HOLOGRAPH WILLS: A SURVEY OF EXISTING LEGISLATION

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In recent years the courts have had to face some of the problems arising from the holograph provisions in the Wills Acts of the three prairie provinces[1]. It is our intention to discuss the reported cases and to indicate some of the problems not finally solved. The following discussion is based on the Alberta Wills Act but will include references to other Canadian statutes and decisions.

HISTORY AND APPLICABILITY

The present Wills Act was enacted in 1927[2] and is based on the Imperial Wills Act[3] and on the draft acts presented to the Conference of Commissioners on Uniformity of Legislation during the years 1922 to 1926[4]. Prior to the passage of that Act there were three statutes governing the law relating to wills. The Imperial Act, which was part of the law of England prior to July 15, 1870[5], the Northwest Territories Act 1880[6] and the Holograph Wills Act of 1926[7] were all in force in Alberta. The Northwest Territories Act simply re-enacted sections of the Imperial Wills Act. When the present Act was introduced in 1927 it expressly repealed the Holograph Wills Act and the relevant sections of the Northwest Territories Act insofar as they applied to Alberta[8]. In 1928 the Commissioners on Uniformity suggested that the Alberta Act be adopted as the uniform act, and the Commissioners did adopt it including the holograph will provisons in 1929. The Alberta enactment still provided the basis for a new draft as presented in 1954 which has not yet been adopted[9]. It will be necessary to refer to the so-called uniform acts again.

The major problem pervading topic of holograph wills is this: how much of the Act applies to holograph wills? The problem has been given consideration in all three prairie provinces but there has not as yet been any authoritative pronouncement to serve as a guide to the interpretation of the whole Act. Before commencing a discussion of this problem it will be wise to refer once again to the history of the acts and to certain important distinctions. Both Alberta and

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1 R.S.A., 1942, c.210.
R.S.M., 1954, c.293.
R.S.S., 1953, c.120
Also, 1952 (N.W.T., 1st sess.) c.19.

2 1927 (Alta.) c.21.

3 Wills Act (1837), 1 Vict. c.26 (Imp.).

4 Can. Bar Assn. Proceedings (1922-26), vols. 7-12.

5 Per Walsh J. A. in *Re McGibbon*, [1931] 2 W.W.R. 86

6 R.S.C., 1886, c.50, ss. 26-35, passed in 1880, 43 Vict. c. 25 ss.47 ff.

7 1926 (Alta.) c. 73.

8 *Supra*, footnote 2, s.40.

9 Can. Bar Assn. Proceedings (1954), vol. 37, Appendix D.

special statute allowing holograph wills[10]. Manitoba in comparison, added the holograph provision to an enactment based on the Imperial Wills Act and made the holograph section the last one in the act[11]. In the 1902 revision, Manitoba moved the holograph section into its present location as section 10[12]. Montague J. in *Re Eames Estate*[13] considered the effect of the Manitoba act and treating the 1902 revision as a re-arrangement quoted Craies on Statutes, "The effect of the Statute Law Revision Act is, in the main, literary only."[14] He therefore held that the position of the holograph provision before the revision was important and it could still be treated as an appendage to the main act so that varying portions of the act, and in particular the sections relating to form, were not applicable to holograph wills. The Alberta and Saskatchewan acts would seem to be distinguishable since the Wills Acts in both provinces incorporated the holograph clause in the original enactment. However, the reasoning in *Re Eames* has been, in effect, approved in Alberta when the topic was discussed in *Re Moir Estate*[15]. Ford J.A. speaking for the majority called the Alberta Act "a consolidation act," and said "there is therefore strong ground for thinking that [the provision governing execution of formal wills] does not apply to holograph wills . . . "[16] It should be noted that Craies in discussing consolidated and revised act points out that they are acts which make minor changes and rearrangements. He also points out that England has passed an Act allowing minor corrections to be made in the course of revision[17]. It is submitted that the Alberta and Saskatchewan Acts which introduce holograph provisions are not revisions but, indeed, are enactments which introduce changes in the substantive law and should be so construed.

By far the most important distinction from the other acts that provide for holograph wills is the wording of the Alberta Act. It is a carefully drawn statute, in this respect at least, since it uses throughout the word "make" in preference to the word "execute."[18] The word is defined by the interpretation section to include execution and the other required formalities. The word "make" is far more appropriate to describe the steps necessary to prepare a valid holograph will since a holograph requires more than mere execution, i.e. the will must be in the testator's handwriting. The possibility of the whole of the Alberta Act, where not inconsistent, applying to holograph wills was not considered in *Re Moir Estate* and it is still open to a court to hold that such is the effect of the careful use of the word "make." In *Re Moir*, the court was prepared to find that the section relating to place of signature did not apply

[10] Alta.: *supra*, footnote 7, repealed by the 1927 Act, *supra*, footnote 2, s. 40; Holograph will are permitted by s.5(b) of the present Act. Sask.: 1931 (Sask.) c.34, s.6.

[11] 1882 (Man.), 45 Vict. c.2, s.32.

[12] R.S.M., 1902, c.174, s.10. The location is similar to that of the 1954 Uniform Act, *supra*, footnote 9.

[13] [1934] 3 W.W.R. 364 (Man. K.B.).

[14] *Ibid.*, at p. 372.

[15] [1942] 1 W.W.R. 241.

[16] *Ibid.*, at p. 250.

[17] Craies on Statutes (1950), at pp. 57, 58.

[18] E.g., ss. 3,5,8,9,16,17,18.

to holograph wills but their opinion is dicta since they found that the will before them did not satisfy the section. Egbert J. has, however, approved the reasoning in *Re Moir* by way of dictum.[19] The use of the word "make" is not accidental; Alberta's Commissioner on Uniformity at the time of the passage of the Wills Act was W. A. Scott and his comments on the subject clearly indicate that he wished to have the word "make" used so that the Act would be appropriate for holograph wills.[20] The word "make" is still found in the uniform Act although the adopting provinces have preferred to use the English "executed."[21] An examination of the proceedings of the Uniformity Commissioners shows clearly that it was intended that a province could accept or reject holograph wills by the omission or inclusion of a single section[22] and the adoption of the word "make" was clearly designed to enable the Act to apply to both formal and informal wills. Whether or not the whole act is applicable to holograph wills, it is submitted that any section using the term "make" must be intended to embrace holograph wills since the term is designed to cover more than "execute."

It is suggested that Alberta courts should be careful in applying the decisions of other jurisdictions on holograph wills. The Alberta Act, while similar to the proposed uniform act, has not been made uniform by any enactment calling for uniformity of construction. In addition, while similar to the uniform act, none of the acts which purport to be uniform use the word "make."[23] This one distinction, "make" for "execute," is of the greatest importance in considering the Act in relation to holograph documents. The term "execute" refers mainly to signing and witnessing whereas "make" refers to the whole will. It should be noted that the reasoning applied in other jurisdictions to the special military provisions should be adopted with care in Alberta since "executed" is appropriate to embrace the military provisions.

SECTION 5

> 5. No will shall be valid unless it is made in one of the forms hereafter in this section permitted, that is to say, unless, . . .
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> (b) it is a holograph will, wholly in the handwriting of the testator and signed by him, whether made or acknowledged in the presence of any witness or not;

The annotation of the draft wills act appearing in the 1954 report of the Uniformity Commissioners includes this statement:

> It would appear that so long as the instrument is wholly the work of the testator and signed by him whether it be written by pen and ink or printed or typewritten or painted or engraved or lithographed it is a valid holograph.[24]

The quotation states as its authority *Re Nesbitt*[25] in which it was suggested that

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[19] *Re Brown Estate* (1953-54), 10 W.W.R. (N.S.) 163. It was not necessary for the court to decide since section 7 would not have been satisfied had it been applicable.

[20] Can. Bar Assn. Proceedings (1926), vol. 11, at p. 419.

[21] The Uniform Act is in force in Manitoba: 1936, c.52; Saskatchewan: 1931, c.34; Prince Edward Island: 1951, c.124; Northwest Territories: 1952, 1st sess., c.19.

[22] S.6(2) of the 1954 Uniform Act.

[23] *Supra*, footnote 21. This feature gives difficulty in interpreting the Manitoba and Saskatchewan Acts.

[24] *Supra*, footnote 9 at p. 5.

[25] [1935] 3 W.W.R. 171.

a typewritten will, if the work of the testator, could qualify as being "written" by the testator. In Saskatchewan Hogarth Surr. Ct. J. in *Re Griffith* considered the decision when he was confronted with a printed will form filled in by the testator and did point out that the Saskatchewan Act required "handwriting." Since the decision in *Re Nesbitt*, Manitoba has amended its Act to substitute "handwriting" for "written" and the Manitoba Court of Appeal in *Re Bell*,[27] a recent decision, dismissed the argument that a typewritten will is handwritten. It is submited that *Re Bell* is correct and to contend that "handwritten" means "in the testator's workmanship" is an unnecessary straining of the wording. It can be argued that handwriting is a definitive term as contrasted with the term "writing" which is defined in most interpretation acts[28] to include printing and engraving. It is also submitted that use of the term "handwriting" in the Wills Acts is an example of the context requiring a definition other than that supplied by the interpretation act.

A recent decision of Sissons C.J.D.C. in *Re Ford Estate*[29] has reopened the question of the effect of any writing or printing which is not the testator's on a non-witnessed instrument. In the *Ford* case, the learned judge was faced with a printed stationer's will form which the testator had used, although he wrote the bulk of the will in his own handwriting. The Chief Judge admitted the written portion to probate on the grounds that "the will is quite complete without the use of the printed words."[30] The judgment distinguished the Saskatchewan cases *Re Rigden*[31] and *Re Griffith*,[32] in which it was held that partly printed will was not "wholly in the handwriting of the testator." Egbert J. also considered the same problem in *Re Brown* when he had before him a printed will form filled out and witnessed while on the inside of the form there were unsigned holograph dispositions. He refused probate of the holograph portions since they were unsigned and could not be read as leading up to the attested signature, which preceded the handwritten portion. In the course of judgment he made this statement:

> If any part of the will, however small, is either typewritten or printed it cannot be said to be wholly in the handwriting of the testator and accordingly is not a holograph will within the meaning of section 5(b).[33]

The only other case we wish to consider is *Re Kemp*,[34] a Manitoba case, in which Tritschler J. considered a purported codicil, consisting of a description of the document, as instructions to alter the testator's will, and the sentence, "Sir I want you to put on 1200 doll for my brother John Kemp he lives in Winni-

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[26] *Re Griffith*, [1945] 3 W.W.R. 146.

[27] [1935] 3 D.L.R. 52.

[28] E.g., R.S.A., 1942, c. 1 s. 41(aa). S.2 states that the terms of the act are not applicable where inconsistent.

[29] (1954), 13 W.W.R.(N.S.) 604 (Alta. D.C.).

[30] *Ibid.*, at p. 607.

[31] [1941] 1 W.W.R. 566 (Sask. Surr. Ct.).

[32] *Supra*, footnote 26.

[33] *Supra*, footnote 19, at p. 170.

[34] (1954), 11 W.W.R.(N.S.) 624 (Man. Q.B.).

peg."[86] The document was signed by the testator but only the sentence above quoted was written by him. The learned judge admitted the quoted portion to probate as a codicil, holding that the remainder of the document was admissible as extrinsic evidence to show the intention of the testator and the nature of the document.

It would appear that there are two views as to the effect of printing in the document which is submitted for probate. One is that the use of printing or the handwriting of someone other than the testator destroys the document as a testamentary paper; the other is that the court will admit the handwritten portion to probate as a holograph will, so long as it is sensible and contains the necessary elements. In the latter case, other writing on the document is admissible where extrinsic evidence would be admissible, e.g., to show intent and nature of the document. The Act does not, of course, explicitly cover such a situation but it states that a will (which includes testament, codicil, and any other testamentary disposition) is valid if it is *wholly* handwritten and signed. The problem appears to be this: what is a will? is it the whole document presented for probate? is it the whole document which complies with the substantive requirements of the law of wills and is in a permitted form? The classic definition gives an affirmative answer to our last question:

> The will of a man is the aggregate of his testamentary intentions so far as they are manifest in writing duly executed according to the statute.[87]

If a will is only that part of a man's intention which is properly "executed," then it would appear that court is justified in considering only that part of the "writings" which are properly executed or made. If that part which is properly made is complete in itself, then presumably the court should admit it. This was in fact done by Egbert J. in *Re Brown* when he admitted the part properly signed and attested and it is done by any court which refuses unattested codicils and alterations, but accepts the attested will. We find examples of courts accepting only the testamentary portions of a document in cases in which they are called upon to consider letters as holograph wills. The courts have been willing to piece together portions of letters in order to construct a testamentary document and have admitted the result to probate. There are several cases[87] in which the courts have admitted to probate the testamentary portion and have excluded the rest. Part of the confusion would appear to stem from the terminology used; in *Re Rigden, Re Griffith,* and *Re Brown,* we find the courts referring to the "document" before them. Mr. Justice Egbert in *Re Brown* stated: "The document with which we are dealing, looked at as a whole, is not a holograph will."[88] It is submitted that it is not the "document" which must be in the testator's handwriting, it is the "will." If the existence of printing in the document destroys it as a holograph will, we would be compelled to say that the

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[86] *Ibid.*, at p. 626.

[87] *Lemage* v. *Goodban* (1867), L.R.1 P.&D. 57, at p. 62.

[87] *Re Toole* (1952), 5 W.W.R.(N.S.) 417, letters to a solicitor; *Re Smith*, 1948 2 W.W.R. 55, letter signed "Mother"; *Re LeBlanc* (1955), 16 W.W.R.(N.S.) 389, letter; *Re Swords*, [1929] 2 W.W.R. 245, 3 letters; *Re Williams*, [1940] 3 W.W.R. 120, note found in deceased patient's purse; *Re Mitchell*, [1924] 1 W.W.R. 484, suicide note.

[88] *Supra*, footnote 19.

testator who writes his will on stationery with a letter head has not succeeded in making a holograph will. Could it be that the watermark is printing? One may argue that all that portion of a document which a testator *intends* to be his will is part of the will and the whole must be valid for any part of it to be valid. It is submitted that this interpretation is not compelled by the Act and, as noted before, a testator may intend alterations which are unattested to be part of his will but it is not likely that a court will say that the whole will is bad because part of what the testator intended to be his will is bad. The interpretation suggested in *Re Kemp* and *Re Ford* appears to enable the court to give effect to the intentions of the testator. The decisions apparently to the contrary can be distinguished in that the parts written in *Re Rigden* and *Re Griffith* would not make sense apart from the printed form and in *Re Brown* the holograph portion was unsigned and probably could not have been read to stand alone.

While dealing with section 5, it may be wise to make reference to a problem which has received little direct consideration. In 1930, McNeil D.C.J. was faced with the argument that a holograph codicil could incorporate, by reference, an unattested formal will. The learned judge rejected the contention:

> In my opinion the only earlier writing which a holograph will or codicil can incorporate must be one wholly in the handwriting of the testator so the resulting whole document would be a document sufficient to satisfy the statute.[39]

In Williams on Wills the author states:

> By incorporation the document becomes testamentary and must be construed with the will, and anything therein which would be invalid if included in a will becomes inoperative.[40]

While the learned author is referring to the substance of the incorporated material, it is submitted that his proposition applies also to form. Incorporation does supply execution but, as we have already mentioned, execution is not enough in the case of a holograph document. Authority impliedly supports the contention of McNeill D.C.J., since the courts, in refusing to consider the printed words in a non-attested will form (except to supply extrinsic evidence), imply that printing cannot be incorporated by reference.[41] These decisions indicate that the printed words, existing before the will was executed and certainly intended by the testator to be part of his will, are, nevertheless, not incorporated.

Whether or not a holograph can incorporate a non-holograph writing, the weight of authority[42] seems to have dismissed all contentions that a holograph cannot be a valid codicil to an attested will and vice-versa. The authors know of no case holding to the contrary. The wording of the Act equating codicil to will and permitting holograph wills would seem to leave no doubt as to the intention of the legislature.

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[39] *Re Robinson*, [1930] 2 W.W.R. 673, at p. 675.

[40] (1952), at p. 69.

[41] Notably *Re Brown*, and *Re Kemp*, but also *Re Rigden* and *Re Griffith*, *ubi sup.*

[42] *Re Ferguson Smith* (1954), 13 W.W.R.(N.S.) 387; *Re Kemp*, *supra*, footnote 34; *Re Cottrel* (1951), 2 W.W.R. (N.S.) 747; *Re Richardson*, [1949] 1 W.W.R. 1075; *Re Gillespie* (1953), 8 W.W.R.(N.S.) 593; *accord*.

SECTION 7

7. (1) Every will shall, so far only as regards the position of the signature of the testator or the person signing for him as aforesaid, be deemed to be valid, if the signature is so placed at or after or following or under or beside or opposite to the end of the will that it is apparent on the face of the will that the testator intended to give effect by his signature to the writing signed as his will.

(2) No such shall be effected by the circumstance,

(a) that the signature does not follow or is not immediately after the foot or end of the will; or

(b) That a blank space intervenes between the concluding words of the will and the signature; or

(c) that the signature is placed among the words of a *testimonium* clause or of a clause of attestation or follows or is after or under a clause of attestation either with or without a blank space intervening, or follows or is after or under or beside the name of a subscribing witness.

(d) that the signature is on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will is written above the signature; or

(e) that there appears to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature.

(3) The enumeration of the above circumstances shall not restrict the generality of subsection (1) of this section, but no signature under this Act shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give any effect to any disposition or direction inserted after the signature was made.

It has not yet been decided whether or not the section applies to holograph wills. The Alberta Appellate Division has decided by way of dicta that it does not.[43] Clarke J.A. dissented and argued that 7(3) applied even if the balance of the section did not. We have already suggested that the whole Act may have been intended to apply to holographs even though the section does not use the word "make" and even though the wording is the same as the English Act, which knows no such thing as an holograph. It is interesting to note that Mr. W. A. Scott, who assisted in the drafting of our Act, thought that the section applied. He approved the wording of s.7(2)(c) as being sufficient to include holograph wills, although he had suggested an alternative clause since the section refers to an attestation clause and a holograph, of course, has none.[44]

Assuming that s.7 did apply to holograph wills, the judges in *Re Moir* and *Re Brown* approved the reasoning of Merriman P. in *Re Long Estate*:

> Provided that the court is satisfied that the whole document was written before the signatures were made, and that the dispositive part of the will may be fairly read as leading up to the part containing the signature . . . [the will will be valid].[45]

In *Re Coughlan Estate*,[46] the testator's will was found on a single unsigned page in her handwriting. Her "signature" appeared on the cover of the document. The cover, which was a stationer's will form, bore the deceased's name and was dated before the will inside had been written. Buchanan C.J.D.C. held that the purported signature was not intended as a signature and was therefore inoperative. He also found that the writing could not be a signature because it pre-

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[43] *Re Moir*, *supra*, footnote 15.

[44] Can. Bar Assn. Proceedings (1926), vol. 11, at p. 421. The suggested alternative read: "That in the case of wills other than a holograph will, the signature . . .

[45] [1936] P. 166, at p. 173.

[46] (1955), 16 W.W.R.(N.S.) 14 (Alta. D.C.).

ceded in time the writing of the will. If section 7 does not apply to holograph wills then there is nothing in the Act which sets out any time element for the signing of holograph wills. The *Long Estate* test also includes a reference to the time element. It would appear that one could still argue that a signature, even if written before the will was written, was nevertheless a signature inasmuch as the Act does not deal with the time element when the will is an holograph. The *Coughlan* decision implies that time is a necessary consideration and in approving the *Long Estate* test suggests that section 7 is applicable to holograph wills. Another basis for invalidating a "signature" written before the instrument proper would be found in the cardinal principle that man may not delegate his power to make a will nor may he incorporate future writings.[47]

SECTIONS 8, 9, AND 11

8. (1) No appointment made by the will in exercise of any power shall be valid unless it is made in a form permitted by this Part.

   (2) Every will made in a form permitted by this part shall so far as respects the formalities thereof, be a valid execution of a power of appointment by will, notwithstanding that it has been expressly required that a will in exercise of such power shall be made with some additional or other formality or formalities.

9. Every will made in a form permitted by this Part shall be valid without any further publication thereof.

It is submitted that these sections clearly embrace holograph provisions since the word "made" is used.[48]

11. If any person attests the execution of a will to or to whose wife or husband any beneficial devise, . . . is thereby given or made, the devise, . . . shall so far only as concerns the person attesting the execution of the will or the wife or husband . . . shall be null and void . . . ;

    Provided that where the will is sufficiently attested without the attestation of any such person or no attestation is necessary, the devise . . . shall not be null and void.

In *Re Eames*[49] Montague J. considered the problem arising when a witness signs a valid holograph will and the argument is raised that the witness is incompetent. Manitoba did not then have the proviso to the section.[50] The judge reviewed many of the authorities and came to the conclusion that a witness to an holograph was not incompetent. The provision should cover the matter in Alberta should it arise.

SECTIONS 16 AND 17

16. No will or any part thereof shall be revoked otherwise than as aforesaid, or

    (a) by another will made in a form permitted by this Part; or

    (b) by some writing declaring an intention to revoke the same and made in a form in which a will is by this part permitted to be made; . . .

Section 16 also is designed to include holographic revocations.[51] There is some difficulty in ascertaining the amount of writing which would be necessary to constitute a "writing" within the section. In *Re McGibbon*[52] The Alberta Appellate Division was faced with the problem when the word "cancelled" in

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[47] Bailey on Wills (4th ed., 1953), at p. 59.

[48] *Supra*, footnote 44. W. A. Scott of the Conference of Commissioners.

[49] *Supra*, footnote 13.

[50] Proviso added: 1936 (Man.) c. 52.

[51] Scott, *supra*, footnote 44.

[52] [1931] 2 W.W.R. 86 (Alta. A.D.).

the testator's handwriting and signed by him appeared on a bequest. Walsh J.A. must have considered the writing to be a "writing" within the section since, if the writing were a codicil, it would have been valid by virtue of the Holograph Wills Act which was in force before the formal will was written and therefore before the cancellation. The only other explanation for the disregard of the Holograph Wills Act is that the court could not consider it since it was repealed. But they did consider the relevant provisions of the Northwest Territories Act which were repealed in the same way and at the same time as the Holograph Wills Act. We have discussed the problem before and the difficulty is this: if the will is a formal one, is the will itself extrinsic evidence to provide the necessary reference? The word of cancellation divorced from the will itself would probably have little meaning. On the reasoning of Tritschler J. in *Re Kemp Estate*,[53] the rest of the will is extrinsic evidence and is to be considered to the same extent as extrinsic evidence is normally admissable. If the purported cancellation appeared on a separate piece of paper would the courts hear evidence to show what the testator intended to cancel? It may be that they would not because such evidence substitutes the witness's testimony for what the testator left unsaid. In the case of writing on the document itself, it may be that the court could be satisfied that there was no danger of misinterpreting the testator's intention. The balance of the will could clearly be admissible to show the elements of time and testamentary nature.

17. No obliteration, interlineation, cancellation by drawing lines across the face of the will or any part thereof or other alteration made in any will after the making thereof shall be valid or have any effect except so far as the words or effect of the will before the alteration are not apparent unless the alteration is made in a form permitted by this Part, but the will with the alteration as part thereof shall be deemed to be duly made if the signature of the testator and the subscription of the witness (if required) are made in the margin or in some part of the will opposite or near to the alteration, or at the foot or end of or opposite to a memorandum referring to the alteration, and written at the end or in some other part of the will.

Section 17 has given some difficulty, although there is a paucity of authority giving interpretation to it. In Manitoba, it has been indicated that the section does not apply to holograph wills.[54] Once again it would appear that we are entitled to rely on the different wording of the Alberta provision in order to distinguish the decisions of other jurisdictions; our act uses the word "make" while Manitoba's refers to "execute". In *Re Cottrell*[55] Egbert J., faced with unattested amendments to a formal will held that the Alberta section did not permit holograph alterations in formal wills although he acknowledged that the section was designed to permit holograph alterations. He stated:

> Section 17 of the Act to my mind precludes any alteration by obliteration, intelineation etc., unless the alteration is in a form permitted by the Act, and while, in my opinion a holograph codicil properly drawn as such would be sufficient to alter an attested will, if an attempt to alter is made by obliteration and interlineation (which in my view do not amount to a codicil in the ordinary and proper sense) then to make such an atempt effective the testator must in the case of an attested will not only affix his signature but must also see that the witnesses do likewise.[56]

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[53] *Supra*, footnote 34.

[54] *Re Scott*, [1938] 3 W.W.R. 278.

[55] *Supra*, footnote 42.

[56] *Ibid.*, at p. 250.

Mr. Justice Egbert reaffirmed this view in *Re Ferguson Smith* and *Re McVay*[57] He indicated that he was bound in this matter by the Appellate Division decision in *Re McGibbon* in which the court considered the effect of unattested alterations. In the *Cottrell*[58] case he quoted Walsh J.A.:

> 'In the entire absence of the subscription of witnesses neither this alteration nor this interlineation can stand under either Act . . .'[59]

In *Re McVay* the learned judge repeated this quotation when he was considering typewritten interlineations and added to the above quotation after the word "Act";

> [i.e. the Wills Act, 1837, ch. 26 as modified by the Northwest Territories Act, RSC, 1886 ch. 50 or the Wills Act presently RSA, 1942, ch. 210][60]

It is submitted that Walsh J.A. was not referring to the Imperial Wills Act, as modified, and the 1927 Alberta Act. In the paragraph from which Mr. Justice Egbert quoted Mr. Justice Walsh had paraphrased the relevant provision of the Imperial Act (the equivalent section to our section 17) and referred to the absence of any provision in the Northwest Territories Act covering the situation. It is submitted that the statement which Egbert J. has quoted does not bind him since Walsh J.A. was referring to the effect under the statutes governing before 1927. In addition the alterations which Walsh J.A. was considering were typewritten on the face of the will. It is submitted that the judgment of Walsh J.A. was divided into two parts, in the first of which he considered the word "cancelled". In the second part he considered signed but unattested typewritten alterations. Egbert J.A. was considering holograph alterations in the correct sense of the word. Even if Walsh J.A. was considering the effect of the alteration under all three statutes the decision did not cover the point before Egbert J. It is true that Walsh J.A. did parenthetically refer to the similarity of the English and Alberta sections. But he did not say the sections were the same and as we have already indicated, the change in wording, notably the introduction of the word "made" and the phrase "(if required)", is of the greatest importance when holograph writings are under consideration.

The decision of Egbert J. has merit in its results and it is submitted that it can be supported by an analysis of the section. It may be unwise to permit holograph alterations in a formal will; since it is essential to the statutory requirements for holograph writings that the work be the testator's and be signed by him. If the alteration is made by drawing lines, or by a simple interlineation, the effect on the will can be substantial and yet the amount of handwriting present be insufficient to determine with certainty the author thereof. It might be difficult for a court to say that the oblique stroke changing a $51,000 bequest to $51,000 was "in the testator's handwriting."[61] Of course, since we per-

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[57] *Supra*, footnote 42, and (1955), 16 W.W.R.(N.S.) 200.

[58] *Supra*, footnote 52, at p. 89.

[59] *Supra*, footnote 42, at p. 249.

[60] *Supra*, footnote 57, at p. 203.

[61] The feat was performed in *Re Scott*, *supra*, footnote 54.

mit holograph wills it would be manifestly unfair to make no provision for the alteration thereof.

Our section 17 is unique in Anglo-Canadian wills statutes. Normally the section is treated as being in two parts broken by the comma after the word "Part". Our Act refers to an alteration "made in a form permitted by this Part", while the Imperial Act allows "execution" as permitted by the Act. In reading the first portion of section 17, and especially the phrase quoted, it will be noted that there is an apparent omission after the word "form". In section 16 the Act refers to a "form in which a will . . . is permitted . . . ." It would appear that the words "in which a will" have been omitted. The result is that the Act calls for an alteration in a permitted form and there is no permitted form for an alteration other than that set out in section 17 itself. The second part of section 17 calls for attestation "if required" but it does not stipulate when attestation is required. It is submitted that alterations are to be attested when (a) the alteration is non-holograph, and (b) the will is non-holograph. It is open to a court to say that the legislature did not intend to change the existing law which called for the attestation of an alteration in a formal will. There is a basic principle of interpretation that the legislature does not intend to alter the existing law:

> One of these basic interpretation presumptions is that the legislature did not intend to make any substantial alteration in the existing law beyond what it explicitly declares . . .[63]

Campbell J. in *Re Gillespie*[64] pointed out another problem which may arise and to which we have already referred, *viz.*, the effect of cancellations written on the face of the will. If the court considers the writing to be an alteration then it must satisfy section 17. Otherwise it must satisfy section 5 if it is a codicil or section 16 of a revocation. There is authority for the proposition that a revocation is not an alteration:

> The difference between revocation and alteration seems to be this: if what is done simply takes away what was given before or a part of what was given before then it is a revocation, but if it gives something in addition or gives something else then it is more than a revocation and cantion and cannot be done by mere obliteration.[65]

It should be noted that section 17 makes cancellation by drawing lines an alteration within section 17. Moreover it cannot be argued that every alteration is a codicil, since if that were so section 17 would be rendered nugatory. If the writing under consideration by the court is an alteration then it must satisfy section 17, and if our interpretation is correct, the writing must be attested when the will is a formal one or the alteration in non-holograph.

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[63] The reference to "will in a form" is found in: s.18, "codicil in a form"; s.16(a), "will . . . in a form"; s.16(b), "in which a will"; s.9 "will made in a form"; s.8(1) "will . . . made in a form."

[64] Maxwell on Statutes (10th ed., 1953), at p. 81.

[64] *Supra*, footnote 42.

[65] Dr. C. A. Wright and authority quoted in (1933), 11 Can. Bar Rev. 277, at p. 279.

TRANSITIONAL

Twice in reported cases the problem has arisen as to whether the Wills Act is retroactive. In both *Re Ferguson Smith* and *Re McGibbon*[66], the courts have considered the effect of testamentary writings made before, or presumed to have been made before, 1927. In *Re McGibbon* the court held that the law governing execution of a will was that in force at the time of execution. Presumably the authority is to be found in English decisions. It could not be argued that the Imperial Wills Act was retroactive since it specifically provided that it did not apply to wills written before it came into effect. The Alberta Act has an unique provision in the transitional section. While the other Acts[67] specifically do not apply to *wills* made (or executed) before the passage of the Act, the Alberta Act does not apply to *persons dying* before the Act comes into effect.

It is interesting to speculate on the effect of our transitional section so far as it effects the doctrine of republication. Section 40 of the 1927 Wills Act provided, as did the English Act, for republication of existing wills. Since the Alberta Act does not deny its applicability to wills written before the passage of the Act it may be that the legislature did intend to provide legislation respecting republication. If so, it is submitted there can be no question that an holograph can republish a formal will and vice versa. The effect of providing legislation respecting republication was considered by the Privy Council in *Goonewardene* v. *Goonewardene*[69]. There the court held that the English Act provided for republication. Regardless of the merit of the Judicial Committee's reasoning in relation to the Imperial Act it would appear that the reasoning is applicable to our Act in view of the change in wording.

This discussion of the law relating to holograph wills may, perhaps, bring into consideration the policy behind holograph wills inasmuch as they are permitted in only three of the common law provinces. It is probably safe to assume that the provisions were introduced into the Canadian West because of the difficulty—not a remote one in 1926—of obtaining competent and disinterested witnesses. This era of diminished distances and rapid communication may have obviated the necessity for holograph provisions. It is interesting to note that J. E. Read, the Nova Scotia member of the Commissioners on Uniformity, considered the holographic provisions to be "radical."[70] In *Re Eames* it was stated that "Our Statute encourages testators to draw their own wills". An examination of some of the reported cases might throw some doubt on the wisdom of this encouragement. In *Re LeBlanc*[72], a recent decision, a remarkable document was offered for probate and the learned judge had almost as much difficulty giving effect to the testatrix's intentions as had the testatrix.

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[66] *Supra*, footnotes 42 and 52 respectively.

[67] See the transitional section in the Uniform Act (1954), *supra*, footnote 9. The section has been adopted by the provinces which adopted the uniform act.

[68] *Supra*, footnote 2, s.39. It has not been included in the revised statutes.

[69] [1931] A.C. 647.

[70] *Supra*, footnote 20, at p. 417.

[71] *Supra*, footnote 13, at p. 366.

[72] *Supra*, footnote 37, at p. 366. See too, *Re Brown* and *Re Foulder*.

Anyone interested may examine the reported decisions to see what amazing documents have been tendered for probate. Letters have been admitted to probate and while, no doubt, the testamentary intention was clear, it may be better to require the testator to put his intentions in a more appropriate form. The most severe criticism of holographic documents is to be found in Taylor J.'s denouncement of the "home-made" will "it would be better had she died intestate."[78]

[78] *Re Foulder*, [1938] 1 W.W.R. 186, at p. 190 (Sask. Surr. Ct.).