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WILLS-VALIDITY OF ATTESTATION ON SEPARATE SHEET OF PAPER NOT PHYSICALLY ATTACHED TO WILL

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WILLS—VALIDITY OF ATTESTATION ON SEPARATE SHEET OF PAPER NOT PHYSICALLY ATTACHED TO WILL—Testatrix drew an instrument consisting of a single sheet of paper, intending it as her will. In the presence of a notary public, three witnesses observed the instrument with testatrix' signature thereon and her acknowledgment of it as her will, but did not sign it. The document was then placed in an envelope. A separate instrument of attestation which referred to the will was prepared by the notary and signed by the testatrix and the attesting witnesses. This instrument and the envelope containing the will were both placed in another folder which was then deposited with the proper officials. Probate was contested on the basis that the Alabama statute,[1] requiring at least two witnesses not only to attest the execution of the instrument but also to subscribe their names "thereto," was not satisfied. *Held*, the attestation was a part of the will itself and sufficient under the statute. *Johnston v. King*, (Ala. 1948) 35 S. (2d) 202.

There is practically no dissent from the proposition that a will may be valid although written on several separate sheets of paper.[2] In determining the acceptability of several sheets as a will, the test most frequently applied allows probate if it can be shown by extrinsic evidence that all the sheets comprising the will were in the same room at the time of execution and were intended by the testator as parts of his will.[3] A second rule requires that the sheets be connected in their internal sense, by coherence or adaptation of the various parts, and that this evidence be contained in the papers themselves.[4] A more liberal variation of this view, however, permits parol evidence where it is necessary to establish the required internal connection.[5] A few courts have adopted a third rule, holding it sufficient if the sheets are physically attached at the time of execution.[6] Adopting the second approach, the court in the principal case finds the reference made to the will in the attestation a sufficient connection to render the two papers one instrument. There is, however, some authority for the proposition that the attestation of the witnesses, if not on the same sheet of paper as the testator's signature, must be on a paper physically connected with that sheet, regardless of internal connection in meaning.[7] It is submitted that the court in the principal case is

right of action cannot be frustrated for reasons of convenience or expense. If it is deemed unjust, the remedy is legislative. . . ." See also the concurring opinion of Justice Jackson in Miles v. Illinois Central R. Co., 315 U.S. 698 at 705, 62 S.Ct. 827 (1942).

[1] Ala. Code Ann. (1941) tit. 61, § 24.

[2] 1 PAGE, WILLS, § 242 (1941); ATKINSON, WILLS, § 139 (1937); 29 MICH. L. REV. 266 (1930).

[3] Bond v. Seawell, 3 Burr. 1773, 97 Eng. Rep. 1092 (1765); Harp v. Parr, 168 Ill. 459, 48 N.E. 113 (1897); Palmer v. Owen, 229 Ill. 115, 82 N.E. 275 (1907); Stege's Estate, 161 Misc. 667, 293 N.Y.S. 856 (1937).

[4] Maginn's Estate, 278 Pa. 89, 122 A. 264 (1923); In re Swaim's Will, 162 N.C. 213, 78 S.E. 72 (1913); 30 A.L.R. 424 (1924); 71 A.L.R. 530 (1931).

[5] Re Sleeper, 129 Me. 194, 151 A. 150 (1930); 71 A.L.R. 530 (1931).

[6] Matter of Field, 204 N.Y. 448, 97 N.E. 881 (1912); Moro's Estate, 183 Cal. 29, 190 P. 168 (1920).

[7] 1 PAGE, WILLS, § 370 (1941); 68 C.J., Wills, § 381(3); 57 AM. JUR., Wills, § 347; Shane v. Wooley, 138 Md. 75, 113 A. 652 (1921); 10 A.L.R. 429 (1921).

correct in refusing to require such physical attachment, even though one of the several sheets bore only an attestation and did not include in addition some other portion of the will. The tests in most jurisdictions for accepting loose sheets as comprising the body of a will are so liberal that the possibilities of fraud are not materially lessened by a requirement that the testator's and witnesses' signatures appear on the same or physically connected sheets. In addition, the mere possibility of fraud and substitution of pages is not sufficient to justify denying admission of a will to probate.[8] To avoid the harsh results of strict application of the doctrine requiring physical attachment of an independent attestation clause, the Mississippi court held that folding the sheet bearing the attestation together with another bearing the testator's signature constituted a sufficient physical connection.[9] Although the principal case cites that decision as supporting its result in upholding the will, the rule adopted by the Alabama court to reach this conclusion would seem to be superior.

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While in the principal case the testatrix signed the attestation, it was not intended as her subscription to the will.

[8] Palmer v. Owen, 229 Ill. 115, 82 N.E. 275 (1907).

[9] Bolton v. Bolton, 107 Miss. 84, 64 S. 967 (1914); 10 A.L.R. 429 (1921).