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WILLS-HOLOGRAPHIC-EVIDENCE AS TO TESTAMENTARY INTENT

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WILLS—HOLOGRAPHIC—EVIDENCE AS TO TESTAMENTARY INTENT—The deceased had in her possession, at the time of her death, an envelope entitled "Will of Ella McNair." The envelope contained three separate sheets of paper dated some nineteen months prior to Ella's death, upon which was written, entirely in the hand of the deceased, what purported to be a will. The document opened with the statement "I, Ella McNair . . . do hereby make my last will." The exordium was followed by fifteen specific bequests, and then the writing ended abruptly at the middle of the back of the third sheet. At the top of the second sheet was written "Will of Ella McNair," and "Will. Ella McNair" was at the top of the third.

Ella had, with a few exceptions, followed the form of a holographic will provided by her attorney. She had omitted the clause revoking prior wills, the clause appointing an executor, and her signature. There was evidence that before and during Ella's final visit to the hospital, the instrument in question was not regarded by her as her will, and that she was planning to draw up a new one. The will was admitted to the probate,[1] and the contestants appealed. *Held,* affirmed, two justices dissenting. "Taking into account the general appearance of the writing, the language and phraseology employed therein, . . . we are constrained to hold that there was, at least in the mind of Mrs. McNair, a document before her sufficiently complete to induce her to affix her name thereon [referring to the inscription 'Will. Ella McNair' at the top of the third page] in token of execution of the same as her will."[2] *In re McNair's Estate,* (S.D. 1949) 38 N.W. (2d) 449.

The majority dealt with the extrinsic evidence that Ella had not considered the document as her will by quoting the following rule from the earlier South Dakota case of *In re Brandow's Estate:*[3] "The only evidence that will warrant the conclusion that a holographic will is a complete and executed document must be found in and on the instrument itself."[4] On the basis of this, and similar statements made by other courts,[5] the majority refused to consider the extrinsic evidence, and looked to the document alone in making its decision. It seems that the court was mistaken in its application of the rule of the *Brandow* case, for the contestant should always be allowed to prove lack of testamentary intent.[6] The rule of the *Brandow* case was designed to solve a problem peculiar to holographic wills. In such wills, since there is less chance that a spurious document will be foisted on the court, the usual strict requirements of execution are lacking. Because of this informality, equivocal and incomplete documents often find their way into court, while their typewritten counterparts would be rejected at first glance. The question of testamentary intent becomes acute when the document offered has not been signed at the end, for then, even the most credulous will question whether the maker considered the instrument finished.[7] Many courts have sought to avoid this difficulty by adopting rules similar to that of the *Brandow* case.[8] In so doing they have placed on the proponent of a holographic will the burden of presenting an instrument sufficiently clear on its face to show the

[1] S.D. Code (1939) §56.0210: "every will, other than an olographic will . . . must be subscribed at the end thereof. . . ."

[2] Principal case at 456.

[3] 59 S.D. 364, 240 N.W. 323 (1932).

[4] Id. at 365.

[5] In re Morgan's Estate, 200 Cal. 400, 253 P. 702 (1927); Dinning v. Dinning, 102 Va. 467, 46 S.E. 473 (1904).

[6] 68 C.J., Wills, §225.

[7] In re Manchester, 174 Cal. 417, 163 P. 358 (1917).

[8] See annotation in 29 A.L.R. 894 (1924).

maker's testamentary intent. The rule, however, was not meant to deprive the contestants of their right to prove lack of such intent. By applying the rule so as to exclude contestant's evidence, the court gave the proponents an advantage not intended by the *Brandow* decision.[9]

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[9] A similar argument was made by Sickels, J., dissenting at p. 457. Mechem, "The Rule in Lemayne v. Stanley," 29 MICH. L. REV. 685 (1931) contains a comprehensive discussion of the general problem raised by the principal case.