for the latter. Even today nuncupative or informal military wills usually may dispose only of chattel interests. In all of these situations the question might arise as to whether a will purporting to pass both species of property is bad altogether, or whether it may be probated for the limited purpose of disposition of the personalty.[5] A somewhat similar problem is presented where an informal will attempts to pass property of greater value than is permitted under the statute for that type of disposition.

Some decisions in the execution cases reject the will altogether,[6] although most have upheld the will as to the permissible part.[7] However, the matter is not as simple as this count would indicate. Two of the decisions[8] which deny probate of the entire will notice the point that to establish the will in part only would, in the circumstances of the case in hand, thwart the testator's purposes rather than carry his intent partially into effect. The opinion on *Starr* v. *Starr*[9] illustrates the injustice of a result which upholds a bequest of testator's chattels to his daughter but invalidates a devise of all lands to his son. However, in other cases

[5] Until the English Court of Probate Act, 1857, 20 & 21 Vict., c. 77, sec. 62, the ecclesiastical court probate had no effect upon devises of land contained in the instrument; the latter had to be established in each proceeding at law or in equity wherein the title to land was in controversy. See Montgomery v. Clark, 2 Atk. 378, 26 Eng. Rep. 629 (1742); Starr v. Starr, 2 Root 303 (Conn. 1795). In Pennsylvania, where only charitable bequests require attestation, the entire will is probated and the validity of charitable bequests is determined on distribution. Carson's Estate, 241 Pa. 117, 88 Atl. 311 (1913); see Slater v. Moyer, 245 Pa. 60, 91 Atl. 216 (1914) (devises of land).

[6] Starr v. Starr, 2 Root 303 (Conn. 1795); Stricker v. Oldenburgh, 39 Iowa 653 (1874); see also In re Beck's Will, 142 N.J. Eq. 15, 18, 58 A. 2d 869, 871 (1948); Godman v. Godman [1920] P. 261, 287 (C.A.); Erwin v. Hamner, 27 Ala. 296 (1855); In re Beck's Will, 142 N.J. Eq. 15, 58 A. 2d 869 (1948).

[7] Brown v. United States, 65 F. 2d 65 (9th Cir. 1933); Lake v. Warner, 34 Conn. 483 (1868); In re Block's Estate, 196 So. 410 (Fla. 1940); Brown v. Avery, 63 Fla. 355, 376, 58 So. 34 (1912); Hays v. Ernest, 32 Fla. 18, 13 So. 451 (1893); Mulligan v. Leonard, 46 Iowa 692 (1877); Guthrie v. Owen, 2 Hump. 202 (Tenn. 1840); In re Davis' Will, 103 Wis. 455, 79 N.W. 761 (1899); Offutt v. Offutt, 3 B. Mon. (42 Ky.) 162, 163 (1842); Marston v. Marston, 17 N.H. 503 (1845); see Hubbard v. Hubbard, 8 N.Y. 196 (1853); Street's Heirs v. Street, 11 Leigh 498 (Va. 1841); Swann v. Weed, 274 Mass. 125, 130, 174 N.E. 314, 315 (1931).

[8] Godman v. Godman, and Starr v. Starr, *supra* note 6. Cf. Ragland v. Wagener, 142 Tex. 651, 180 S.W. 2d 435, 152 A.L.R. 1232 (1944).

[9] See note 6 *supra*.

rejecting the entire will there would have been no injustice in partial probate and doubtless the testator would have preferred this to total failure of his dispositions.[10]

Most of the cases where the will is probated in part involve only a single beneficiary, or the property is given to several persons in equal shares.[11] Surely the testator would have desired pro tanto establishment in this situation, although most of the opinions make no mention of this point.[12]

Testamentary Capacity

In an old Massachusetts case[13] a married woman's will exercised a power of appointment in the authorized manner, but her attempt to bequeath her chattels was ineffective because of coverture. The court decreed probate limited to the exercise of the power. This result was reasonable since the same person was the beneficiary as to both dispositions. Of course this particular problem cannot occur today, since the last vestiges of testamentary incapacity of married women have been swept away.

Formerly one could bequeath chattels at a younger age than was permissible for a devise of land, and this is still true in a few states. The cases are uniform in allowing the bequests when the testator met the age requirement as to disposition of personalty although the will purportedly contained devises of land which could not be upheld because of minority.[14] In none of the cases did it appear that the land and the chattels were given to different persons.[15]

It was once held in England that the testator's insane delusion was fatal to his will although it did not affect his disposition,[16]

[10] Stricker v. Oldenburgh, *supra* note 6 (only one beneficiary); *quaere* as to Erwin v. Hamner, *supra* note 6.

[11] Perhaps this can be said of all of the cases *supra* note 7, except Brown v. Avery.

[12] But see Guthrie v. Owen, *supra* note 7. In Luke v. Warner, *supra* note 7, the provisions of the will are not stated in the opinion, which indicates the rule of Starr v. Starr, *supra* note 6, has been superseded in Connecticut.

[13] Heath v. Withington, 6 Cush. (60 Mass.) 497 (1850); see also Reed v. Blaisdell, 16 N.H. 194 (1844).

[14] Deane v. Littlefield, 1 Pick. (Mass.) 239 (1822); Early v. Arnold, 119 Va. 500, 89 S.E. 900 (1916); see also Banks v. Sherrod, 52 Ala. 267 (1875) (charge of legacies on land).

[15] *Cf.* Banks v. Sherrod, *supra* note 14. In Deave v. Littlefield, *supra* note 14, the court noticed that there was a single beneficiary so that no inequality resulted.

[16] Waring v. Waring, 6 Moore P.C. 341, 13 Eng. Rep. 715 (1848).

but this view has been abandoned there.[17] In the United States it is generally agreed that if the testator's mind meets the general test for testamentary capacity, his will is not invalid because he possessed some insane delusion which did not affect the will.[18] The cases are rare which consider the problem of an insane delusion affecting part but not all of the will. An English decision denied probate of the part of the will prompted by the insane delusion,[19] and dicta in American cases recognize this possibility.[20] Of course baffling questions might arise as to just how far an insane delusion affected the provisions of the will; and it is possible, though not probable, that in particular cases it might be unfair to probate only the portions of the will not affected by the delusion.

Undue Influence, Fraud and Mistake

At the start there is a special problem in the undue influence and fraud cases. Should the misconduct of third persons invalidate devises to innocent beneficiaries although it did cause the gifts to the latter? Although the matter is none too clear, it seems that undue influence may invalidate provisions for the innocent.[21] On the other hand, the fraud cases seem to show an inclination to uphold bequests to the innocent if they can be sustained on any rational causal basis other than the fraud of third persons.[22] Perhaps the courts are applying broader causal principles in penalizing those who are guilty than they do in case of those who are

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[17] Banks v. Goodfellow, L.R. 5 Q.B. 549 (1870).

[18] Pendarvis v. Gibb, 328 Ill. 282, 159 N.E. 353 (1927), 23 ILL. L. REV. 299; In re Eveleth's Will, 177 Iowa 716, 157 N.W. 257 (1916); In re Morley's Estate, 138 Ore. 75, 5 P. 2d 92 (1931).

[19] In re Estate of Bohrmann [1938], 1 All E.R. 271, 16 Can. B.R. 405, 24 Iowa L.R. 630; see also Haddock v. Trotman, 1 Fost. & F. 31, 175 Eng. Rep. 612 (1857).

[20] Estate of Hart, 107 Cal. App. 2d 60, 236 P. 2d 884 (1951); Holmes v. Campbell College, 87 Kan. 597, 125 Pac. 25, 41 L.R.A. (N.S.) 1126 (1912); Hegarty's Appeal, 75 Pa. 503, 514 (1874). *Cf.* Randolph v. Lampkin, 90 Ky. 551, 14 S.W. 538, 10 L.R.A. 87 (1890) where the court speaks of "want of sufficient testamentary capacity" and is obviously thinking of the sort of mental defect that affects the whole will; and see Hildreth v. Hildreth, 153 Ky. 597, 156 S.W. 144 (1913).

[21] Vanvalkenberg v. Vanvalkenberg, 90 Ind. 433 (1883); In re Hanson's Estate, 169 Wash. 637, 14 P. 2d 702 (1932); *cf.* Stutiville's Ex'rs v. Wheeler, 187 Ky. 361, 219 S.W. 411 (1920), where the influence was found not to be undue. See also note 26 *infra.*

[22] See Wilkinson v. Joughin, L.R. 2 Eq. 319 (1866); Provenza v. Provenza, 201 Miss. 836, 29 So. 2d 669 (1947); Howell v. Troutman, 53 N.C. (8 Jones) 276 (1860). See *infra* notes 28-30.

not.[23] Although this point of view is not as discernable in the undue influence cases, it may be that there too an unconscious distinction is drawn.

The remainder of this section assumes situations wherein some of the gifts are considered to be due to misconduct or mistake, and others are not. Numerous opinions indicate that the parts of the will unaffected by undue influence may be upheld although the tainted part is rejected.[24] Some of these decisions qualify the rule with the proposition that the gifts must be separable,[25] and in at least one case they were considered to be inseparable with the result that the entire will is invalid if undue influence is shown.[26] Moreover, in Illinois and Missouri it is held that upon trial of the statutory issue of "will or no will" the entire instrument must be denied probate, apparently regardless of whether the provisions are separable.[27]

An English case rejected a bequest to a woman who fraudulently misrepresented herself to be a widow and hence free to marry the testator, but upheld a legacy to her child by her lawful husband who was still living.[28] The American cases hold that the unaffected part of the will may be probated although the defrauder is denied the fruits of his schemes.[29] One case mentions

[23] See Wilkinson v. Joughin, *supra* note 22.

[24] Zeigler v. Coffin, 219 Ala. 586, 123 So. 22, 63 A.L.R. 942 (1929); Hyatt v. Wroten, 184 Ark. 847, 43 S.W. 2d 726 (1931); Snodgrass v. Smith, 42 Colo. 60, 94 Pac. 312, 15 Ann. Cas. 548 (1908); Pepin v. Ryan, 133 Conn. 12, 47 A. 2d 846 (1946); In re Ankeny's Estate, 238 Iowa 754, 28 N.W. 2d 414 (1947); Wellman v. Carter, 286 Mass. 237, 190 N.E. 493 (1934); In re George's Estate, 144 Neb. 887, 15 N.W. 2d 80 (1944); Matter of Maguire, 105 Misc. 433, 173 N.Y. Supp. 392 (1918); In re Koller's Estate, 116 Neb. 764, 219 N.W. 4 (1928); Sumner v. Staton, 151 N.C. 198, 65 S.E. 902 (1909); Carothers' Estate, 300 Pa. 185, 150 Atl. 585 (69 A.L.R. 1127 (1930)). See also Shelton v. Gordon, 252 Ala. 187, 40 So. 2d 95 (1949).

[25] Hyatt v. Wroten, Ankeny's Estate, Wellman v. Carter, Matter of Maguire, Carothers' Estate, all *supra* note 24. See also Walker v. Irby, 238 S.W. 844 (Tex. Com. App. 1922).

[26] In re George's Estate, *supra* note 24. See also In re Kelly's Estate, 150 Ore. 598, 46 P. 2d 84 (1935); In re Dand's Estate, 41 Wash. 2d 158, 247 P. 2d 1016 (1952); *supra* note 21.

[27] Snyder v. Steele, 304 Ill. 387, 136 N.E. 649, 28 A.L.R. 1 (1922), 32 YALE L. J. 294; McCarthy v. Fidelity Nat. Bank & T. Co., 325 Mo. 727, 30 S.W. 2d 19, 69 A.L.R. 1122 (1930), 16 IOWA L. REV. 119 (1930); see In re Dand's Estate, *supra* note 26.

[28] Wilkinson v. Joughin, *supra* note 22. The court considered that the gift to the child might have been prompted by affection, regardless of the fact that testator was not legally married to the mother. *Cf.* In re Rosenberg's Estate, 196 Ore. 219, 246 P. 2d 858 (1952).

[29] In re Carson's Estate, 184 Cal. 437, 194 Pac. 5, 17 A.L.R. 239 (1920); In re Hollis' Estate, 234 Iowa 761, 12 N.W. 2d 576 (1944); O'Connell v. Dowd, 182 Mass. 541, 66 N.E. 788 (1903); Black v. Smith, 58 N.D. 109, 224 N.W. 915

the necessity of separability in order to probate part of the will.[30]

Mistake in the inducement, in the absence of fraud, is not ground for attacking a will unless it appears on the face of the instrument what the testator would have desired but for the mistake.[31] It is extremely unlikely that a case involving the possibility of partial probate will arise on account of a mistake of this nature.

It is commonly held that an entire will cannot be contested for a mistaken description or scrivener's error,[32] although the matter can sometimes be put aright in the process of construction.[33] One American decision had adjudged partial probate on the ground of mistake in the preparation of the will.[34] In that case the testator devised his realty to one person and his personalty to another; but it was shown that he considered certain leasehold premises to be real property. After a great deal of difficulty it was held that the bequest of personalty was not the will of the testator as to the leasehold, and hence the latter was excepted from the probate. There is no reason why an entire devise or bequest cannot be denied probate upon proof that it was inserted by mistake.[35] Indeed English practice goes way beyond this and freely permits restrictive words inserted by mistake to be stricken on probate although this has the effect of increasing the gift.[36]

(1929). See also In re Holmes' Estate, 98 Colo. 360, 56 P. 2d 1333 (1936); Matter of Maguire and In re Koller's Estate, both *supra* note 18, Ogden v. Greenleaf, 143 Mass. 349, 9 N.E. 745 (1887); In re Dand's Estate, *supra* note 26, 41 Wash. 2d 158, 247 P. 2d 1016 (1952). As to the distinction between fraud and undue influence, see In re Estate of Newhall, 190 Cal. 709, 214 Pac. 231, 28 A.L.R. 778 (1923).

[30] In re Carson's Estate, *supra* note 22.

[31] Martindale v. Bridgforth, 210 Ala. 565, 98 So. 800 (1924); Matter of Tousey, 34 Misc. 363, 69 N.Y. Supp 846 (1901); Gifford v. Dyer, 2 R.I. 99 (1852).

[32] Campbell v. Campbell, 138 Ill. 612, 28 N.E. 1080 (1891); Ex parte King, 132 S.C. 63, 128 S.E. 850 (1925). But see In re Kempthorne's Estate, 188 Iowa 70, 175 N.W. 857 (1920).

[33] Campbell v. Campbell and Ex parte King, both *supra* note 32. See Sherwood v. Sherwood, 45 Wis. 357 (1878); Matter of Smith, 254 N.Y. 283, 172 N.E. 499, 72 A.L.R. 867 (1930) (mistake as to extent of revocation clause); *cf.* Mahoney v. Grainger, 283 Mass. 189, 186 N.E. 86 (1933), 19 CORN. L. Q. 154 (1933) (mistake as to legal meaning).

[34] Burger v. Hill, 1 Bradf. 360 (N.Y. 1850), and see Hill v. Burger, 10 How. Prac. 264 (N.Y. 1854); see Will of Nadal, 2 Hawaii 400 (1861).

[35] In re Swartz's Will, 79 Misc. 388, 139 N.Y. Supp. 1105 (1913); *cf.* In re Graber's Will, 5 N.Y. Supp. 197 (1889).

[36] Morrell v. Morrell, L.R. 7 P.D. 68 (1882); *cf.* Goods of Duane, 2 Sw. & Tr. 590, 164 Eng. Rep. 1127 (1862).

In the United States this result can only be reached upon construction and in a much more limited sphere.[37]

Missing Parts of Lost Will

In a majority of states the testator may revoke a part of his will by mutilation of the part with revocatory intent.[38] Here it is clear that the remainder of the will may be admitted to probate if there was no intent to revoke the entire instrument, since the original will minus the revoked portions constitutes the will at the time of the testator's death.[39] In other states this manner of partial revocation is not permitted.[40] Hence if the provision intended to be revoked is discernable on the face of the instrument,[41] or proof of its contents can be supplied[42] the will as originally executed should be admitted to probate. If parts are missing and their contents cannot be proved the problem of partial probate is presented if the jurisdiction does not allow partial revocation. The same is true in any jurisdiction when a portion of the will is missing for some other reason than that involving revocatory intent,[43] and perhaps also in the cases where it cannot be ascertained whether modifications or interlineations were made before or after execution.[44]

A line of New York cases holds that the remaining parts of the will should be probated when the testator intended to revoke

[37] Matter of Mills, 195 Misc. 104, 89 N.Y.S. 2d 201 (1949) (and/or). One of the most striking American cases is Matter of Smith, 254 N.Y. 283, 172 N.E. 490, 72 A.L.R. 867 (1930); and see generally Evans, *Irregularities of Testamentary Expression*, 27 KY. L.J. 241 (1939).

[38] See Birdwell, *Statute Law of Wills*, 14 IOWA L. REV. 1, 290 (1929).

[39] Meredith v. Meredith, 5 W. W. Harr. (Del.) 35, 157 Atl. 202 (1931); In re Fox's Estate, 192 Mich. 699, 159 N.W. 332 (1916); In re Sheaffer's Estate, 240 Pa. 83, 87 Atl. 577 (1913); In re Appleton's Estate, 163 Wash. 632, 2 P. 2d 71 (1931).

[40] Board of National Missions, etc. v. Sherry, 372 Ill. 272, 23 N.E. 2d 730 (1939); Lovell v. Quitman, 88 N.Y. 377 (1882) (a close reading of the statute is necessary to ascertain that it does not authorize partial revocation by act).

[41] Lovell v. Quitman, 88 N.Y. 377 (1882); see Board of National Missions, etc. v. Sherry, 372 Ill. 272, 23 N.E. 2d 730 (1939).

[42] Hartz v. Sobel, 136 Ga. 565, 71 S.E. 995 (1911); In re Callahan's estate, 403 Ill. 436, 86 N.E. 2d 250 (1949).

[43] See Cutler v. Cutler, 130 N.C. 1, 40 S.E. 689, 57 L.R.A. 209 (1902) (partial destruction by vermin).

[44] Matter of Hamlin's Will, 124 Misc. 847, 208 N.Y. Supp. 799 (1925) (entire will rejected); In re Ayres' Estate, 141 Misc. 236, 252 N.Y. Supp. 482 (1931) (two small affected items omitted from probate); see In re Rockett's Estate, 348 Pa. 445, 35 A. 2d 303 (1944).

only the missing parts.[45] The result is reached without much consideration as to the effect that the missing parts might have had on the remainder.[46] Likewise there is little concern over the fact that the outcome is to allow partial revocation which in theory is forbidden. Cases in other jurisdictions reject the entire will upon the ground that the part offered is not the will as executed by the testator,[47] although one of them is concerned with the extent to which the missing parts might have affected the remainder.[48]

Lost Will Partially Proved

When the will is missing at the testator's death the proponents are usually confronted with a presumption of revocation if the instrument had been in his possession.[49] If the circumstances are such as do not give rise to the presumption, or if it is overcome, there are obstacles in some jurisdictions by way of statutes forbidding probate unless the will was destroyed after testator's death or was fraudulently destroyed in his lifetime.[50] Finally the proponent must supply the quantum of admissible proof necessary to establish a lost will, usually described as "clear and convincing" or by words of similar import.[51] If the proponent clears

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[45] In re Kent's Will, 169 App. Div. 388, 155 N.Y. Supp. 894 (1915), see *supra* text at note 2; In re Fox's Will, 118 Misc. 352, 193 N.Y. Supp. 232 (1922); In re Bescher's Estate, 132 Misc. 625, 229 N.Y. Supp., 821 (1928); In re Enright's Will, 139 Misc. 192, 248 N.Y. Supp. 707 (1931) (construction); In re Lyon's Will, 75 N.Y.S. 2d 237 (1947); In re Ross' Will, 107 N.Y.S. 2d 185 (1951); In re O'Reilly's Will, 109 N.Y.S. 2d 437 (1951).

[46] See cases *supra* note 45; also In re Schell's Will, 272 App. Div. 210, 70 N.Y.S. 2d 441 as discussed in 1950-1951 Survey of N.Y. Law in 26 N.Y.U.L. REV. 960-964 (1951). But see In re Curtis' Will, 135 App. Div. 745, 119 N.Y. Supp. 1004 (1909); In re Daniel's Estate, 147 Misc. 541, 265 N.Y. Supp. 663 (1933) (entire will rejected); see also *supra* note 44.

[47] Henry v. Fraser, 58 App. D.C. 260, 29 F. 2d 633, 62 A.L.R. 1364 (1928); In re Ainscow's Purported Will, 41 Del. (2 Ter.) 148, 17 A. 2d 227 (1940); In re Ainscow's Will, 42 Del. (3 Ter.) 3, 27 A. 2d 363 (1942); In re Johannes' Estate, 170 Kan. 407, 227 P. 2d 148, 24 A.L.R. 2d 507 (1951).

[48] In re Johannes' Estate, *supra* note 47, see also text at note 4 *supra*.

[49] See White v. Brennan, 307 Ky. 776, 212 S.W. 2d 299, 3 A.L.R. 2d 943 (1948).

[50] See In re Arbuckle's Estate, 98 Cal. App. 2d 562, 220 P. 2d 950, 23 A.L.R. 2d 372 (1950); Estate of Havel, 156 Minn. 253, 194 N.W. 633, 34 A.L.R. 1300 (1923); In re Kerckhof's Estate, 13 Wash. 2d 469, 125 P. 2d 284 (1942); notes, 39 CAL. L. REV. 156 (1951); 32 CAL. L. REV. 221 (1944); 41 MICH. L. REV. 358 (1942).

[51] See annotation, 148 A.L.R. 400 (1944). The most important problem of manner of proof is well discussed in Sparks, *Admissibility of Oral Declarations of a Testator to Prove a Lost Will in Kentucky*, 36 KY. L. J. 431 (1948).

all of these hurdles and establishes all of the contents of the will, it is entitled to probate.

What if it is possible to establish the contents in part only? Unlike the topic discussed immediately above this question can readily occur in any jurisdiction. The problems are substantially the same. The only difference is a practical one; in the partial revocation cases the court has part of the will before it in its original form and is therefore more sure of its ground than in the lost will cases where all of the evidence is secondary.[52]

A number of cases have probated portions of a lost will when the remainder could not be proved.[53] However, two strong American decisions have rejected the entire will.[54] They were motivated by fears that, under the circumstances, probate of part would defeat testator's intent rather than carry it partially into effect. If these opinions are considered in connection with the limitations indicated in the decisions allowing probate of part of a lost will,[55] and with the doubts expressed by the House of Lords[56] concerning the probate of the residuary clause when the remainder is not proved, the weight of judicial reasoning is clearly opposed to the admission of a part of a lost will on a mere mechanical basis.

Writing generally upon the subject of lost wills, Dean Alvin E. Evans considered briefly the subject of partial probate.[57] In connection with the situation where the residuary clause alone is proved he said:

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[52] See text at note 68 *infra*.

[53] Sugden v. Lord St. Leonards, L.R. 1 P.D. 154 (1876) (residue and most other provisions established—see note 56 *infra*); Skeggs v. Horton, 82 Ala. 352, 2 So. 110 (1886) (name of legatee of $500 not shown—does not decide whether this passes into the residue); In re Patterson's Estate, 155 Cal. 626, 102 Pac. 941 (1909) (any substantial part, complete in itself, may be shown); Jones v. Cosler, 139 Ind. 382, 38 N.E. 812 (1894) (destroyer cannot object to probate of part proved); Steele v. Price, 44 Ky. (5 B. Mon.) 58 (1944) (principal devisees shown though some minor ones are not); Preston v. Preston, 149 Md. 498, 132 Atl. 55 (1926) (allowed although some small items not proved); Tarbell v. Forbes, 177 Mass. 238, 58 N.E. 873 (1900) (same); Jackson v. Jackson, 4 Mo. 211 (1835); Dickey v. Malechi, 6 Mo. 177 (1839). See also Creek v. Laski, 248 Mich. 425, 227 N.W. 817, 65 A.L.R. 1113 (1929) (tort action by a single legatee for spoliation of will).

[54] Butler v. Butler, 5 Har. (Del.) 178 (1849); Davis v. Sigourney, 8 Metc. (Mass.) 487 (1844); see Brackenridge v. Roberts, 114 Tex. 418, 270 S.W. 1001 (1925), and *infra* note 56.

[55] See Skeggs v. Horton, Jones v. Cosler, Steele v. Price, Preston v. Preston, Tarbell v. Forbes, *supra* note 53.

[56] Woodward v. Goulstone, L.R. 11 App. Cas. 469 (1886) (residue only shown).

[57] Evans, *The Probate of Lost Wills*, 24 NEB. L. REV. 283, 289-290 (1945).

> If it [the residuary clause] throws a large estate into the hands of non-heirs, the result seems undesirable. . . . But since there is no way to know what the testator would desire in the situation, it seems better to let the property pass under the statute of descent and distribution. . . . The better rule, then, would be to hold that the testator died intestate under the circumstances, unless enough is known to indicate that this consequence would not be fantastic.

The residuary clause is flexible enough so as to catch dispositions which fail because of partial revocation,[58] ademption,[59] lapse,[60] or renunciation.[61] In these cases the testator's actual desire that the residue be swelled is often no more apparent than when the partial failure of his will is due to testamentary incapacity, undue influence, fraud or mistake. Is there any reason why the gifts failing for the first group of reasons should go into the residue while those ineffective for the second set of causes pass under the intestate laws? True, in case of the latter the gift is bad ab initio, but the same is true of the void bequest which is treated like one which lapsed.[62] True again, objections in the latter group are raised at probate, but partial revocation is also adjudicated at that stage.

When there is loss of evidence of a non-residual gift it is not ordinarily[63] possible to declare that the lost disposition should pass as intestate property and to sustain the will otherwise, including the residuary clause. Here the only alternatives are to

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[58] Bigelow v. Gillott, 123 Mass. 102 (1877); Brown v. Brown. 91 S.C. 101, 74 S.E. 135 (1911); but see Miles' Appeal, 68 Conn. 237, 36 Atl. 39 (1896). However, the striking of words cannot have the effect of inserting a new beneficiary. Eschbock v. Collins, 61 Md. 478 (1883); Nelen v. Nelen, 52 R.I. 354, 161 Atl. 121 (1932). Nor may the striking increase a nonresidual gift. Pringle v. M'Pherson, 2 Brev. (S.C.) 279 (1809); *cf.* Larkins v. Larkins, 3 Bos. & P. 16, 127 Eng. Rep. 10 (1802).

[59] First National Bank of Boston v. Perkins Institute for the Blind, 275 Mass. 498, 176 N.E. 532 (1931).

[60] In re Boyle's Estate, 121 Colo. 599, 221 P. 2d 357 (1950), s.c., 123 Colo. 448, 231 P. 2d 465 (1951). See also Bridgeport Trust Co. v. Parker, 97 Conn. 245, 116 Atl. 182 (1922) (void legacy, but void devise passes to heirs).

[61] Albany Hospital v. Albany Guardian Society, 214 N.Y. 435, 108 N.E. 812 (1915).

[62] See note 60 *supra*.

[63] In Skeggs v. Horton, 82 Ala. 352, 2 So. 110 (1886) the contents of a lost will were established except that the name of the recipient of a $500 legacy was unknown. The court admitted the remainder of the will but declined to pass upon the question of whether this passed into the residue or became intestate property, although the court rather indicated preference for the latter result since the testator did not intend the residuary legatee to have this money. But cannot the same be said in case of lapse?

permit everything not otherwise established to pass under the residuary clause, or to reject the will altogether. While it has never been seriously contended that the entire will fails because of ademption, lapse or renunciation of part, we know that probate is sometimes denied in toto because objections which are raised at the probate stage go only to part of the will. If it were a new proposition we could argue for uniform treatment in all cases where there must be either partial or total failure of the will. It is too late to make this contention, but it is not too late to assert that there need not be total rejection of the lost will in every case where it is possible to probate part of it.

Conclusion

It seems unsound to deny partial probate upon the ground that part of the instrument is not "the will" of the testator. This is just a way of saying that he cannot be allowed half—or nine-tenths—of a loaf if the law cannot give him the whole. "Will or no will" should refer to the finality of the adjudication, rather than to the intended extent of the testamentary disposition. Statutory language describing the issue involved in will contests[64] need not be construed to require a finding of "the will, the whole will and nothing but the will."

However, as many of the cases indicate, there must be limitations to allowance of partial probate. These have been described in various ways—that the probated part must be separable from that which is not probated, that partial probate should not work injustice upon the objects of the testator's bounty, nor disrupt his scheme of distribution. Usually these boil down to a consideration of whether the testator would probably have preferred partial probate to total intestacy. This seems to be what Dean Evans had in mind in considering the narrower problem of probate of the residuary clause of a lost will otherwise unproved. This approach seems appropriate to the whole problem of partial probate.

The suggested technique, that of determining whether or not the testator would probably have preferred total intestacy or partial probate, is essentially one employed in will construction cases, particularly where the testator did not actually contemplate

[64] See note 27 *supra.*

the situation which existed at his death so that resort must be made to the rules of construction.[65] It is likewise the test which the court should employ in deciding whether to apply or reject the doctrine of dependent relative revocation.[66] In cases where the will partly fails on account of incapacity, undue influence, fraud or mistake the entire contents of the will is known so that in the light of the circumstances surrounding the testator the court can usually form an intelligent conclusion as to whether the testator would have preferred partial probate to total intestacy. As a practical matter the same is true if a will partially fails because of insufficient execution, although here there is perhaps a bit of a question as to whether the terms and extent of the ineffective gift are known from a permissible source. Even if it is considered that the ineffective gift is not demonstrated from the instrument *as a will,* there is at least a declaration of intention[67] with a very considerable cogency, and one which can scarcely be disregarded by the judicial mind.

The case for partial probate is not as strong when part of the will fails for lack of evidence. Pertinent data are missing which are present in the situations discussed immediately above. Still the appearance of the part produced often gives a clue as to what, in a general way, was in the missing part. Even when the entire will is lost, the contents which are proved, together with evidence of the testator's surrounding circumstances, may enable the court to find that the testator would have preferred partial probate. Again, evidence of what the missing parts contained, although insufficient for their inclusion in the probated instrument or even inadmissible for that purpose,[68] may be considered upon the

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[65] See ATKINSON ON WILLS, sec. 146 (1953).

[66] See Warren, *Dependent Relative Revocation,* 33 HARV. L. REV. 337, 345 (1920). Surrogate Foley criticized the procedure of having such matters turn upon speculation as to what the testator would have intended. Matter of McCaffrey, 174 Misc. 162, 20 N.Y.S. 2d 178 (1940). But this inquiry is made every day in the process of construction of wills.

The doctrine of dependent relative revocation has been applied in case the contents of the lost revoking will cannot be established. Estate of Thompson, 185 Cal. 763, 198 Pac. 795 (1921); *cf.* Bell v. Timmins, 190 Va. 648, 58 S.E. 2d 55 (1950); but see In re Cunningham, 38 Minn. 169, 36 N.W. 269 (1888).

[67] In Shattuck v. Fagan, 337 Mich. 83, 59 N.W. 2d 96 (1953) the court went to the extent of referring to a prior will entirely invalid for want of execution, for the purpose of measuring the extent of the disposition in the probated will. This seems unsound. See 29 N.Y.U.L. REV. 883-885 (1954).

[68] See text following note 2 *supra.*

issue of whether the testator would have desired partial probate rather than total failure of the will.

The burden should be upon the proponent to establish his case for partial probate, and naturally he will be more apt to fail where whole or part of the will is missing. Even in that case, however, it should be enough to show reasonable probabilities as to whether the testator would have preferred probate of the part that can be established to total intestacy. Probably no more of a showing should be necessary than in making out intent in the will construction cases.