THE COURT OF APPEAL

PROBATE

Neutral Citation Number [2021] IECA 28
Court of Appeal Record No. 2020/195
High Court Record No.: 19/9819

Whelan J.
Ní Raifeartaigh J.
Binchy J.

IN THE MATTER OF THE ESTATE OF MARY PHILOMENA MAUREEN MCENROE (OTHERWISE MAUREEN MCENROE) LATE OF 20 CYPRESS PARK, TEMPLEOGUE, DUBLIN 6W, RETIRED COMPANY SECRETARY, DECEASED
AND IN THE MATTER OF THE SUCCESSON ACT, 1965
AND IN THE MATTER OF THE APLICATION BY EVELYN O'NEILL, A SISTER OF THE DECEASED, AND ONE OF THE RESIDUARY LEGATEES AND DEVISEES NAMED IN THE LAST WILL AND TESTAMENT OF THE DECEASED TO PROVE THE DECEASED'S LAST WILL AND TESTAMENT IN COMMON FORM OF LAW IN ITS CURRENT FORM AND CONDITION

JUDGMENT of Ms Justice Ní Raifeartaigh delivered on the 12th day of February, 2021

1. This is a case in which the question is whether a will which was executed by Ms. McEnroe, the testatrix, should be admitted to probate in circumstances where it has on its face a number of unexecuted alterations. These alterations consist of two obliterations and one interlineation. More particularly, the case raises an issue concerning the construction of ss.85 and 86 of the Succession Act 1965 in a situation where there has been an obliteration *by pen* of a relatively small number of words in a will *such that those words are illegible*, but where the rest of the will remains intact (including the signature and attestation of the witnesses). The matter requires careful construction of the statutory provisions in circumstances where s.86 of the 1965 Act replaced s.21 of the Wills Act 1837 by re-enacting the provision with one crucial difference, being the omission of a proviso in s.21 which would, if it had been carried through to s.86, have provided a clear answer to the problem arising in this case. The meaning of the terms "destruction" and "obliteration" in ss.85 and 86 of the 1965 and the relationship between them are central to the judgment.

The Facts

2. Ms. McEnroe, a retired company secretary, died in May 2017 at the age of 87 years. She was a single woman without children and had made and executed her last will and testament in May 2005. The will was a homemade pre-printed will, written on two sides of a single sheet of paper.

3. The will had on its face a number of alterations and the probate office therefore refused to prove the will without further evidence being adduced. A sister of the testatrix, the applicant/appellant Mrs. O'Neill, brought an originating notice of motion before the High Court on an *ex parte* basis requesting that the will be admitted to probate in its current form and condition, and that liberty be granted to the applicant to apply for and obtain a grant of letters of administration with will annexed.

4. Mrs. O'Neill swore an affidavit in which she exhibited the death certificate and set out the family circumstances of the testatrix. Ms. McEnroe had 7 siblings, three of whom predeceased her. Mrs. O'Neill refers to the will in issue in these proceedings and says that she is not aware of any other will before or after this one. She confirms that the handwriting and signature at the end of the will are those of the testatrix. She exhibits the latter's driving license which also contains her signature.

5. Mrs. O'Neill explains that the two witnesses to the will, H.L. and M.L. (a married couple), were neighbours and good friends of the testatrix. Mr. L died on 4 June 2015 and his death certificate is exhibited. Mrs. L is alive but is of "unsound mind", and the certificate of registration of Enduring Power of Attorney in relation to her is exhibited. Accordingly, neither of the two witnesses can assist in determining the circumstances in which the alterations to the will occurred. Their son B.L. made a statement confirming that at the time the will was made, his parents were living at an address which is a few doors away from the home of the testatrix. He also says that he is satisfied that the witness' signatures on the will are those of his parents. His statement is exhibited in the affidavit of Mrs. O'Neill.

6. The applicant exhibits a draft Inland Revenue certificate which indicates that the total gross value of the testatrix' estate at the date of her death was in the region of €1,094,094 with a net value of €1,080,629.

7. Mrs. O'Neill also says that the testatrix was suffering from end stage dementia at the date of her death in 2017. Her GP swore an affidavit of mental capacity confirming that he was satisfied that on the 11 May 2005 the testatrix had been fully capable of making a will, which is also exhibited to Mrs. O'Neill's affidavit.

8. An affidavit was also sworn by Ms. Susan Hunter, daughter of the applicant Mrs. O'Neill. She says she had a close relationship with the testatrix who was her maternal aunt and also her godmother. She avers that sometime in January 2014, when her aunt (the testatrix) was in hospital and it became clear she would not be returning home to live in her own house, her aunt asked her to go to her house and secure the will and other important paperwork. On foot of the request and details given, Ms. Hunter went to the house and found the papers which were hidden upstairs under the floor boards in a "hidey

hole". They were stored in a biscuit tin inside the hidey hole. She confirms that the will contained the alterations thereon at the time she took possession of it. In July 2014 she handed this will over to Joe Clancy Solicitors because at that stage the testatrix' enduring power of attorney was in the process of being registered by that firm.

9. Mr. Joe Clancy, Solicitor, swore an affidavit in which he describes the testatrix executing an enduring power of attorney on the 12 December 2012 which was registered on the 3 July 2014. The completed form includes a part signed by the GP which confirms that the testatrix had capacity to execute this document (which was 7 years *after* she had executed her will).

The alterations to the will

10. There are three alterations to the will (two obliterations and one interlineation), none of which were properly executed in accordance with the requirements of the Succession Act.

11. *The first alteration* - The first alteration to the will is an *obliteration* of the name of the original executor. This is done by a pen having scored out the name to such an extent that it is no longer legible.

12. Mrs. O'Neill avers that she believes that the original executor was a Mr. P.W. who was a valued work colleague of the testatrix and a manager in the same company as that in which the testatrix worked. He died suddenly on the 19 September 2006. She believes that following his death, the testatrix decided to obliterate his appointment as executor and replace him with a different executor, although she is careful to point out that she has no evidence that this is in fact the case. The identity of the proposed replacement executor is not now ascertainable by reason of illegibility. Mrs. O'Neill that she thinks that the replacement executor may be one of her siblings, but as they all have similar length names in their shortened versions (Bartle, Patsy, Peggy, Detty), she cannot make out which of those is written in. Again, she has no evidence as to whether this is so and this is merely a surmise. The testatrix's initials appear on the left and on the right, but there was no witnessing of the change(s). Mrs. O'Neill also indicates that there is no evidence as to when the alterations to the will were made. The insertion therefore did not comply with the requirements of s. 86 of the Succession Act in any event.

13. *The second alteration* - The second alteration is on line 26 of the will and consists of an *obliteration* of a line which appears in the body of the will. There is a list of bequests (of sums of money) and devises (of shares) in the main body of the will. Each of the bequests starts with the word "To…" and then indicates the name of the person and the precise bequest or devise. Immediately after the last of these bequests (which is a bequest of a sum of money to a religious order), a line is completely obliterated, again by pen scoring. The line after that says, "I leave the balance of my estate to my sister…." i.e. a residuary bequest.

14. *The third alteration*- The third alteration is an *interlineation* of the word "say" inserted in the latter sentence so that it reads: "….This to the *say* thanks for all the meals cooked and all the house-cleaning which they did for me….".

15. Mr. Clancy, Solicitor, indicates in his affidavit that a handwriting expert was retained to inspect the will (following the first date before the High Court and as suggested by the trial judge). The expert, Mr. Dave Madden of Document Examination Ireland, examined the will on the 12 December 2019 at the solicitor's offices. Despite applying various forensic techniques commonly used to decipher obliterated entries, he was unable to make out the original contents of the obliterated writing with any degree of certainty. He was also unable to determine if the alterations took place before or after the execution of the will. A document to this effect authored by Mr. Madden was exhibited.

Relevant Legislation

16. S.77(1) of the Succession Act 1965 provides that to in order to be valid, a will shall be made by a person who has attained the age of 18 years or who is or has been married and is of "sound disposing mind".

17. S.78(1) provides that the will shall be signed at the foot or end thereof by the testator, or by some person in his presence and by his direction. Subsection (2) provides that such signature shall be made or acknowledged by the testator in the presence of each of two or more witnesses, present at the same time, and each witness shall attest by his signature the signature of the testator in the presence of the testator, but no form of attestation shall be necessary nor shall it be necessary for the witnesses to sign in the presence of each other. Subsection (3) deals with the location of the signature of the testator ("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 the signature to the writing signed as his will"). Subsection (4) sets out certain circumstances which will not affect the will e.g. that there is a blank space between the concluding word of the will and the signature, or particular locations of the signature. Subsection (5) provides that a signature shall not be operative to give effect to any disposition or direction inserted after the signature is made.

18. S.85(2) of the 1965 Act provides as follows:

> "Subject to subsection (1) [1], no will, or any part thereof, shall be revoked except by another will or codicil duly executed, or by some writing declaring an intention to revoke it and executed in the manner in which a will is required to be executed, or by the burning, tearing, or destruction of it by the testator, or by some person in his presence and by his direction, with the intention of revoking it."

On a simple parsing of this subsection, the following propositions emerge: A will or part of a will may be revoked: (1) by another will or codicil duly executed; or (2) by some writing

[1] Which deals with revocation by marriage

declaring an intention to revoke it, which writing is properly executed; or (3) by engaging in an act of burning, tearing or destruction with an intention to revoke. As regards method (3), there must be a combination of the requisite *act* together with the requisite *animus revocandi*.

19. Its predecessor provision was s.20 of the Wills Act 1837 which in substance is the same although the language is a little different:

> "No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner herein-before required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is herein-before required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same."

20. S.86 of the 1965 Act provides:

> "An obliteration, interlineation, or other alteration made in a will after execution shall not be valid or have any effect, unless such alteration is executed as is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the signature of each witness is made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end of some other part of the will."

On a simple parsing of the above, two propositions emerge: (1) An alteration (including obliteration or interlineation) made in a will after execution shall have effect *if the alteration is executed* as is required for the execution of the will (with the saver that the requirement under s.78 of the signatures to be at the foot of or end of the will is modified); (2) If the alteration is made after execution and is *not executed* as is required for the execution of the will, then the alteration is not valid and has no effect.

21. On its face, s.86 deals only with the validity of the *alteration* and not the validity of the rest of the will.

22. The provision in existence prior to the enactment of s.86 was s.21 of the Wills Act 1837 which provided:

> "No obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, *except so far as the words or effect of the will before such alteration shall not be apparent*, unless such alteration shall be executed in like manner as herein-before is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such

alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will." (emphasis added)

23. What may be noted is that the words italicised above were not carried through into the s.86 of the 1965 Act although the rest of the wording is almost identical. It is the absence of the underlined words (or equivalent) in s.86 which creates the problem at the heart of the present case. The underlined words can be referred to as the exception or proviso. Unfortunately, it is that precise scenario which arises in the present case i.e. there have been unexecuted alterations *and* the words of the will before such alteration are no longer apparent. This creates the following conundrum: the alteration is not valid and is presumptively of no effect, but the unaltered portion of the will is no longer known and therefore cannot be given effect as if the alteration had never been made.

High Court Judgment

24. The trial judge set out the facts described above and then said that the interlineation did not pose any particular problem and could be dealt with by admitting the will to probate without it, on the basis that there was no proof that it had been inserted before execution, citing *In re the Goods of Adamson* [2] and s.86 of the 1965 Act. I agree with that point.

25. As regards the first obliteration (concerning the name of the executor), he noted Mrs. O'Neill's surmises as to who might have been named originally and who might have been the replacement, but said that this could not be discerned from the document.

26. As regards the second obliteration, he said that the "surmise that what was obliterated was a gift appears to me to be reasonable, but it is only surmise" (para 9).

27. He noted that he had raised the question of forensic examination of the document and that the case was adjourned to enable such examination to take place. As we have seen, this did not yield any further information.

28. There were two further hearings, at one of which the trial judge raised the question of whether the application could properly be dealt with *ex parte*. He noted that counsel acknowledged that the obliterations gave rise to a significant legal difficulty but sought to persuade the court to follow an English case in which a particular approach had been adopted.

29. The judge said that he had no difficulty with the proposition that the will executed in 2005 was a valid will but said that he "remained of the view that the document now produced is not the document executed by the testatrix because it has been obliterated in two places". He referred to the cases of *Benn* [3] and *Morell* [4] but pointed out that they were decided before the 1965 Act; pointing out the difference between the difference in

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[2] (1875) L.R. 3 P&D 253
[3] [1938] I.R. 313
[4] (1935) 69 I.L.T.R 79

wording between s.21 of the 1837 Act and s.86 of the 1965 Act insofar as the proviso in s.21 in respect of indecipherable obliterations was not carried forward. He noted that the passage from Professor Brady's authoritative text, *Succession Law in Ireland*, cited by the appellant (set out below) was based on *Benn* which was decided before the introduction of the 1965 Act. He accepted the opinion of McGuire/Speirin in their text on the Succession Act that the absence of the proviso was probably not intended to affect the partial revocation of a will under s.85.

30. Turning to the key submission of counsel, he noted the reliance upon *Re Adams* [5] in which obliteration with a ball point pen was held to amount to "destruction" within the meaning of s.20 (i.e. the equivalent of our s.85(2)). He noted that "the conclusion certainly appears to assist the applicant, but it is interesting to note that … [the judge] got to the conclusion by reference to s.21 of the Act of 1837 and specifically by adopting and applying the test which is applied in England for the purpose of determining whether there has been a partial revocation – which turns on the proviso…".

31. He noted that a separate proposition was advanced that, assuming the obliterated line was a gift, it might be void for uncertainty but commented that "the argument was not developed".

32. The trial judge then concluded:

> "25. It is acknowledged that the proviso to s. 21 of the Wills Act, 1837 which would have provided a ready answer by allowing the will to be admitted to probate as if the obliterations were blank is unavailable. Unless, then, the obliterations are taken to have amounted to destruction so as to have effected a partial revocation, the document propounded is not the entirety of the will and there is no evidence as to what has been obliterated. The argument advanced on behalf of the applicant is acknowledged to be novel and the English authority on which it is based is in turn based on legislative provisions which are not the same as ours.
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> 26. The applicant has not engaged with the issue as to what will become of the estate if the court were not persuaded to admit the will to probate.
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> 27. Emphasising that I am doing so because I have been pressed to decide the application without notice and that I am not pronouncing against the will, I refuse the application. There will be no order as to costs".

33. Accordingly, the trial judge did not rule definitively on whether the will should be admitted to probate or not, but rather declined to decide that issue in the absence of "notice", by which he appears to have meant notice to those who might be entitled under intestacy.

34. The appellant appealed on the basis that the trial judge was wrong to so rule, and that he should have ruled the will valid and admitted it to probate. She also submits that he

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[5] [1990] CH 601, [1990] 2 All ER 97

should have made an order directing that the costs of the application be borne by the estate.

Submissions

35. As the application to the High Court was *ex parte*, as was the appeal, the only party who made submissions was the applicant/appellant, Mrs. O'Neill.

36. In general terms, the appellant accepts that the point is a difficult one in the absence of any Irish authority since the introduction of the 1965 Act and in circumstances where s.86 re-enacted s.21 of the 1837 Act with the specific omission of the proviso which would have explicitly governed the situation arising in this case and which was key to the analysis of the English authorities of both ss.20 and 21 the 1837 Act, in particular *Re Adams*. As the appellant points out, the difficulty of applying s.86 of the 1965 Act in this case is that the section requires that unexecuted alterations be treated as invalid, but the assumption is that the solution is to give effect to the underlying words the subject matter of the invalid alteration, whereas in the case of this particular will this cannot be done as the original words underlying the obliterations are indecipherable. This leads to the conundrum I described above.

37. In essence, the appellant submits that the Court could either (1) treat the scoring out of the words as an act of destruction within the meaning of s.85(2) with an intention to revoke those specific parts of the Will i.e. partial revocation; or (2) treat the obliterated portions, including the bequest, as void for uncertainty. Under either of these approaches, the rest of the will would be left intact and operative, and probate would be granted with blank spaces for the parts of the will which were obliterated. The appellant also invites the Court to go further than the trial judge did in respect of the second obliteration and find that it is likely that it was a bequest or devise, and not merely a surmise, as the trial judge described it.

38. The appellant submits that what should not be done is to treat the entire will as invalid and/or regard it as an actual or even potential situation of intestacy or regard the situation as one in which those who might benefit under intestacy have a right to be heard in these proceedings, as appears to have been the approach adopted by the trial judge. [6] She submits that the only person(s) who might theoretically have a right to be heard is the person or persons who were to be the beneficiary of the bequest which was obliterated, but of course their identity cannot now be ascertained because the underlying word(s) cannot be deciphered. In this particular case, if the Court were to take the view that all potential beneficiaries on intestacy should be heard, there would be 15 persons in that position because that is the number of persons who would be entitled to share in the administration intestate of the estate pursuant to s.69(1) of the 1965 Act; the testatrix

[6] Although the trial judge did not expressly refer to intestacy, it can be inferred that this is what he had in mind when he raised the question of what the outcome would be if he did not admit the document to probate (see paras 11,13, 14 and 24 of the judgment of Allen J.)

having had a number of brothers and sisters, some of whom predeceased her and who themselves had a number of children.

39. In favour of an approach which would uphold the validity of the will (with the scored-out lines in the will being treated as blanks), the appellant makes a number of more specific points, some arising from general principles applicable to the construction of wills, and some relating more directly to ss.85 and 86 of the 1965 Act arising out of the authorities on their predecessor statutory provisions, ss.20 and 21 of the Wills Act, 1837. I will discuss each of these points in the course of my own discussion, to which I now turn.

Discussion

Some relevant general principles in the area

40. The first point made by the appellant is that the common law courts lean in favour of testacy: see *Kavanagh v Fegan* [7], where Hanna J. said:

> "Now there are two matters in a case of this kind which the Court must bear in mind continuously when considering the facts: -1. That the Court leans in favour of testacy; and 2. That there is a rebuttable presumption of law that a will, on its face made in conformity with the law, should be admitted to probate. It is a rebuttable presumption…In my opinion the evidence necessary to rebut the presumption in favour of regular and due execution must be cogent and reliable in the sense that it is evidence upon which the Court can act with confidence".

41. In *Mulhern v. Brennan* [8], McCracken cited the memorable expression of the above principle by Lord Esher MR in the *Harrison* case, saying:

> "There is considerable authority that, in construing a Will, the Court will presume that the testator did not intend to die intestate as to any part of his estate, for otherwise he would not have made a Will. Accordingly, where there is an ambiguity, this is very colourfully expressed by Lord Esher M.R. in In Re: Harrison (1885) 30 Ch.D. 390 where he said at p.393:-
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> > "There is one rule of construction, which to my mind is a golden rule, viz., that when a testator has executed a Will in solemn form you must assume that he did not intend to make it a solemn farce, - that he did not intend to die intestate when he has gone through the form of making a Will. You ought, if possible, to read the Will so as to lead to a testacy, not an intestacy. This is a golden rule. I do not deny that this Will may be read in two ways, or that it requires a blank should be filled up. But it may be read in such a way as not to amount to a solemn farce."

42. The second point is that the will in the present case complies with the formal requirements of s.78 of the 1965 Act (set out above) and that there is no question over

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[7] [1932] IR 566

[8] [1999] 3 IR 528

the mental capacity of the testatrix at the time she made the will, having regard to the evidence from her GP. Where a will has been signed by a testator and witnessed, with a formal attestation clause, there is a presumption that the will has been properly executed. The courts frequently apply the maxim *omnia praesumuntur rite esse acta* in this regard.

43. The third point identified by the appellant is that none of the grounds for challenging a will arise in this case. The appellant submits that the High Court (McDonald J) in *Darragh v. Darragh* [9] succinctly summarised the grounds upon which a will may be challenged as:

    (a) The will was not executed in compliance with the statutory rules in s.78 of the 1965 Act; or

    (b) The testator did not know and approve the will; or

    (c) The testator was not of sound mind, memory and understanding at the time he made the will such as to lack the necessary testamentary capacity required by s.77 of the 1965 Act; or

    (d) The execution of the will was tainted by duress or undue influence.

44. Further, the appellant submits, there is no presumption of duress or influence in relation to wills: *Lambert v. Lyons* [10] That was a case in which the plaintiffs claimed an order striking down a codicil on the basis that it was extracted under duress and undue influence and there was a discussion of the authorities and texts at pp.136-9, culminating in the following conclusion:

> "Irish law, accordingly, recognises a distinction between the proof of undue influence in the context of wills and in the context of transactions *inter vivos*. In the case of undue influence in the context of wills, the burden of proof is on the plaintiffs and there is no presumption of undue influence arising from special relationships".

45. Fourthly, the appellant makes the point that bequests may be void for uncertainty without affecting the overall validity of a will. In this regard, the Court was furnished with an extract from Professor Brady's text at para 6.47 where he states this principle in the following terms:

> "A gift in a will may fail for uncertainty if either the subject matter of the gift, or the object or objects, are not stated with sufficient clarity to enable the court, having regard to admissible extrinsic evidence, to enforce its terms. The courts however have gone to great lengths in order to save gifts which appear to be too vague to take effect and, as Lord Hardwicke LC put it in *Minshull v. Minshull* "a court never

[9] [2018] IEHC 427
[10] [2010] IEHC 29 (Murphy J.)

construes a devise void, unless it is so absolutely dark, that they cannot find out the testator's meaning".

The principle is part of the more general or "golden" principle that *"You ought, where possible, to read the will so as to lead to a testacy, not an intestacy"* (per Lord Esher MR in In re Harrison [11]). Professor Brady points out that this approach has similarly been adopted by the Irish courts, citing *Makeown v. Ardagh*. [12]

46. I accept that all of the above-identified principles by the appellant are indeed general and well-established principles in the area of probate.

What was originally in line 26 of the will (the second alteration)?

47. In my view, there is no great difficulty with the first and third alterations of the will. Each is an unexecuted interlineation. Neither conforms the requirements of s.86 of the 1965 Act. As regards the first alteration, the absence of a named executor can be dealt with under Order 79 rule 5(6) of the Rules of the Superior Courts. As regards the third alteration (the word "say"), the purported interlineation can be simply disregarded. The real problem is the second alteration, namely the obliteration of line 26.

48. The appellant submits that it is very clear that the second obliteration concerned a bequest or devise of money or shares, given its location within the will as a whole and falling, as it does, at the end of a list of bequests relating to sums of money and shares, and just before the residuary clause. On balance, I agree with the appellant that line 26 of the will *probably* originally contained some bequest of money or devise of shares to a named individual or body. Apart from what I have said above, it is also possible to discern the euro symbol "€" in the line , which is otherwise completely indecipherable. Of course, the Court on appeal is normally reluctant to disturb findings of fact by the trial judge or, as in this case, what might be said to be the reverse, namely his view that the evidence was not sufficient to make a finding and amounted to a mere 'surmise'. However, in this case this Court is in as good a position to make a finding of fact as the trial judge by looking at the will and the evidence on affidavit and, having done so, I am of the view that the inference should be drawn, on the balance of probabilities, that this particular line of the will (line 26) originally contained a bequest or devise. I have inspected the original testamentary instrument. The jurisprudence, including *In the Goods of Benn, deceased* , makes clear the right of a Court to rely on its own opinion from observation of the fabric of the will under consideration.

49. The question then arises as to what impact the obliteration of this bequest or devise has upon the validity of the rest of the will.

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[11] (1885) 30 ChD 390, 393

[12] (1876) 10 IR Eq 445

Construction of ss.85 and 86 of the 1965 Act: obliteration, destruction and revocation

50. Can s.85(2) be construed to include a partial revocation by destruction by means of the scoring out of words by pen to the point of illegibility, as submitted by the appellant? [13] While there is no Irish authority on point, the appellant drew the Court's attention to a number of English authorities albeit, as already mentioned, with the significant reservation that their precedential value is limited by the fact that the crucial proviso or exception clause in s.21 (underlined when set out earlier in this judgment) was not carried through in the 1965 Act. The clause in question is **"...except so far as the words or effect of the will before such alteration shall not be apparent..."**.

51. In the discussion which follows, it may be helpful that the reader be reminded that s.20 of the 1837 Act was the predecessor to s.85(2) of our 1965 Act, and s.21 the predecessor of s.85 of the 1965 Act.

52. In *Hobbs v. Knight* [14], a decision of the Prerogative Court in 1838, the cutting out of a signature on a will was held to be an act of destruction under s.20 such as to render the entirety of the will invalid. However, this was because the signature was an essential part of the will. Sir Herbert Jenner said:

> "I consider the name of the testator to be essential to the existence of a will, and that, if that name be removed, the essential part of the will is removed, and the will is destroyed."

At paragraph 780, he suggested *obiter* that obliteration could constitute destruction. This passage was, as we shall see, subsequently followed in the *Adams* decision, discussed below:

> "It was said in the argument (perhaps it is not very material) that a will cannot now be revoked by obliteration, the term obliteration having been advisedly omitted by the legislature; but I am not prepared to say (although I now merely throw this out) that a will may not be revoked in that way, for I see no reason why, if the obliteration amount to a destruction of the will (that is, if the name of the testator, which is essential to the will, be so obliterated that it cannot be made out), a will may not be revoked in that way as well as any other. Suppose a testator had so obliterated his name from a will as to render it impossible to make it out, and I am not at liberty to supply it by evidence aliunde, how would this operate with respect to the 21st clause of the act which enacts [here he sets out the wording of s.21]. By this clause, as I understand it, where words are so obliterated that they do not appear, it is a good revocation pro tanto. Would not the same rule be applied with respect to the name of the testator? I think that it was the intention of the legislature that it should be sufficient if the name of the testator was so obliterated

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[13] Assuming of course that the words scored out are not essential matters such as the attestation clause or to the testatrix' signature

[14] [1838] 1 Curt 768

that it could not be made out; it never could be intended that a testator might revoke his will pro tanto, and yet not be at liberty to revoke the whole will".

53. The important point for present purposes is that he accepted that an obliteration such that the underlying words were no longer legible could amount to an act of "destruction" and therefore revocation in appropriate circumstances.

54. Where words in a will have been struck through with a pen *without obliterating the underlying words*, this does not amount to destruction: *Stephens v Taprell* [15] , a decision of the Prerogative Court in 1840. In this case the will was found locked up in the testator's office after his death and the body of the will was struck through with a pen, the name of the testator was crossed out, as well as the attestation clause and the names of the witnesses (and a codicil which had not been legally executed). Sir Herbert Jenner said:-

> "When the legislature, after mentioning 'burning' a will and 'tearing' a will, speak of 'otherwise destroying' a will, they must be understood as intending some mode of destruction *ejusdem generis*, not an act which is not a destroying in the primary meaning of the word, though it may have the sense metaphorically, as being a destruction of the contents of the will. It never could have been their intention that the cancelling of a will should be a mode of destroying it."

55. The decision in *Stephens v. Taprell* was followed in *Cheese v. Lovejoy* [16], where the testator had crossed out certain lines with a pen and written "This is revoked" on the back of the will. This was held to be insufficient to constitute destruction within the meaning of s.20.

56. Going back to *Stephens v Taprell* for a moment, it is interesting to note that in reaching his conclusion that a crossing out of (still legible) words did not amount to "destruction" in s.20, Sir Jenner engaged in an analysis of the proviso in s.21 which was omitted in our 1965 Act. He pointed out that the Wills Act, 1837 had been framed upon the recommendations in a report of commissioners on real property but that s.21 had departed from the commissioners' recommendation in an important respect. The recommendation of the commissioners was that "where a will is found with unattested obliterations, it should be considered to be wholly unaltered, except that if any words cannot be read or *made out in evidence*, in consequence of the obliteration, the will shall take effect as if such words did not form part of it" (emphasis added). The italicised words allowed for the possibility of extrinsic evidence being adduced to prove what the original words were even if they were no longer decipherable because of the obliteration. This aspect of the recommendation did not make its way into the legislation, however, and as Sir Jenner was of the opinion that "the court is obliged to reject extrinsic evidence, however strong it may be, as to the contents of the will before the attestation, and to look

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[15] 2 Curt. 458

[16] (1877) 2 PD 251

only to the will itself, and, when it finds a word to be utterly illegible, to omit that word as well as the word substituted."

57. The case of *Adams* directly raised the question which had been the subject of *obiter* comment by Sir Jenner in *Hobbs v Knight*, namely whether a will had been "destroyed" when material parts of the will (including the signature of the testatrix and attesting witnesses) had been obliterated by heavy scoring with a ballpoint pen. The testatrix made a will with the assistance of her solicitors who retained it in their office. Several years later, she telephoned her solicitor and instructed him to destroy her will. He wrote to her enclosing the will and informed her that she should destroy it herself. When she died, the will was found among her effects, heavily scribbled on by a ballpoint pen. The heaviness of the scoring varied in different parts of the will. The signature of the testatrix and witnesses had been so heavily scored that it was impossible to see them with a naked eye. The question arose whether this fell within the meaning of "destruction" under s.20 of the Wills Act, 1837.

58. Counsel argued that there was a distinction between destruction and overlaying the words with ballpoint ink, but the court rejected the argument, saying that what was important was that it was impossible to discern the presence the signature "by the normal sense by which signatures are discerned". The court followed the *obiter* remarks of Sir Jenner in *Hobbs v. Knight* described above. The court went on to apply the same test as had been applied in respect of s.21 for deciding whether original words were "apparent" or not, namely that words can be considered to be apparent "if experts, using magnifying glasses, when necessary, can decipher them and satisfy the court that they have done so" without any "physical interference with the document, so as to render clearer what may have been written upon". Applying that test, the court concluded that a material part of the will had been destroyed and, the court also being satisfied from all the circumstances that there had been an intention to revoke, the entire will had therefore been revoked by the testatrix. The court refused to grant probate of the will.

59. It is material to note that that the case was decided pursuant to s.20 (and not s.21) of the 1837 Act. What is most important for present purposes is the view that the scoring out by pen to the point of illegibility can constitute an act of "destruction" in certain circumstances.

60. I pause also to note the court's comments concerning the inference that the testatrix in *Adams* intended to revoke the will. The court drew two separate inferences. First, it said that it could be readily inferred that obliteration or partial obliteration had been *done by the testatrix and not some third party*, this being "the inevitable and proper inference to be made where it can be shown that a will was in the hands of a testatrix in unaltered form and where the will has not left those hands until the time of death and at or immediately after the death it is found to be in an in altered form". Secondly, it could be inferred that the obliteration was done *by the testatrix with the intention of revoking the will*. Citing Williams on Wills 6th ed at p.154, he referred to a presumption that where a will is destroyed or found mutilated in a place in which the testator would naturally put it,

the presumption is that the testator destroyed it with the intention of revoking it. He also noted that the presumption could be rebutted. Nothing before him rebutted the presumption, he said; on the contrary there was great deal that appeared to reinforce it.

61. Counsel also relies upon *In the Goods of John Woodward* [17] and in *Re Everest* [18] for the proposition that there can be a revocation by destruction of a part (only) of a will. It may be noted that in both cases the act of destruction was by cutting or tearing. In *Woodward*, a will was found in an iron chest in which the testatrix kept important papers. It had been written on the first sides of seven sheets of paper and signed by the testatrix and witnesses on each sheet, and at the end. The first seven or eight lines had been cut and torn off, but the remainder of the will was complete. It was held that it could not be inferred that the testatrix intended to revoke the whole will from the cutting or tearing off of the early part of the will, and the will was admitted to probate in its incomplete state. Lord Penzance referred to s.20 of the 1837 Act and then quoted with approval from the case of *Clarke v. Scripps* [19], in which Sir J. Dodson carefully distinguished between partial and total revocations, and emphasised the requirement of an intention to revoke with regard to each:

> "Upon this enactment (1 Vict.c.26, s.20) it is obvious, first, that a part only of a will may be revoked in the manner described; in other words, that the whole will is not necessarily revoked by the destruction of a part; nevertheless, I do not by any means intend to say that the destruction of a part may not under certain circumstances operate as a revocation of the whole will. Secondly, it is to be observed that the burning, tearing or otherwise destroying the instrument must be done with the intention to revoke. It is not the mere manual operation of tearing the instrument, or the act of throwing it into a fire, or of destroying it by other means, which will satisfy the requisites of the law; the act must be accompanied with the *intention* to revoke; there must be the animus as well as the act, both must occur in order to constitute a legal revocation. It is the animus also which must govern the extent and measure of operation to be attributed to the act, and determine whether the act shall effect the revocation of the whole instrument, or only of some and what portion thereof. Now the intention of a testator to revoke wholly or in part may, I conceive, be proved, first, by evidence of the expressed declaration of a testator, especially if such declaration was contemporaneous with the act…Secondly, the intention may, in the absence of any express declaration, be inferred from the nature and extent of the act done by a testator i.e. it may be inferred from the state and condition to which the instrument has been reduced by the act. From the face of the paper itself it may be inferred, either he did intend to destroy it altogether or did not".

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[17] [1871] L.R. 2 P&D 206

[18] [1975] Fam. 44

[19] 2 Rob. Ecc. 563

62. In *Everest*, the testator executed a will which was executed at his bank and deposited there for safekeeping. Two years later, he removed it from the bank and did not return it. After his death, his widow found the will with the lower half of the front page cut away. The will contained clauses appointing the bank as executors and trustees, giving his personal chattels to his widow, and providing that his real estate and residue of his personal property be held on trust; however, the details had been cut away. Court granted probate of the will, drawing the inference that testator had not intended to revoke the whole will and had intended the remaining part to be effective. It was admitted to probate in the state in which it had been found. Lane J. said:

> "What is important is that even though there be no instructions as to the trust which he set up, there is sufficient remaining of the will to satisfy me that he intended that what remained should be effective. And I am of opinion that it would be wrong to refuse to give effect to the testator's wishes, in so far as these are determinable from what remains of his will. Accordingly, I order that probate issue of the will, mutilated as it is".

63. Counsel also referred to the following two Irish cases both of which pre-dated the 1965 Act and are of limited assistance. The case of *Morell* [20] involved the striking out of a signature in a codicil. The testator, having made and duly executed his will, made a first codicil which he signed in two places; once below the attestation clause, which signature was struck out, and once at the end of the will and immediately above the attestation clause, which signature was left untouched. Hanna J. said that he was drawing the inference that Mr. Morell probably signed first at the end of the attestation clause and then having noticed that the will ended a few lines above the attestation clause, signed at the end of the will and struck out the first signature he had made. The codicil was admitted to probate. Not only did the case pre-date the 1965 Act but it is also distinguishable from this case because the alteration was legible.

64. The will in the case of *In the Goods of Benn* contained both interlineations and an obliteration. The court in its judgment was primarily concerned with the interlineations, holding that the evidence suggested that the interlined words had been inserted before the will was executed and therefore that they should be included in the grant of probate. However, as regards the obliteration, the court (Hanna J.) confined itself to saying at the conclusion of the judgment (p.322) that they were indecipherable "and the grant must be blank in respect of them", without further elaboration.

65. There appears to be no Irish authority after the passage of the 1965 Act dealing with matter raised by the present case. The appellant relies upon a passage from Brian E. Spierin, *Succession Act 1965 and Related Legislation: A Commentary*, 5th edition. Referring to the words in s.21 of the 1837 (the proviso or exception) not having been carried through into s.86, the author comments:

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[20] (1935) 69 ILTR 79

"This exception has not been carried over…The absence of an express proviso, however, was probably not intended to affect the partial revocation of a will under s.85. Thus, if a testator were to erase or to cut or tear out a gift he or she had made by will with the intention of revoking it, this would be effective to revoke the gift. Where the act of the testator does not amount to 'burning, tearing or destruction, though, the provisions of s.86 must prevail".

66. Counsel also cited the following passage from Professor Brady's text:

"If unattested alterations were made in a will after execution or, if made before execution, but there is no evidence to show that they were so made, the will can take effect as if there were blanks in the spaces which contain the alterations if the original words cannot be read. Similarly, if words in a will are completely erased or obliterated, and extrinsic evidence is not admissible, or otherwise available, the will can take effect as if there were blanks in the spaces which contained those words". (para 3.15)

The text cites *Morrell* for the proposition in the second sentence in that passage, but I do not, with respect, see anything in *Morrell* which definitively supports that proposition as the matter of obliterated words did not arise nor was it discussed in that case.

67. Before proceeding to interpret ss.85 and 86 of the 1965 Act, it may be helpful to summarise the principles emerging from the above authorities relating to revocation by destruction under s.20 of the 1837 Act as follows:

(a) There may be full or partial revocation of a will by destruction;

(b) For there to be revocation by destruction, there must be both (i) an act of destruction and (ii) an intention to revoke ;

(c) The double requirement of an act of destruction and the intention to revoke applies whether the revocation is full or partial. In the case of a full revocation, there must be an act of destruction of at least an essential part of the will (such as the testator's signature) together with an intention to revoke the whole of the will. In the case of a partial revocation, there must be an act of destruction of part of the will together with an intention to revoke that part of the will.

(d) Cutting out with a scissors or tearing off a part of a will constitutes an act of destruction.

(e) Scoring a will with a pen to the extent that the words are no longer legible is also an act of destruction.

(f) The mere crossing out of words which remain legible does not amount to an act of destruction.

(g) Where a portion of a will not essential to its validity as a testamentary instrument is destroyed a question of fact arises as to whether the word(s) destroyed is so important as to raise the presumption that the rest cannot have been intended to stand without it or whether it does not assail the essence of the will but, rather, is of relative unimportance or operates independently of the other provisions of the will.

68. Arising from the above, the questions which appear to me now to arise include the following:

(a) Are any of the above principles disturbed by the fact that the proviso in s.21 of the 1837 Act was not carried through in the 1965 Act?

(b) More specifically, is there any reason that the word "destruction" in s. 85(2) of the 1965 cannot be interpreted as including scoring words through to the point of absolute illegibility and/or does the wording of s.86 (and specifically the fact that the proviso clause was not carried through) prevent such an interpretation?

(c) Does the difficulty posed by the statutory interpretation of the provisions require that the court give an audience to persons who might potentially benefit in a situation of intestacy?

69. No evidence was adduced before the Court as to why the proviso in s.21 was omitted from the equivalent section in the 1965 Act. The conspicuous absence of the proviso from the new provision which otherwise closely mirrors the old provision is notable. However, the Court is not entitled to take into account the Dáil Debates [21], which do in fact contain an exchange concerning the reason for the omission of the proviso.

70. I cannot discern from the face of the legislation what the legislative intent might have been in omitting the proviso. However, the following can, I think, be stated with some certainty. The general purpose of s.86 is to discourage unexecuted alterations to wills and to set out the method by which wills *can* be validly altered. In construing ss.85 and 86, this should be borne in mind.

71. Further, in my view, there is nothing in s.86 from which it could be inferred that the Oireachtas intended to convey that the entire will should be rendered invalid in the event that it contained an obliteration to the point to point of illegibility irrespective of the nature or scale of the obliteration seen in the context of the will as a whole. Moreover, such an interpretation would run contrary to the very well-established principle that the law leans in favour of testacy.

72. Having regard to the above, it seems to me that the omission of the proviso in s.86 does not *prevent* the Court from now interpreting ss.85 and 86 in the following manner, in order to resolve the conundrum of interpretation set out earlier in this judgment. It

[21] *Crilly v T&J Farrington* [2001] 3 IR 251

should be noted that in all of the following points, the underlying predicate is that the alteration was not executed.

1. The mere crossing out of words which remain legible is an "obliteration" which falls within s.86 and is not a valid alteration of the will. The still-legible crossed-out words must be given effect.

2. If words are scored out with a pen to the extent that they are no longer decipherable even with the assistance of the techniques used by a handwriting expert, this is also an "obliteration", but of a more fundamental kind.

3. If words are scored out with a pen to the extent that they are no longer decipherable even with the assistance of the techniques used by a handwriting expert, this obliteration also amounts to an act of "destruction" within the meaning of s.85(2), akin to a cutting or tearing or burning. The rest of the will remains intact and the revocation may be held to operate only in respect of the obliterated illegible portion (i.e. it is treated as a blank, as was done in the *Benn* case), subject to the important caveat that the whole will should be held invalid if the destruction related to an essential part of the will such as the signature of the testatrix/testator.

4. For the court to conclude that there was a partial revocation by destruction pursuant to s.85(2), in addition to the act of destruction by obliteration, it must also be clear (a) that the testator or testatrix was the person who engaged in the act of destruction and not some third party, although in the usual way, this is a matter to be addressed by way of inference from the will and the surrounding circumstances; and (b) that the testatrix or testator engaged in the act of destruction with an intention to revoke, and again this can of course can be inferred, if appropriate to do so, from the surrounding circumstances.

73. It seems to me that this interpretation of the legislation does no violence to the English language; is reasonably logical; and is consistent with the purposes of each of s.85 and 86. Furthermore, it is an interpretation which is more consistent with the general principles of probate law than the alternative of treating such an obliteration as inevitably leading to intestacy, because it gives effect to the remainder of the testator's intentions as appear from the rest of the will rather than rendering the will invalid in its entirety by reason of the obliteration(s).

74. I also draw some support for this view from the fact that this is what Professor Brady considered the position to be in his authoritative text on Irish succession law, albeit that I am not convinced that the authority he cited in support of the proposition in fact does provide the support in question.

Application to present case

75. I now turn to apply these principles to the facts of the present case. I have earlier in this judgment found on the balance of probabilities that line 26 was probably a pecuniary

bequest or a devise. Having regard to the evidence as to the will being recovered from its hidey-hole on the instructions of the testatrix, I am satisfied to draw the inference that the testatrix herself carried out the pen-scoring in question. It seems to me also that her intention to carry out a partial revocation only can also be clearly inferred given the relatively limited nature of the obliterations. In the circumstances, I would hold that the first obliteration (of the executor) should be treated as blank with the result that the position is then governed by Order 79 rule 5(6) of the Rules of the Superior Courts (SI 469/2015), while the second obliteration (of the bequest or devise) should be treated simply as a blank, in light of the approach of Hanna J. in the case of *Benn*. The rest of the will can be treated as valid.

76. It follows from what I have said that there is no need or entitlement for those who might benefit under intestacy to be represented at a hearing in relation to the will.

77. I should perhaps add that I would emphasise that this is a case in which (a) there was no suggestion whatsoever of third party interference; (b) the intention of the testatrix to partially revoke was clear; and (c) the scored-out portions of the will were relatively minimal, constituting a small fraction of the overall will and did not involve any essentials such as the testatrix's signature or those of the witnesses to the will.

Legislative clarification

78. The question of statutory construction which has arisen in this case can be said to arise in part from the legislative history to which I have referred (the omission of the proviso when enhancing the new provisions in 1965) but also from the conundrum described above whereby the purpose of s.86 – to treat unexecuted obliterations as invalid- and the literal language of the section simply cannot, in practical terms, be given effect to in cases where the underlying words are illegible. I have sought to reach a reasonable interpretation of the statutory provisions without over-straining language and while honouring the legislative intent as far as it can be ascertained. However, it may well be that ss.85 and 86 would benefit from the attention of the Oireachtas in the future in order to put beyond doubt the proper approach of the courts to wills in which words have been obliterated to the point of illegibility. The risk of improper alterations of wills is a serious matter and there should be no ambiguity or lack of clarity as to how the court should deal with wills which present the problem discussed in this judgment. I would make the additional observation that any potential review of the ss.85 and 86 might usefully include a consideration of whether a court may receive extrinsic evidence as to what the underlying words were in a situation where words in a will have been obliterated to the point where they are no longer legible. As noted earlier (paragraph 64), Professor Brady appeared to think that, in a case where there has been an obliteration of words in a will, extrinsic evidence, if available, would be admissible to prove what the original words were; while Sir Jenner in *Stephens v Tapprell* thought not (see paragraph 54 above). This issue did not arise in the present case because no extrinsic evidence was available.

Bequest void for uncertainty

79. I would be inclined to take the view that the Court should in any event uphold the validity of this will having regard to the principle that bequests which are void for uncertainty should be treated as blank, but as the matter was not the subject of detailed submissions, I prefer to rest my conclusion upon the above.

Costs

80. In relation to the issue of costs, counsel cited the Chubb decision and submitted, on the basis of s.168(1)(b) of the Legal Services and Regulation Act 2015, that the costs should come out of the estate. It seems to us that this application should be acceded to. S.168(1)(b) provides that a court may, where proceedings before the court concern the estate of a deceased individual order that the costs of or incidental to the proceedings of one or more parties to the proceedings be paid out of the property of the estate. The issue raised in this case was novel and the probate office directed that the application to be brought. The appellant had no choice but to bring the application in order to get a grant and administer the estate, and the difficulty arose out of the actions of the deceased herself, not by reason of any conduct on the part of the appellant. Accordingly, we will grant the costs of the appeal and reverse the High Court decision and award the High Court costs to the appellant also, both to come from the estate in due course.

Summary

81. In the interests of clarity, I will re-state my conclusions:

    (a) The first obliteration (of the executor) should be treated as blank with the result that the position is then governed by Order 79 rule 5(6) of the Rules of the Superior Courts (SI 469/2015);

    (b) The second obliteration (of the bequest or devise) should be treated simply as a blank.

    (c) The interlineation (the insertion of the word "say") should be ignored as if the word had not been inserted.

    (d) The rest of the will can be treated as valid.

    (e) All costs to come out of the estate in due course pursuant to s.168(1)(b) of the 2015 Act.

82. This judgment is being delivered electronically, I wish to record that both Whelan J. and Binchy J. have indicated their agreement with it.