Smith and Drewry's Ltd. v. Stephenson[24] reveals this view (on facts similar to *Miller v. Decker*), and based the judgment on contributory negligence.

The modern stand concerning defences in which the plaintiff and the defendant were co-operating in a negligent course of conduct is demonstrated by *Dokuchia v. Domansch*[25]. Here the plaintiff knew of the performance of the very act that constituted negligence and co-operated in it, though he was not under any obligation to do so. He was allowed to recover a proportion of his damages under the Contributory Negligence Statute, it being held that the volens maxim was no defence. These results were particularly satisfactory, for there is no reason why in a case like this the loss should be borne exclusively by the unfortunate person on which is happens to fall.

No longer would one have to distinguish between cases where a person had knowledge of the danger and its extent and consented to it, and cases where the plaintiff has been guilty of a want of care for his own safety. Instead the two tasks would be integrated, and where a person knew of and consented to take a risk which a reasonable man would not take, or where the person was too intoxicated to be able to have any knowledge, then his contributory negligence would be of such a degree as to almost it not entirely, exclude his recovery.

—J. S. Moore,
Third Year Law.

[24] [1937] 1 W.W.R., at p. 111;
[25] [1945] 1 D.L.R. 757.

WILLS—LEGATEE OMITTED—POWER OF COURT TO ADD OMMITED NAME—CONSTRUCTION

The decision of Freedman J. in *Re Le Blanc Estate*[1] re-opens the problem of a probate court's power to add words to an otherwise incomplete will. In the Le Blanc case the learned judge was faced with an holograph will which in addition to numerous less important errors omitted the name of a legatee. The will read as follows:

Los Angeles, Cafb. U.S.A
14 June 1953
Mothet in case of quick desessed, my will his forreward to children
$6000.00 Olive Braden Six towsend Dollars.
$2500.00 Alice Pigott tow tousand amd five husdren Dollars.
$2500.00 Felix Le Blanc tow towsend and five husdren Dollar
$4000.00 Ernest Le Blanc four towsend Dollars.
$2000.00
$1000.00 Desised expenses and taxes.

$1800.00 extermartion of properter ellath in towsends Dollars.
Mother Mrs. Hossanna Le Blanc

This curious document came before the court in an application brought under the Manitoba Trustee Act[2] by the administrator with will annexed. All the

[1] (1955), 16 W.W.R. (N.S.) 389.
[2] R.S.M., 1954, c. 273.

beneficiaries were of age, and all concurred in the interpretation of the will. The learned judge pointed out that in such circumstances the court would normally leave it to the parties to effect the agreement at which they had arrived, but in this instance the district registrar of the Winnipeg Land Titles office required a court order before permitting any disposition of the realty in the estate. Accordingly this motion was entertained in order to expedite the administration.

Although as Freedman J. observed, "considered purely as a piece of English prose, the foregoing effort of the testatrix manifestly consistutes no challenge to Macaulay,"[3] he nevertheless found little difficulty in attaching meaning and intent to her writing. The opening line of the will he interpreted to mean either: "my estate is to be forwarded to my children," or: "my will is for reward to my children," and indeed, the four named beneficiaries were children of the testatrix. The closing words of the will were a greater problem, but bore "their own phonetic clue to meaning" and were construced to mean: "estimation of property eighteen thousand dollars." This seems to be reasonable reading of the words as they appear in the will, particularly in view of the fact that the dispositions totalled $18,000.00.

We come now to the contentious element in the construction of this will. It will be observed that opposite the $2,000.00 bequest there is a blank space. Freedman J. felt that this was "clearly a bequest of $2,000.00 to some person whose name does not appear," and he became convinced after an examination of the original will. Much of the will was written in a downward slant, so that some of the words from the preceding bequest fell opposite the figures "$2.000.00". Accordingly, the blank space, clearly revealed in the typewritten copy, was less apparent in the original will, leading to the presumption that this was an error of omission on the part of the testatrix. It was the submission of the four children named in the will as legatees that this fifth bequest was intended for Julia, a fifth child of the testatrix and the only child not named in the will. Freedman J. agreed, having "no hesitation in concluding that the bequest of $2,000.00 was intended for her," and he so ruled.

There is, however, little authority for the decision. The learned judge supported his decision by a reference to Theobald on Wills[4] "and cases cited there." It is of interest to examine those cases and the other authorities. The passage from Theobald states:

> With regard to supplying words in a will, the rule seems to be that where the will as it stands is clearly inconsistent, so that the choice lies between rejecting some portion of it or supplying some word, while at the same time the latter course will make the will consistent, the court will be justified in making the necessary addition.

The first authority cited by Theobald is *Hope* v. *Potter*[5] in which the Vice-Chancellor, Sir. W. Page Wood, stated the cases in which the court may exercise its discretion to supply words in a will may be classed under two heads, only one of which is relevant to this discussion, *viz.*,

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[3] *Supra*, footnote 1, at p. 391.

[4] (11th ed., 1954), pp. 642 ff.

[5] (1857), 3 K. & J. 206, 69 E.R. 1083.

> . . . when the will is in itself incapable of bearing any meaning unless some words are supplied, so that the only choice is between an intestacy and supplying some words; but even as in every case, the court can only supply words *if it sees on the face of the will itself clearly and precisely what are the omitted words*, (italics added) which may be supplied upon what is called a necessary implication from the terms of the will, and in order to prevent an intestacy.[6]

It is obvious that the test supplied by the Vice-Chancellor is more rigorous than that applied by Freedman J. Can it be said that the missing legatee's name is clearly and precisely evident on the face of the will? Is the will incapable of bearing meaning without the addition. Since the case quoted is the authority applied by Freedman J. he must have been prepared to answer these questions in the affirmative.

Missing names are dealt with specifically in Theobald, where we read: "Although a blank is left for the name of a legatee, the court may be able *from the context* (italics added) to ascertain who was intended to take." This quotation would appear to be more pertinent to the case under discussion. *In Re Harrison*[8] is cited for this proposition, in which the testatrix failed to fill up, completely, a printed will form so that she gave all her property: "unto _____ to and for her own use and benefit absolutely, and I nominate, constitute and appoint my niece Catherine Hellard to be executrix . . . ." The Court of Appeal in upholding the decision of Kay J. agreed that the will could be read, disregarding the blank, and be given meaning so that the niece would take. Lord Esher M.R. stated: "No doubt the language is awkward and elliptical, but is it capable of being read in that way," Kay J. had observed in the lower court: ". . . if this had been a holograph will and she had left a blank herself, it might be extremely difficult to deal with it." This latter statement can be contrasted with the alacrity with which Freedman J. treated the omission in the holograph will with which he was dealing.

The other authorities on the subject show that the courts are unwilling to let extrinsic evidence in to explain an omission. Halsbury's Laws of England[9] points out:

> In a court of construction the only legitimate evidence of the testator's intention is the will itself properly authenticated. In order, however, that the will may be properly expounded, the court adopts the general rule that any evidence of the circumstances is admissible which in it nature and effect simply explains what the testator *his written* (italics added); but in general no evidence can be admissible which . . . is applicable to the purpose of showing merely what he *intended to have written*. (Italics added)

This quotation appears to indicate that no evidence may be admitted other than the will itself when the court is faced with the problem of filling in a blank space. Halsbury continues:[10]

> Evidence can never be given in a court of construction in order to complete an incomplete will, or to add to, vary or contradict the terms of a will, or generally to prove any testamentary intentions of the testator not found in the will . . . .

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[6] *Ibid.*, at pp. 209 and 1084 resp.

[7] *Supra*, footnote 4, at p. 253.

[8] (1885), 30 Ch. D. 390.

[9] (2nd ed., 1940), vol. 34, at p. 165.

[10] *Ibid.*, at p. 169.

The leading case of *Newburgh* v. *Newburgh*[11] is cited here, in which part of the dispositions were accidentally omitted from the will. The Vice-Chancellor, admitting that the mistake existed, said that the court:

> . . . had no authority to correct the will according to the intention. The will executed with that omission was certainly not the will of the devisor . . . but the court could not, for that reason, set up the intention of the testator . . . . To assume such a jurisdiction would, in effect be to repeal the Statute of Frauds . . . .[12]

Halsbury further points out that:[13] "a testator may well intend to die partially intestate; when he makes a will, he is testate only so far as he has expressed himself in his will." It is submitted that this is a possible construction to be applied to the Le Blanc will. Although there is no evidence to support such a submission (and such evidence, if available, should not be admissible), the view is not an impossible one. Such conflicting constructions serve to illustrate the dangers inherent in purporting to supply words or names to a will, even when the object is to avoid a partial intestacy.

Similar views are expressed in R. E. Kingsford's Canadian Laws of Wills,[14] an adaptation of Jarman on Wills:

> In no instance has a total blank for the name (of a beneficiary) been filled up by parol evidence. In such cases, indeed, there is no certain intent on the face of the will to give to any person: the testator may not have definitely resolved in whose favour to bequeath the projected legacy.

This observation seems relevant to the Le Blanc will. Even if it is agreed that the testatrix has decided to whom the legacy is to go, she has failed to indicate that person. Parke B. makes this cogent statement in *Doe* v. *Needs*:[15]

> If, upon the face of the devise, it had been uncertain whether the devisor had selected a particular object of his bounty, no evidence would have been admitted to prove that he intended a gift to a certain individual . . . for to allow such evidence would be, with respect to that subject, to cause a parol will to operate as a written one: or, to adopt without writing, which the law appointeth shall not pass but by writing.

Very few Canadian cases on the subject are to be found in the reports, but two or three should be considered of interest. The decision in *In Re Wyllie Estate*[16] involved a will executed on printed forms as follows: "I devise and bequeath all my real estate unto————————absolutely, and my personal estate I bequeath unto my sister Miss Marie Wyllie." Simons J. followed *In Re Harrison*,[17] reading the will "according to loose English grammar and ideas," and found that the testator intended to include both real and personal property in the gift to his sister. The inapplicability of this decision to the *Le Blanc* case is obvious and shows that in the rare instances in which courts have supplied names they have not wandered far from the face of the will.

The Ontario Court of Appeal, in *Re Brown*[18] construed a will which read: "I, Florence Brown, wife of George A. Brown, do will all my property real and personal and that my husband George A. Brown act as executor." The testatrix

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[11] (1820), 5 Madd. 364, 56 E.R. 934.
[12] *Ibid.*, at pp. 365 and 935 resp.
[13] *Supra*, footnote 9, at p. 204.
[14] (6th ed., 1913), at p. 257.
[15] ((1836), 2 M. & W. 129, 150 E.R. 698, at pp. 140 and 703 resp.
[16] [1920] 3 W.W.R. 392.
[17] *Supra*, footnote 8.
[18] (1922), 52 O.L.R. 103 (C.A.).

failed to expressly name the legatee but MacLaren J.A. felt that on the plain reading of the will the husband was intended as universal legatee. In the course of judgment he states:[19]

> The fact that his name occurs a few words further on would also tend to divert her attention from the omission and mislead her.
> Reading the whole will, it would seem impossible to imagine that she could have intended to have any other name inserted, and his is the only name in the will besides her own.

Of particular significance is MacLaren J.A.'s characterization of the issue to be determined by him:[20]

> The question we have to decide is, whether the language of the will sufficiently indicates a legatee, or whether there is an intestacy.

There is no suggestion here that the court may look beyond the language of the will to determine the identity of the missing legatee.

Finally, in *Re McKittrick*,[21] the testator directed that the residue of his estate be divided into eight equal parts but he named only seven beneficiaries. It was agreed that the missing beneficiary was omitted by mistake or accident and the court below had supplied the eighth. One of the seven named beneficiaries was the City of Winnipeg Municipal Hospitals Building Fund and the lower court had, on learning there were two municipal hospitals in Winnipeg, gave one-eighth of the residue to each. Dennistoun J.A. disagreed with the lower court and noted that the learned judge below "had to go outside the will to ascertain the number of municipal hospital buildings which were in existence at the death of the testator." He concludes that "such an investigation would be improper", and accordingly, the Court of Appeal found an intestacy at to one-eighth of the residue. This decision seems consistent with the weight of authority we have examined, but it is of additional interest to note that the omission was similar to that in the Le Blanc case. Moreover, it is submitted that Freedman J. adopted the same course as the first instance judge in *Re McKittrick* in going outside the will. It was necessary for him to determine that the testatrix had five children, only four being named in the will. It is significant that *Re McKittrick* was not cited before the learned judge and that there was no attempt made to explain the earlier case. It is submitted that *Re McKittrick* precluded Freedman J. from seeking information necessary to fill the blank in the Le Blanc will from outside the will.

On its facts, it is unlikely that the *Le Blanc* decision caused any injustice to the parties concerned. Nevertheless, it seems clear that if there had been opposition raised before the court the authorities referred to by the learned trial judge would have been insufficient to maintain the stand which he took. It is to be hoped that courts of construction will either confine themselves to "the four corners of the will" or else justify their departure from univesally accepted canons of interpretations.

—M. A. Putnam,
Third Year Law.

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[19] *Ibid.*, at p. 104.

[20] *Ibid.*, at p. 103.

[21] [1934] 1 D.L.R. 442 (Man. C.A.)