

"End" of a Will in New York

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In any question arising from a condition in restraint of marriage, there is a balancing of two opposing interests—the desire of the courts to give effect to the testator's wishes as expressed in his will, and the desire of the courts to uphold the public policy of the state. In view of the onslaughts made on the common law doctrine in regard to these conditions by both the legislature and the courts, the intention of the testator has been reduced to a secondary position. The courts, freed from the necessity of giving lip-service to outmoded and antiquated legalisms, have torn aside the veil of technicalities and regarded the problem afresh. If, in the final analysis, the condition is one which tends to restrain all marriage, or is unreasonable, the testator will not be permitted, by the use of technical language, to indirectly achieve the result which he could not achieve directly. Nor can it be doubted that it is better, in the long run, to sacrifice the intentions of individual testators to the interests of uniformity and public policy.

ROSE M. TRAPANI.

“END” OF A WILL IN NEW YORK.

Miss Emma, a spinster, wishes to make a will. She buys a blank will form from her corner stationery store, and, being satisfied that the printed matter is in nice, technical, legal language, she starts to fill it out in her own handwriting. This will form consists of one sheet of paper, so folded on the left as to make four pages. The formal opening is on the first page, and the formal termination is on the second page, leaving the third and fourth pages blank. There is a blank space of a few inches on the first page for the dispositive provisions of her will. But there is not enough room for all the bequests she wishes to make. And seeing there is no space above the formal termination on the second page, Miss Emma continues and concludes her bequests on the third page, still in her own handwriting. In thus carrying over from the first to the third page, she has followed the method employed by many people in writing informal letters. She then calls in two of her neighbors, declares to them that the document is her will, signs her name in the proper place on the second page, and asks them to subscribe their names below the attestation clause, which they do. Miss Emma dies a short time later, and the will is presented to the surrogate for probate. Should the surrogate admit the will to probate?¹

It is easy enough to say that she should have sought the advice of her attorney, but she no longer is in a position to remedy her mis-

¹ These are substantially the facts in *Matter of Golden*, 165 Misc. 205, 300 N. Y. Supp. 737 (1937), *aff'd*, 253 App. Div. 919, 3 N. Y. S. (2d) 886 (2d Dept. 1938). In that case, it was held that the will was subscribed at the literary end and, therefore, entitled to probate.

take. So it falls upon the surrogate to attempt to reconcile her will with the requirements of the statute. Section 21 of the Decedent Estate Law² decrees that every will must be "subscribed at the end" by the testator and two or more witnesses. The purpose of the statute is to minimize the danger of probating a document which decedent never intended to be his last will. Since decedent cannot be present to testify, the instrument must testify for him. His subscription is to vouch for the fact that decedent put his final seal of approval on the document, thus authenticating it as the final draft of his intended will.³ The main purpose of the statute, however, is to prevent possible tampering with the executed will, and to deny the probate of any provisions which were fraudulently added after its execution.⁴ In this case, there is no doubt that Miss Emma intended the instrument to be her last will and testament, and there is not the slightest possibility of any fraudulent additions, since it was proven to be in testatrix's own handwriting. Therefore, the fact that she signed on the second page does not violate the spirit of the statute. But does it violate its letter? In interpreting Section 21 of the Decedent Estate Law, it is the intent of the legislature and not the intent of decedent which governs.⁵ But what did the legislature mean when it used the word "end"? In other words, what is the "end" of a will in New York?

Physical End v. Literary End.

This may seem a very simple question. The end is the end; there is nothing more definite than that. It is probable that the legislature itself, when it passed the Decedent Estate Law over a hundred years ago, did not foresee any difficulty arising over the point. But the fact remains that two theories as to its interpretation have been formulated. The *physical end theory* states that the will must be subscribed at that place which, in point of space, is actually and physically farthest removed from the beginning of the will; in other words, the last page in the proper order of pagination.⁶ For example, if Miss Emma had signed at the foot of the third page, instead of on the second, there would be no doubt that she signed at the physical

² "Every last will and testament of real or personal property, or both, shall be executed and attested in the following manner:

"1. It shall be subscribed by the testator at the end of the will.

* * *

"4. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness, at the end of the will, at the request of the testator."

³ *Tonnele v. Hall*, 4 N. Y. 140 (1850).

⁴ *Sisters of Charity v. Kelly*, 67 N. Y. 409 (1876); 1 DAVIDS, NEW YORK LAW OF WILLS (1924) § 287; 1 JESSUP-REDFIELD, LAW AND PRACTICE IN THE SURROGATE'S COURT (1930) § 280.

⁵ 7 HEATON, SURROGATES COURTS (1934) § 229.

⁶ *Matter of Andrews*, 162 N. Y. 1, 56 N. E. 529 (1900); 1 DAVIDS, *op. cit. supra* note 4, at § 289.

end. The *literary end theory*⁷ is best described in the words of Surrogate Hetherington of Queens: "A will is not a sheet of paper, nor a number of sheets or pages; it is the words written thereon. The law affords the right of testamentary disposition; such disposition is to be gathered from language; hence, the end of the language, not the paper on which it is written, is the only appropriate interpretation to be given the wording of the statute."⁸ A great majority of the states in which a will must be signed at the end, adhere to this theory.⁹ But, unfortunately, the Court of Appeals has not as yet seen fit to agree that the literary end is the "only appropriate interpretation" of the statute. In fact, until 1912 when *Matter of Field*¹⁰ was decided, the Court of Appeals strictly adhered to the physical end theory.

*Sisters of Charity v. Kelly*¹¹ was one of the earliest cases in which the Court of Appeals adopted the strict view; but it came as mere *dicta*, since the will had already been declared invalid for the reason that the signature had not been acknowledged. Actually, the testator signed in two places. He signed once in the attestation clause, which signature was declared ineffective because it was put there after the witnesses had already signed, and because it was not shown to have been intended as a subscription. The other signature is the one in which we are interested. It appeared in his own handwriting as follows:

"Likewise I make, constitute, and appoint Edward McCarthy to be executor (*J. Kelly*) of this my last will and testament, hereby revoking all former wills by me made."

No other material provisions followed this paragraph. We have seen that this signature was not acknowledged. However, the court went on to say that the will was not signed at the physical end, since two material provisions followed the signature. It is doubtful whether the court would so hold today. In the first place, the clause appointing the executor cannot properly be said to follow the signature. Secondly, a clause revoking all prior wills becomes immaterial when the will purports to dispose of all of the testator's estate.¹² As a result, it would seem that today it might be held that the signature was at the physical end.

A number of subsequent cases, however, adopted the law and reasoning of the *dicta* in the *Sisters of Charity* case, and thus confirmed the physical end theory as the law of New York.¹³ This

⁷ Other titles that have been applied to this theory are "constructive", "speaking" and "logical" end theory.

⁸ *Matter of Golden*, 165 Misc. 205, 206, 300 N. Y. Supp. 737, 738 (1937).

⁹ 68 C. J. (1934) p. 663, § 297; THOMPSON, WILLS (2d ed. 1928) § 112.

¹⁰ 204 N. Y. 448, 97 N. E. 881 (1912).

¹¹ 67 N. Y. 409 (1876).

¹² *Matter of Serveira*, 205 App. Div. 686, 200 N. Y. Supp. 464 (2d Dept. 1923).

¹³ *Matter of Donner*, 37 Misc. 57, 74 N. Y. Supp. 828 (1902); *Matter of Hewitt*, 91 N. Y. 261 (1883); *Matter of O'Neil*, 91 N. Y. 516 (1883); *Matter*

wave of strictness reached its crest in *Matter of Andrews*,¹⁴ decided in 1900. In that case, the facts were substantially the same as those stated at the beginning of this article, with the principal exception that the will was not in the handwriting of testatrix, but in that of a stranger whom testatrix had appointed executor.¹⁵ The possibility of fraud was much greater in that case, although there was no suspicion of fraud. The Appellate Division very reluctantly refused probate,¹⁶ and the Court of Appeals affirmed their decision, declaring that because it was not subscribed at the physical end, the will was not entitled to probate. The Court then stated: "We desire to express in the most emphatic manner our approval of the Statute of Wills as now construed."

But twelve years later, when deciding the *Field* case, they were not quite so emphatic.¹⁷ There the will form consisted of one sheet. Above the signature and physically attached to the sheet, similar to the way the pages are attached to a calendar, were six sheets on which the testator wrote the provisions of his will in his own handwriting. The court said: "The evil of fraudulent changes in wills is rare, while the evil of defeating them altogether is common. Hence, we think we have gone far enough in the direction of rigid construction and that the doctrine of certain authorities should not be extended, lest in the effort to prevent wrong, we do more harm than good. * * *. We regard the decision in the *Andrews* case as extreme and as marking a boundary beyond which we should not go. The *natural end* of a will is where the draftsman stopped writing in the consecutive order of composition * * *." ¹⁸ (Italics ours.) But the facts in this case show that the physical and the literary end coincided. As a result, the Court of Appeals showed itself quite sympathetic to the literary end theory, but it did not adopt the theory, nor did it overrule or modify the *Andrews* case.¹⁹

Another interesting point in the *Field* case was the method by

of Conway, 124 N. Y. 455, 26 N. E. 1028 (1891); *Matter of Blair*, 84 Hun 581 (N. Y. 1895), *aff'd*, 152 N. Y. 645, 46 N. E. 1145 (1897); *Matter of Whitney*, 153 N. Y. 259, 47 N. E. 272 (1897).

¹⁴ 162 N. Y. 1, 56 N. E. 529 (1900).

¹⁵ There are other minute circumstances upon which a distinction might be based. The court seemed to stress the lack of any grammatical or thought sequence, and the fact that the first two pages when taken alone made out a complete will.

¹⁶ *Matter of Andrews*, 43 App. Div. 394, 396, 60 N. Y. Supp. 141, 142 (2d Dept. 1899). The court said: "If we were unaided by the light of judicial decisions, we should be of opinion that the end of a will under the statute was the point or position where the testator * * * last wrote any provisions of the will in the order of writing * * * to be determined by the context of the instrument itself."

¹⁷ This case is also known as the famous "Calendar Case".

¹⁸ 204 N. Y. 448, 455, 97 N. E. 881, 883 (1912), quoting *Matter of Andrews*, 43 App. Div. 394, 401, 60 N. Y. Supp. 141, 147 (2d Dept. 1899); "The remedy has proven in practice far worse than the disease." Did the court intend to confine the *Andrews* case to its own facts?

¹⁹ See *Matter of Schroeder*, 98 Misc. 92, 163 N. Y. Supp. 956 (1916).

which the court distinguished *Matter of Whitney*,²⁰ decided in 1897. There, a sheet containing the "Third" and "Fourth" provisions had been similarly attached to the face of the instrument; but it was attached directly over the "First" and "Second" provisions, so that it had to be turned back in order to read the first two clauses. The will was declared invalid because of the possibility of fraud. It was distinguished in the *Field* case by reason of the fact that the will could not be read consecutively without skipping backward and forward. As a result, the rule seems to be that if a will can be read consecutively without jumping about among the papers, and, when thus read, the signature is found at the end, the will is valid, no matter whether that end is the physical end or not.²¹

Since then, only two cases involving the end of a will have been brought before the Court of Appeals, both of which were decided without opinion. In one, the will was signed at neither the physical nor the literary end, and was declared invalid.²² In the other, it was found that the clause appointing the executor was added after execution, and the will was probated without the additional clause.²³ So, as far as the Court of Appeals is concerned, *Matter of Field* is its last spoken word on the subject.

It is in the lower courts, however, that the real battle rages between the two theories. Each surrogate has his own ideas as to which will should be probated and which should not. While he is bound in law to apply the statute and its judicial interpretation to each case, he also feels bound in conscience, whenever possible, to give effect to an instrument, the whole of which, he is satisfied beyond a reasonable doubt, the testator intended to be his last will and testament. Perhaps this gives a clue as to the origin of the conflict. Quite a few ingenious interpretations have resulted, which, although they might find no sanction in the Court of Appeals, indicate the tendency on the part of the courts to become more and more lenient in admitting wills to probate.

Where the testator started on the first page, continued on the fourth page, and concluded and signed on the second page, the third page being left blank, it was held that it was signed at the literary end.²⁴ Where the testator started on the first page, and continued on the third page and concluded and signed at the foot thereof, but, there not being enough room at the foot of the third page, the witnesses signed upside down at the foot of the second page, the rest of which was blank, it was held that it was merely a matter of which

²⁰ 153 N. Y. 259, 47 N. E. 272 (1897).

²¹ *Matter of Murphy*, 160 Misc. 353, 289 N. Y. Supp. 952 (1936).

²² *Matter of Ryan*, 252 N. Y. 620, 170 N. E. 166 (1930).

²³ *Matter of Whited*, 266 N. Y. 507, 195 N. E. 175 (1935).

²⁴ *Matter of Peiser*, 79 Misc. 668, 140 N. Y. Supp. 844 (1913) (the court stresses the fact that there was a literary, logical and grammatical sequence, which precluded the possibility of fraud).

way the will was folded and the court admitted the will to probate.²⁵ Still other cases have declared the statute to mean the literary end.²⁶

Signature In or After Attestation Clause.

First, let us consider a will in which the signature of the testator appears in or after the attestation clause. When it is found after the attestation clause, the will is perfectly valid: it simply means that the testator has made the attestation clause a part of his will.²⁷ The fact that his signature appears below that of the witnesses does not make the will invalid; each has signed "at the end", which is all that the statute requires.²⁸ Even if the testator subscribes after the witnesses in point of time, the will may still be valid, if it was all part of one transaction.²⁹ When the signature is found in the attestation clause, there is a rebuttable presumption that it was not intended as a subscription, but was put there for the purpose of filling out the attestation clause.³⁰ If, however, the proponent introduces evidence to show that the testator intended it to be a subscription, the presumption is overcome, and the signature is valid.³¹

Matter in Margin, and Blank Spaces in Will.

Ordinarily the margin of a will is not considered a part of the will. However, it has been held that dispositive provisions in the margin will not invalidate the will, and that such provisions will not be stricken out.³² They have been made a part of the will, and therefore, the will is deemed signed at the literary end.

Likewise, blank spaces left in a will do not invalidate it, even though they open the door to fraud.³³ Where the testator signed

²⁵ *Hitchcock v. Thompson*, 6 Hun 279 (N. Y. 1875).

²⁶ *Matter of Douglass*, 38 Misc. 609, 78 N. Y. Supp. 103 (1902); *Matter of Foley*, 76 Misc. 168, 136 N. Y. Supp. 933 (1912); *Matter of Block*, 107 Misc. 124, 175 N. Y. Supp. 733 (1919); *Matter of Sidenberg*, 115 Misc. 38, 187 N. Y. Supp. 414 (1921); *Matter of Mackey*, 136 Misc. 413, 243 N. Y. Supp. 229 (1930). See also *Matter of McConihe*, 123 Misc. 318, 205 N. Y. Supp. 780 (1924) ("In recent years, the courts have departed from the strict and technical rule of requiring subscription at the physical end of the will, to defeat the intent of the testator").

²⁷ *Younger v. Duffie*, 94 N. Y. 534 (1884).

²⁸ N. Y. DECEDENT ESTATE LAW § 21 does not state that testator must sign above the witnesses. See note 2, *supra*.

²⁹ *Matter of Haber*, 118 Misc. 179, 192 N. Y. Supp. 616 (1922); *Matter of Jones*, 157 Misc. 847, 285 N. Y. Supp. 894 (1936).

³⁰ *Matter of Eyett*, 124 Misc. 523, 209 N. Y. Supp. 251 (1925); *Matter of Rudolph*, 180 App. Div. 486, 167 N. Y. Supp. 760 (2d Dept. 1917).

³¹ *Matter of Case*, 126 Misc. 704, 214 N. Y. Supp. 678 (1926).

³² *Matter of Sidenberg*, 115 Misc. 38, 187 N. Y. Supp. 414 (1921); *cf. Matter of Gibson*, 128 App. Div. 769, 113 N. Y. Supp. 266 (3d Dept. 1908), *aff'd*, 195 N. Y. 466, 88 N. E. 1100 (1909); *In re Swire's Estate*, 225 Pa. 188, 73 Atl. 1110 (1909).

³³ *Matter of Dayger*, 47 Hun 127 (N. Y. 1888); 68 C. J. (1934) p. 666, § 302.

at the end of the first page, and the witnesses signed at the top of the fourth page, the second and third pages being blank, it was held that this was a substantial compliance with the statute.³⁴

Material Provisions Following Signature.

Many wills are offered for probate, in which there is some provision or provisions following the signature, and which are, therefore, signed at neither the physical nor the literary end. But this does not automatically disqualify the will. The surrogate will look further and determine whether the matter following the signature is a material or immaterial part of the will. If the provision is immaterial, it will be stricken out, and the rest of the will probated.³⁵ What provisions are material? Let us look at some of the decisions before we set down any rule.

A clause appointing an executor has invariably been held to be material.³⁶ Likewise, a clause providing that the executor should serve without bond,³⁷ that a house should be sold and the proceeds added to the cash and divided "as stated on front page",³⁸ that the executor should sell certain property to cover any deficiency in the bequests,³⁹ that only one dollar should go to any beneficiary who contested the will,⁴⁰ have all been held to be material. Of course, the residuary clause,⁴¹ or any other testamentary bequest,⁴² regardless of its value, is material. On the other hand, a clause providing the effect of a lapsed legacy, where such clause is the same as would happen by operation of law,⁴³ an informal clause explaining the reasons for the bequests,⁴⁴ and a clause providing for compensation of the executor, where it is practically the same as that allowed by law,⁴⁵ have all been held to be immaterial. Likewise the date,⁴⁶ and the testimonium⁴⁷ and attestation⁴⁸ clauses, are immaterial. A clause

³⁴ Matter of Singer, 19 Misc. 679, 44 N. Y. Supp. 606 (1897).

³⁵ Matter of Gibson, 128 App. Div. 769, 113 N. Y. Supp. 266 (3d Dept. 1908).

³⁶ Matter of Van Tuyl, 99 Misc. 618, 166 N. Y. Supp. 153 (1917).

³⁷ Matter of Buckenthien, 112 Misc. 163, 184 N. Y. Supp. 189 (1920); Matter of Tyner, 138 Misc. 192, 245 N. Y. Supp. 206 (1930).

³⁸ Matter of Buckenthien, 112 Misc. 163, 184 N. Y. Supp. 189 (1920).

³⁹ Matter of Blair, 84 Hun 581 (N. Y. 1895), *aff'd*, 152 N. Y. 645, 46 N. E. 1145 (1897).

⁴⁰ Matter of Jarvis, 143 Misc. 641, 257 N. Y. Supp. 829 (1932).

⁴¹ Matter of Faye, 97 Misc. 532, 163 N. Y. Supp. 408 (1916).

⁴² Matter of Reisner, 81 Misc. 101, 142 N. Y. Supp. 1074 (1913).

⁴³ Matter of Gibson, 128 App. Div. 769, 113 N. Y. Supp. 266 (3d Dept. 1908).

⁴⁴ Matter of Sidenberg, 115 Misc. 38, 187 N. Y. Supp. 414 (1921). *Contra*: Hays v. Harden, 6 Pa. 409 (1847).

⁴⁵ Matter of McConihe, 123 Misc. 318, 205 N. Y. Supp. 780 (1924).

⁴⁶ Matter of Foley, 76 Misc. 168, 136 N. Y. Supp. 933 (1912).

⁴⁷ Matter of Ficken, 143 Misc. 407, 256 N. Y. Supp. 617 (1932).

⁴⁸ Younger v. Duffie, 94 N. Y. 534 (1884).

revoking all prior wills will be deemed immaterial where the present will purports to dispose of the entire estate.⁴⁹

From the foregoing it is apparent that a material provision is one that is testamentary or dispositive in character. "If the clause added below the signature neither affects the disposition of the estate, nor appoints an executor or guardian, the authorities are unanimous that such clause does not invalidate the will, and that within the meaning of the statute the signature is at the end of the will."⁵⁰ It makes no difference whether the testator considered the clause material or not; that is for the court to decide.⁵¹ Of course, any matter added after execution is not a part of the will.⁵²

Even though material provisions follow the signature, further attempts have been made to salvage the will. One was by reasoning that a time element is involved in determining the end of the will; another, by attempting to incorporate the matter following the signature into the will by reference.

Assume that after the testator signed, but before the witnesses did, a material provision is added. Is the will signed at the end? It has been held that that part above the signature is entitled to probate, with the additional clause stricken out.⁵³ This is probably a variation on the rule that any matter added to a will after its execution is not a part thereof, and therefore, does not affect its validity. However, this provision was not added after execution, since execution had not been completed. Therefore, the reasoning of the court seems to be this: to determine whether testator signed at the end, the time when he signed may be taken into consideration; as long as testator signs in point of time after all the provisions are written down, he has signed his will at the end, no matter where the signature appears in point of space; anything added after he has signed, is not a part of his will.⁵⁴ There seems to be little justification for this interpretation of the word "end", and probably it would not receive serious consideration from the Court of Appeals.

⁴⁹ Matter of Serveira, 205 App. Div. 686, 200 N. Y. Supp. 464 (2d Dept. 1923).

⁵⁰ Matter of McConihe, 123 Misc. 318, 205 N. Y. Supp. 780 (1924), quoting from 1 PAGE, WILLS (1901) 206.

⁵¹ Matter of Blair, 84 Hun 581 (N. Y. 1895), *aff'd*, 152 N. Y. 645, 46 N. E. 1145 (1897).

⁵² Matter of Whited, 266 N. Y. 507, 195 N. E. 175 (1935).

⁵³ Matter of Mackey, 136 Misc. 413, 243 N. Y. Supp. 229 (1930) (the court based its decision on Matter of Foley, 76 Misc. 168, 136 N. Y. Supp. 933 (1912)).

⁵⁴ Matter of Foley, 76 Misc. 168, 172, 136 N. Y. Supp. 933, 937 (1912) ("The logical end must, in the nature of things, include time as well as space * * *. When something is written in after the testator's subscription, the testator certainly has not signed at the logical end of the will, although he may have signed at the physical end").

Incorporation by Reference.

It has long been a rule in New York that extraneous unattested documents may not be incorporated in, or deemed a part of a will merely because they were referred to in the will; that one may not go outside the four corners of the will in order to ascertain the testamentary intent.⁵⁵ This rule against incorporation is not statutory, but the result of judicial decisions. In the words of Judge Cardozo: "Its form and limits are malleable and uncertain. We must shape them in the light of its origin and purpose. All that the statute says is that a will must be signed, published and attested in a certain way * * *. From this the consequence is deduced that the testator's purpose must be gathered from the will and not from other documents which lack the prescribed marks of authenticity. It is a rule designed as a safeguard against fraud and mistake."⁵⁶ It must admit of some exceptions, however. Unattested documents, which are in existence at the time of execution, may be incorporated by reference in order to identify the beneficiary, or to identify the property or subject of the bequest; but not for the purpose of identifying both the beneficiary and the property.⁵⁷ This was the state of the law when *Matter of Fowles*⁵⁸ was decided. There, a testator directed that trust funds be paid as his wife's will might direct, and that she should be deemed to have predeceased him should they both die in a common disaster, the order of death being unknown. They both lost their lives on the *Lusitania*. It was objected that this was an attempt to incorporate his wife's ambulatory will into his own will. Judge Cardozo said: "It is plain, therefore, that we are not to press the rule against incorporation to a dryly logical extreme. We must look in each case to the substance. We must consider the reason of the rule, and the evils which it aims to remedy."⁵⁹ Thus, it can be seen that the strict rule against incorporation has been modified to a certain extent. To what extent cannot be answered at this time. This case is another indication of the liberal trend.

What relation has incorporation by reference to the end of a will? Assume in the facts stated at the beginning of this article, that Miss Emma, at the bottom of the first page, had written "continued on page 3"; could it be said that the material on the third page was incorporated into the first page by reference? It has been so held.⁶⁰ Likewise, it has been held that although a will not subscribed at the end is invalid as a whole, a validly executed codicil,

⁵⁵ 1 DAVIDS, *op. cit. supra* note 4, at §§ 436, 437.

⁵⁶ *Matter of Fowles*, 222 N. Y. 222, 118 N. E. 611 (1918).

⁵⁷ 1 DAVIDS, *op. cit. supra* note 4, at § 437; *Tonnele v. Hall*, 4 N. Y. 140 (1850) (map of property owned by testator was incorporated into the will by reference).

⁵⁸ 222 N. Y. 222, 118 N. E. 611 (1918).

⁵⁹ *Matter of Fowles*, 222 N. Y. 222, 232, 118 N. E. 611, 616 (1918).

⁶⁰ *Matter of Rowe*, 159 N. Y. Supp. 615 (1916).

referring to the will, will incorporate it by reference into the codicil.⁶¹ These decisions, however, are against the great weight of authority.⁶² How will this weight of authority withstand the assault of *Matter of Fowles*? It is hard to tell. A validly executed trust agreement may be made a part of a will by reference.⁶³ On the other hand, as recently as 1930, the Court of Appeals, in a memorandum decision, refused to incorporate by reference the provisions following the signature; but in that case there was no grammatical or literary sequence, no continuity of sentence or thought.⁶⁴

By far the greatest single factor causing this question to be raised, is the use of the printed blank will form. These forms leave just so much space for the dispositive provisions, perhaps a few lines, perhaps three pages. Many times there is not enough room for the testator to complete his bequests above the formal termination. Then he must look for a place to finish, just as Miss Emma did. Sometimes he fits the surplus into the margin. More often the only space left is that below the attestation clause, and he attempts to connect it to his will by putting in "continued below", or "continued on next page" or "over". A majority of the cases so far have declared such wills to be entirely invalid, even where the testator merely finished, after his signature, the sentence which he had started above his signature.⁶⁵ It is apparent that will forms are dangerous in the hands of an untrained layman.

Factors Affecting the Decisions.

There is a decided *reluctance* on the part of the courts to frustrate the obvious intent of the testator, such reluctance being evident even in those cases where they do not feel justified in admitting the will to probate.⁶⁶ There is a conflict between their common sense and their knowledge of the virtues and failings of human nature on the one hand, and their legal training and dry logic on the other. Which will predominate depends on the facts and circumstances of the individual case.

Another consideration which the courts weigh heavily, is the presence or absence of the *possibility of fraud*. The main purpose of the statute is to prevent fraud. If the will has been so drawn, and

⁶¹ *Matter of Douglass*, 38 Misc. 609, 78 N. Y. Supp. 103 (1902); *Matter of Block*, 107 Misc. 124, 175 N. Y. Supp. 733 (1919) (Surrogate Fowler incorporated into the codicil only so much of the will as preceded the signature).

⁶² *Matter of O'Neil*, 91 N. Y. 516 (1883); *Matter of Conway*, 124 N. Y. 455, 26 N. E. 1028 (1891); *Matter of Whitney*, 153 N. Y. 259, 47 N. E. 272 (1897); *Matter of Andrews*, 162 N. Y. 1, 56 N. E. 529 (1900); *Matter of Emmons*, 110 App. Div. 701, 96 N. Y. Supp. 506 (1st Dept. 1906); *Matter of Judge*, 141 Misc. 254, 252 N. Y. Supp. 500 (1931).

⁶³ *Matter of Bremer*, 156 Misc. 160, 281 N. Y. Supp. 264 (1935); *Matter of Rausch*, 258 N. Y. 327, 179 N. E. 755 (1932).

⁶⁴ *Matter of Ryan*, 252 N. Y. 620, 170 N. E. 166 (1930).

⁶⁵ *Matter of O'Neil*, 91 N. Y. 516 (1883).

⁶⁶ See note 16, *supra*; *Matter of Fox*, 184 N. Y. Supp. 187 (1919).

so executed, as to reduce that possibility to a minimum, the spirit and the purpose of the statute have been fulfilled. Then the court may feel justified in finding a way, reasonable or unreasonable, to admit the will to probate. On the other hand, assume that a will, similar to that in the *Field* case, did not violate the strict letter of the statute, but was drawn in such a way as to afford ample opportunity for fraud. The Appellate Division held, in such a case, that the will violated the spirit of the statute, and therefore, was not entitled to probate.⁶⁷ This may seem a bit strict in view of the fact that blank spaces are held not to affect the validity of a will. However, the case is valuable to show how seriously the courts weigh the possibility of fraud.

The fact that a proposed will is *holographic* is also taken into consideration. Where the testator has written it out in his own handwriting, the requirements of the statute are greatly relaxed.⁶⁸ It is said that substantial compliance is sufficient; but that means substantial compliance with each and every requirement of the statute.⁶⁹

Finally, the substance of the will itself has great influence over the courts. That is, the *continuity* of the thought and of the language may be the deciding factor in admitting the will to probate.⁷⁰ For instance, assume that at the foot of the first page, Miss Emma had started to write, "I give and bequeath to my—", and then continued on the third page, "—beloved sister, Gracie, \$500". In that case there would be both continuity of grammar and continuity of thought, so that no reasonable man reading her will after her death would doubt that Miss Emma had first written the first page and had then gone directly to the third. It is proof within the will itself that the part on page three was not fraudulently added after execution. This is especially important, when and if the court feels disposed to adopt the literary end theory.

In some states it is held that material provisions following the signature to a will, whether written before or after the execution thereof, do not invalidate that part of the will which precedes the signature.⁷¹ It may be argued that in this way only a part of a testator's will may be probated, and thus, in effect, the court would be making a new will.⁷² This may be true. But it is much better to be definite and clear, than to attempt to achieve the same result by taxing one's ingenuity. For instance, suppose the surrogate in attempting to probate Miss Emma's will, decided to unfold the paper and lay it out flat, with the first and the fourth pages upward. Thus he would have one long sheet of paper with two sides. Beginning

⁶⁷ Matter of Fults, 42 App. Div. 593, 59 N. Y. Supp. 756 (4th Dept. 1899).

⁶⁸ Matter of Eyett, 124 Misc. 523, 209 N. Y. Supp. 251 (1925).

⁶⁹ 1 DAVIDS, *op. cit. supra* note 4, at §§ 354, 429, 430.

⁷⁰ Compare Matter of Andrews, 162 N. Y. 1, 56 N. E. 529 (1900), with Matter of Rowe, 159 N. Y. Supp. 615 (1916).

⁷¹ 20 PENN. STAT. § 191, 1917, June 7, P. L. 403, 2.

⁷² Matter of Gibson, 128 App. Div. 769, 113 N. Y. Supp. 266 (3d Dept. 1908).

at the top of the first side, which was page one of Miss Emma's will, he would read sideways for half the sheet. The other half of the sheet, which was page four, he could consider as being left blank by Miss Emma. Then turning the sheet over from the bottom, he would continue reading on what had formerly been the third page. Again he would be reading sideways. But in this way, he could so read the will as to make the signature which was on the second page appear to be at the physical end. He could thus admit the will to probate on that theory. This may seem far-fetched. Perhaps it is, but that is substantially what happened in *Matter of Murphy*.⁷³ There, testatrix started on the first page, continued on the fourth page, and then concluded by unfolding the sheet and writing on the other side from the top of the page down to the bottom where it was signed and attested. The surrogate held that it was signed at both the physical and literary end.

Conclusion.

A fair and unbiased appraisal of all the cases would force us to the conclusion that the "end" of a will means the physical end. But we would also be justified in concluding that this theory has been undermined considerably, especially by the surrogates, so that its position as the law of New York is precarious and uncertain.⁷⁴ A well argued case would either topple it completely, or cause a reaction in the Court of Appeals to reaffirm its position. In the latter case, the only remedy would be by legislative enactment.⁷⁵

Considering the two theories from a practical point of view, it would seem that the literary end theory is more just and equitable. There would be no more danger of fraud under this theory, for the requirements of Section 21 of Decedent Estate Law and Section 144 of Surrogate's Court Act⁷⁶ would still have to be satisfied. Moreover, the proponent would have to *prove* that the place of the testator's signature was the literary end. It would be very difficult to prove this without some internal evidence in the will itself: thus the language and thought sequence would become most important, if not controlling.

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⁷³ 160 Misc. 353, 289 N. Y. Supp. 952 (1936).

⁷⁴ In 7 HEATON, *op. cit. supra* note 5, at § 238, the author comes to the conclusion that the physical end theory is no longer the rule in New York, and that the literary end theory is now the law.

⁷⁵ Either by a proviso similar to that in Pennsylvania, or perhaps by a statute drawn along the lines of N. Y. SURROGATE'S COURT ACT § 142, which provides for the probate of a will where the witnesses are absent, dead or incompetent, or where their memories are faulty, or even where they testify against the will. For the liberality of the courts in construing this statute, see *Matter of Katz*, 277 N. Y. 477, 14 N. E. (2d) 797 (1938); *Matter of Price*, 254 App. Div. 477, 5 N. Y. S. (2d) 457 (1st Dept. 1938), *aff'd*, 279 N. Y. 700, 18 N. E. (2d) 320 (1938).

⁷⁶ This section is a complement to N. Y. DECEDENT ESTATE LAW § 21, and prescribes what proponent must prove to the satisfaction of the surrogate, before the surrogate may admit the will to probate.