

# Montana Law Review

---

Volume 5  
Issue 1 *Spring 1944*

Article 1

---

January 1944

## When Is a Holographic Will Dated?

Claude W. Stimson

Follow this and additional works at: <https://scholarworks.umt.edu/mlr>



Part of the [Law Commons](#)

Let us know how access to this document benefits you.

---

### Recommended Citation

Claude W. Stimson, *When Is a Holographic Will Dated?*, 5 Mont. L. Rev. (1944).

Available at: <https://scholarworks.umt.edu/mlr/vol5/iss1/1>

This Note is brought to you for free and open access by ScholarWorks at University of Montana. It has been accepted for inclusion in Montana Law Review by an authorized editor of ScholarWorks at University of Montana. For more information, please contact [scholarworks@mso.umt.edu](mailto:scholarworks@mso.umt.edu).

an appeal, as in cases of allowance of suit money in the court below.

And, in conclusion, may we point out that we find a certain male illogic in originating the rule that a wife be required to expend her own income for her support during a divorce action. Does or does not a husband owe the duty of support to his wife?

Geraldine Ede Hennessey.

### WHEN IS A HOLOGRAPHIC WILL DATED?

The recent decision of the Supreme Court of Montana in the case of *Irvine's Estate*<sup>1</sup> has aroused and renewed the interest of legal minds in the subject of holographic wills. The history of this kind of will reaches back to early French law which was codified in the Code Napoleon, and its roots extend into Roman times.<sup>2</sup> The word "holographic" is derived from two Greek words meaning "whole" and "to write." The holographic will is a will which is entirely in the testator's handwriting.<sup>3</sup> In the words of the Napoleonic Code:<sup>4</sup> "An holographic testament shall not be valid, unless it be written entirely, dated and signed by the testator with his own hand: it is subjected to no other form." Montana has adopted the following definition: "A holographic will is one that is entirely written, dated, and signed by the hand of the testator himself. It is subject to no other form, and may be made in or out of this state, and need not be witnessed."<sup>5</sup>

The holographic will stemming from French law has come to be recognized in several European countries, including Austria, Belgium, Germany, Italy, Spain and Scotland.<sup>6</sup> It is also recognized in a few of the Central and South American states, and in Louisiana and nine of the western states of the United States.<sup>7</sup> In nine other states a different kind of holographic will is found, which, instead of being a distinct type of will, merely dispenses with the necessity of witnesses if the instrument is in the handwriting of the testator, but in other

<sup>1</sup>In re *Irvine's Estate*, *Wild v. Hall* (1943) .....Mont....., 139 P. (2d) 489.

<sup>2</sup>Citations to Roman origins are given in 28 *YALE L. J.* 72.

<sup>3</sup>*PAGE, WILLS* (3d ed. 1941) I, §383, p. 694; *ATKINSON, WILLS*, §133, p. 305.

<sup>4</sup>*CODE NAP.*, Art. 970.

<sup>5</sup>*R. C. M.* 1935, §6981.

<sup>6</sup>28 *YALE L. J.* 72; 14 *CALIF. L. REV.* 245.

<sup>7</sup>California, Idaho, Montana, Nevada, North Dakota, Oklahoma, South Dakota, Utah, Wyoming.

respects must conform to the requirements of the general statute on wills.<sup>8</sup> It is the former type of holographic will, set forth in the Code Napoleon, which Montana has adopted and its Supreme Court has applied in the *Irvine* case.

Several reasons have been advanced for giving effect to the holographic will with no formalities except that it be "entirely written, dated, and signed by the hand of the testator himself." It has been said that the handwriting requirement makes forgery difficult.<sup>9</sup> It would appear, however, that early acceptance of the holographic will was based in considerable part upon the theory that such will is the exclusively personal act of the testator, and that the testator, by writing each word of the document with his own hand, can not easily be imposed upon.<sup>10</sup> "A holographic will separates the testator from every foreign influence and gives him full freedom of providing for his inheritance without the dangers of an anticipated publicity."<sup>11</sup> The holograph is itself evidence that the testator was not incompetent or irresponsible.<sup>12</sup> "Indeed the fact that the will is holographic, and that it was prepared by himself in strict accord with the law prescribing the requisites of such a testament—that by it he indicated that he knew that, as the law requires, such a will, to be valid, must be in the testator's own writing and dated by him—is itself well-nigh indubitable evidence that he was very much 'at himself' when he drew the instrument, and at that time knew precisely what he was doing . . .'"<sup>13</sup>

Holographic wills may be proved in the manner in which other private writings are proved.<sup>14</sup> In most states strict compliance with the statutory requirements is insisted upon.<sup>15</sup> In

<sup>8</sup>ATKINSON, WILLS, §133, p. 306.

<sup>9</sup>In re Dreyfus' Estate (1917) 175 Cal. 417, 165 P. 941, L. R. A. 1917F 391; Heffner v. Heffner (1896) 48 La. Ann. 1088, 20 So. 281. In the California case the court said: "Our code provision allowing olographic wills was first enacted in 1872. The commissioners who drafted the Civil Code, in their note, recommend it on the ground that it 'may not, and indeed it is confidently claimed in those countries where olographic wills are recognized, does not give rise to as many attempts at fraudulent will-making and disposition of property as where it does not exist'."

<sup>10</sup>In re Donovan's Estate (1903) 140 Cal. 390, 73 P. 1081; In re Mauvais' Estate (1919) 43 Cal. App. 64, 185 P. 987, 991; 5 CALIF. L. REV. 503.

<sup>11</sup>Luigi Miraglia, *Comparative Legal Philosophy* (Boston: The Boston Book Co., 1912) p. 758.

<sup>12</sup>26 CAL. JUR. 855.

<sup>13</sup>In re Little's Estate (1920) 46 Cal. App. 776, 189 P. 818, 824.

<sup>14</sup>Mitchell v. Donohue (1893) 100 Cal. 202, 34 P. 614.

<sup>15</sup>In re Noyes' Estate (1909) 40 Mont. 190, 105 P. 1017, 26 L. R. A. (N. S.) 1145, 20 Ann. Cas. 366; In re Carpenter's Estate (1916) 172

other states courts have said that substantial compliance with the statute is sufficient.<sup>16</sup>

Aside from the fact that a holographic will (1) must consist of a writing which shows testamentary intent—a requirement of any kind of will—the three principal requisites of the holographic will are (2) that it be entirely in the handwriting of the testator, (3) that it be truly signed, and (4) that it be properly dated. In North Carolina and Tennessee there is (5) the additional requirement that the will have been found among the testator's valuable papers or effects, or that it have been given to some person for safekeeping.<sup>17</sup> The "date" requirement of the holographic will is the central topic of this comment, although each of the other four factors just mentioned will be treated briefly.<sup>18</sup>

The requirement of testamentary intent may be disposed of in a few sentences, for it is the same requirement as that found in any other kind of will. The will "must pass an interest which is to take effect upon the death of the testator. It is to be distinguished, on the one hand, from an instrument which takes effect during the lifetime of the maker; and, on the other, from an instrument which merely recites, as a fact, testator's present intention or wishes, but which does not purport to transfer property on testator's death, in accordance therewith."<sup>19</sup> A North Carolina case has held that it is not essential that the testator intend the writing to be a will,<sup>20</sup> but several California cases have emphasized the requirement that the testator have intended the document to be his will.<sup>21</sup> And in the states which require that the will be found among the testator's

Cal. 268, 156 P. 464, L. R. A. 1916E 498; In re Vance's Estate (1916) 174 Cal. 122, 162 P. 103, L. R. A. 1917C 479; In re Towle's Estate (1939) 14 Cal. (2d) 261, 93 P. (2d) 555, 124 A.L.R. 624.

<sup>16</sup>Wise v. Short (1921) 181 N. C. 320, 107 S. E. 134; In re Hail's Estate (1923) 106 Okla. 124, 235 P. 916.

<sup>17</sup>ATKINSON, WILLS, §134, p. 311.

<sup>18</sup>It is perhaps unnecessary to add that all varieties of wills must meet such general requirements as that the testator have mental capacity to make a will, and that undue influence and fraud were not present. ATKINSON, WILLS, §133, p. 305.

<sup>19</sup>PAGE, WILLS (3d ed. 1941) I, §385, p. 695.

See in re Richardson's Estate (1892) 94 Cal. 63, 29 P. 484; In re Major's Estate (1928) 89 Cal. App. 238, 264 P. 542; In re Ross' Estate (1933) 131 Cal. App. 635, 22 P. (2d) 22.

<sup>20</sup>Alston v. Davis (1896) 118 N. C. 202, 24 S. E. 15. Testator wrote, in a letter to his sister in which he told of his plans for the future: "If I die or get killed in Texas, the place must belong to you, and I would not want you to sell it." The court held that the writing constituted a valid holographic will.

<sup>21</sup>Ahlborn v. Peters (1940) 37 Cal. App. (2d) 698, 100 P. (2d) 542; In re Hathway's Estate (1940) 38 Cal. App. (2d) 526, 101 P. (2d) 741; In re Kenyon's Estate (1941) 42 Cal. App. (2d) 423, 109 P. (2d) 38.

valuable papers, "the fact that a holographic will is found 'among the valuable papers and effects' of the deceased implies that it was placed there by him or with his knowledge and consent, with the intention that it should operate as his will."<sup>22</sup>

The requirement that a holographic will be entirely in the handwriting of the testator is said to make forgery more difficult.<sup>23</sup> Litigation concerning this requirement has led to a considerable number of interesting conclusions. Typewriting is generally not recognized as handwriting, although one case has been reported where the court held valid a document written on a typewriter by a man who was physically incapable of writing in long-hand.<sup>24</sup> In general it is believed that long-hand writing can be forged less easily than typewriting,<sup>25</sup> although there is something to be said on the other side of the question.<sup>26</sup> California courts have pointed out that in 1872, when the statute recognizing holographic wills was first enacted in that state, "the practical modern typewriter, now in almost universal use, was unknown."<sup>27a</sup> And presumably the framers of the statute used the word "written" to mean letters drawn in long-hand. Anything in the nature of printing is excluded.

One of the most litigious questions concerning the "entirely written" requirement is how to interpret a document which is partly in the deceased's handwriting and partly printed or typewritten. The courts attempt to apply the rule that the document is not valid as a holographic will if the deceased intended to incorporate in it any of the words not in his own handwriting. If the written part constitutes in complete form the writing of the deceased, the printed words may be discarded as surplusage.<sup>27</sup> California has recently added to its code provision on holographic wills these words: "No address, date or other matter written, printed or stamped upon the document, which is not incorporated in the provisions which are in the handwriting of the decedent, shall be considered as any part of the will."<sup>28</sup> This provision was not intended as a change in the existing law, however, but was added for the purpose of codify-

<sup>22</sup>In re Cole's Will (1916) 171 N. C. 74, 87 S. E. 962, 963.

<sup>23</sup>In re Dreyfus' Estate, *supra*, note 9; ATKINSON, WILLS, §134, p. 307.

<sup>24</sup>M'Beath Trustees v. M'Beath (1935) Scots Law Times Rept., 315.

<sup>25</sup>In re Dreyfus' Estate, *supra*, note 9.

<sup>26</sup>5 CALIF. L. REV. 503.

<sup>27a</sup>In re Dreyfus' Estate, *supra*, note 9.

<sup>27</sup>In re Thorn's Estate (1920) 183 Cal. 512, 192 P. 19; In re Bernard's Estate (1925) 197 Cal. 36, 239 P. 404; In re Atkinson's Estate (1930) 110 Cal. App. 499, 294 P. 425; In re Bower's Estate (1938) 11 Cal. (2d) 180, 78 P. (2d) 1012.

<sup>28</sup>PROB. CODE §53.

ing the law as the courts had already interpreted it.<sup>29</sup> Space does not permit a detailed statement of conclusions reached in each of the various situations where courts have interpreted documents containing both written and printed words; but the "surplusage" view will be considered in some detail under the section on the "date" requirement.<sup>30</sup>

The third requisite of a holographic will is that it be truly signed by the testator. The signature need not be at the end of the document unless there is a statutory requirement to that effect. The signature may be on the margin,<sup>31</sup> or elsewhere in the document, if it can be shown that the testator intended it to be his signature. The heart of the problem here is the intention of the testator; and the difficulty of discovering that intention when there are no witnesses is obvious.<sup>32</sup> A few decisions will illustrate the problem and the viewpoint of the courts. Where a document ended with the words "last will of John Jones," it was held to be adequately signed, the court stating that an inspection of the entire instrument showed that the testator intended it to be his signature.<sup>33</sup> A signature on an envelope containing a will has been held insufficient.<sup>34</sup> It has been held that a signature at the end is not necessary when the testator has written his name in the first line of the will.<sup>35</sup> And in another California case the court pointed out that, to denominate the writer's name in the first line a signature, it must be established that the instrument is on its face a complete and executed document.<sup>36</sup> But courts have held that the name written in the first line may constitute a valid signature even though there

<sup>29</sup>In re Bower's Estate, *supra*, note 27; In re Towle's Estate, *supra*, note 15; In re Goldsworthy's Estate (1942) 54 Cal. App. (2d) 666, 129 P. (2d) 949.

<sup>30</sup>Two other points may be noted before leaving the "entirely in the handwriting" subject. Signatures found in an attestation clause do not invalidate the document as a holographic will; the presumption being, until rebutted, that the signatures of the witnesses were for the purpose of proving the testator's handwriting, and not for the purpose of executing a statutory will. In re Soher's Estate (1889) 78 Cal. 477, 21 P. 8; UNDERHILL, WILLS I, §9, p. 16; ROOD, WILLS (2d ed. 1926) §271, p. 213.

No other document not in testator's handwriting can be incorporated by reference, since to do so would incorporate as a part of the will words not in testator's own handwriting. Hewes v. Hewes (1916) 110 Miss. 826, 71 So. 4.

<sup>31</sup>In re Button's Estate (1930) 209 Cal. 325, 287 P. 964.

<sup>32</sup>ATKINSON, WILLS §134, p. 310.

<sup>33</sup>In re Brandow's Estate (1932) 59 S. D. 364, 240 N. W. 323.

<sup>34</sup>In re Tyrrell's Estate (1915) 17 Ariz. 418, 153 P. 767.

<sup>35</sup>In re Kinney's Estate (1940) 16 Cal. (2d) 50, 104 P. (2d) 782.

<sup>36</sup>In re Morgan's Estate (1927) 200 Cal. 400, 253 P. 702.

is no period at the end of the document.<sup>37</sup> The general view is that the court must determine, from an examination of the entire instrument, whether or not the writer completed the writing and intended his name written in any part of the instrument to constitute his signature.<sup>38</sup>

A fourth essential to the validity of a holographic will is that the document be found among the testator's valuable papers and effects, or that it have been given to another person for safekeeping. The fact that a testator considers the document sufficiently valuable to keep with his valuable effects indicates a sort of testamentary intent. Since only two states<sup>39</sup> have this requirement in their holographic wills statute, however, no further space can be given to it in this comment; and the final requirement, that the will be dated in the testator's handwriting, will now be considered.

It is of course necessary that the holographic will be dated only when the statute so provides. French law prior to 1735 did not require a date.<sup>40</sup> In Montana and California, and in six other states,<sup>41</sup> the statute does include this requirement. The date must be entirely in the testator's own handwriting; and this requirement and the definition of "date" constitute a fertile field for litigation. It is conceded that the sufficiency of the date must be determined from the face of the document, with no resort to extrinsic evidence to show which figures are intended as the correct date.<sup>42</sup> It is also generally held that the place is not a part of the date, and hence the fact that the name of the city or state is printed or is omitted does not invalidate the date.<sup>43</sup> Courts are also in general agreement that it does not matter where, on the document, the date is placed, so long

<sup>37</sup>In re England's Estate (1927) 85 Cal. App. 486, 259 P. 956; In re Brooks' Estate (1931) 214 Cal. 138, 4 P. (2d) 148.

<sup>38</sup>In re Manchester's Estate (1917) 174 Cal. 417, 163 P. 358, L. R. A. 1917D 629, Ann. Cas. 1918B 227; In re McMahon's Estate (1917) 174 Cal. 423, 163 P. 669, L. R. A. 1917D 778; In re Sullivan's Estate (1928) 94 Cal. App. 674, 271 P. 753; In re Bauman's Estate (1931) 114 Cal. App. 551, 300 P. 62.

<sup>39</sup>North Carolina and Tennessee.

<sup>40</sup>See 28 YALE L. J. 72.

<sup>41</sup>Idaho, Louisiana, North Dakota, Oklahoma, South Dakota, Utah. See ATKINSON, WILLS §134, pp. 308-9.

<sup>42</sup>Succession of Beird (1919) 145 La. 756, 82 So. 881, 6 A. L. R. 1452; Succession of McCay (1928) 166 La. 681, 117 So. 772.

<sup>43</sup>Stead v. Curtis (1911) 191 F. 529, 112 C. C. A. 463, aff. 205 F. 439, 123 C. C. A. 507; In re Oldham's Estate (1928) 203 Cal. 618, 265 P. 183; In re DeCaccia's Estate (1928) 205 Cal. 719, 273 P. 552, 61 A. L. R. 393; Robertson's Succession (1897) 49 La. Ann. 868, 21 So. 586, 62 Am. St. Rep. 672; Succession of Heinemann (1931) 172 La. 1057, 136 So. 51.

as the testator clearly intended it to be the date.<sup>44</sup> It has even been held that a date at the beginning of the writing may differ from a date at the end, without invalidating the instrument.<sup>45</sup> Furthermore, it has been held to be immaterial whether a date at the top of an instrument was the date of the will or the date when the testator was the owner of the property listed, the statutory requirement that the instrument be "dated" having been fulfilled.<sup>46</sup>

Even though the instrument contain two different dates, the statute is satisfied, since a holograph need not be written all at one time.<sup>47</sup> The instrument may be dated after it has been executed.<sup>48</sup> One figure may be written over another and yet the date requirement be satisfied, provided it is clear which figure the testator intended as the date.<sup>49</sup> Strict construction, however, has refused to permit a date to be found indirectly, as, for example, by means of a statement giving the age of the testator,<sup>50</sup> or a statement concerning the "1935 LaSalle which I now drive."<sup>51</sup>

It is generally agreed that abbreviations may be used, in writing the date, provided their meaning is clear. Some of the abbreviations which have been upheld are: "March 26/25,"<sup>52</sup> "4/12/17th,"<sup>53</sup> "4-14-07."<sup>54</sup> Where the figures for the day and month are both less than 13, however, the date is usually held to be invalid because the meaning is uncertain.<sup>55</sup> Abbreviations must, of course, be adequate to represent a complete date.

One of the most interesting of the interpretations de-

<sup>44</sup>Zerega v. Percival (1894) 46 La. Ann. 590, 15 So. 476; Jones v. Kyle (1929) 168 La. 728, 123 So. 306.

<sup>45</sup>Picard v. Succession of Picard (1934) 179 La. 746, 155 So. 11.

<sup>46</sup>In re Clisby's Estate (1904) 145 Cal. 407, 78 P. 964, 104 Am. St. Rep. 58.

<sup>47</sup>Succession of Guiraud (1927) 164 La. 620, 114 So. 489; Succession of Cunningham (1918) 142 La. 701, 77 So. 506; Jones v. Kyle, *supra*, note 44; Picard v. Succession of Picard, *supra*, note 45.

<sup>48</sup>Jones v. Kyle, *supra*, note 44.

<sup>49</sup>Succession of McCay, *supra*, note 42.

<sup>50</sup>Estate of Martin (1881) 58 Cal. 530.

<sup>51</sup>In re Schiffmann's Estate (1936) 16 Cal. App. (2d) 650, 61 P. (2d) 331.

<sup>52</sup>Succession of Caro (1932) 175 La. 402, 143 So. 355; Succession of Coleman (1933) 177 La. 898, 149 So. 513.

<sup>53</sup>In re Olssen's Estate (1919) 42 Cal. App. 656, 184 P. 22.

<sup>54</sup>In re Chevallier's Estate (1911) 159 Cal. 161, 113 P. 130. Also see In re Lakemeyer's Estate (1901) 135 Cal. 28, 66 P. 961, 87 Am. St. Rep. 96; In re Carpenter's Estate, *supra*, note 15; In re Vance's Estate, *supra*, note 15; Succession of Heinemann, *supra*, note 43.

<sup>55</sup>Succession of Beird, *supra*, note 42, in which "9/8/18" was held invalid because it was not clear which figure represented the month and which the day. See also In re Price's Estate (1910) 14 Cal. App. 462, 112 P. 482.



veloped by the courts is the generally accepted view that although the date must be complete it need not be correct. Apparently the word "dated," as used in the statute, means a complete date consisting of year, month, and day; but the instrument is "dated" whether the date is the correct one or not. For example, a California court has recently said: "The cases have firmly established the rule that the requirement of a date includes the day, month and year, and that if any one of them is omitted or not written by the testator the document cannot be admitted to probate as a holographic will . . . The date stated need not, however, be the actual date of execution of the will."<sup>66</sup>

Unusual sets of facts have given rise to some interesting opinions which perhaps have not always been in accord with common sense. In *Estate of Vance*<sup>67</sup> probate of a holographic will was refused because the testator failed to complete the year, leaving it "this 22nd day of March in the year of our Lord one thousand," when the year should have been "one thousand nine hundred and ten." The court pointed out that day, month and year must be given, in order to comply with the statute; that, although the date need not be the date on which the instrument was in fact written, it must be complete. In other words, California courts, following the Louisiana decisions,<sup>68</sup> distinguish between an incorrect date, as in a case where the year 1859 was written instead of the year 1889,<sup>69</sup> which will not necessarily vitiate the will, and an incomplete date which is held not acceptable. It may be argued that the year as stated in the *Vance* case was a complete year, but the answer is that the testator did not complete the date which he intended to write. It has been pointed out that the distinction made by the California and Louisiana courts is not parallel to the distinction made by the French authorities between an incorrect and an incomplete date. In France the holographic will is invalid if it does not contain "the precise and certain indication of the day, month and year in which it was drawn."<sup>70</sup> An incomplete date does not satisfy this requirement; whereas an incorrect date is presumed to be correct unless evidence

<sup>66</sup>In re Clark's Estate (1942) 55 Cal. App. (2d) 85, 129 P. (2d) 969, 971. See also In re Vance's Estate, *supra*, note 15; In re Maguire's Estate (1936) 14 Cal. App. (2d) 388, 58 P. (2d) 209; 26 CAL. JUR. 859, 860.

<sup>67</sup>*Supra*, note 15.

<sup>68</sup>See *Heffner v. Heffner*, *supra*, note 9.

<sup>69</sup>*Estate of Fay* (1904) 145 Cal. 82, 78 P. 340, 104 Am. St. Rep. 17. See also In re Wilkinson's Estate (1931) 113 Cal. App. 645, 298 P. 1037.

<sup>70</sup>5 CALIF. L. REV. 266, 267.

found in the instrument itself shows it to be incorrect, in which event the will is invalid unless the date can be corrected from evidence found in the instrument itself.<sup>61</sup>

It has been held that omission of the century does not violate the date requirement, since the assumption is that the latest possible century was intended.<sup>62</sup> But the omission of day, month or year is fatal according to the preponderance of authority.<sup>63</sup> An old Louisiana case<sup>64</sup> and an Oklahoma case<sup>65</sup> stand practically alone in upholding the validity of a holographic will dated with month and year only.

To fulfill the statutory requirement the date must be entirely in the handwriting of the testator. A consequence of this provision has been much litigation, particularly concerning dates which are partly in printed form. There may be said to be two theories which courts have applied in working out most of these cases. They may be called the *intent* and the *surplusage* theories.<sup>66</sup> In the intent theory the court attempts to discover, from an inspection of the entire instrument, whether or not the testator intended to adopt the printed figures as a part of the written instrument. If he did, the writing can not be held to constitute a valid will, for the reason that it would not be entirely in the testator's handwriting. In applying the surplusage theory the court, instead of seeking the testator's intention, attempts to determine whether or not the printed figures are necessary to a complete date. In a California case, *Estate of Francis*,<sup>67</sup> for example, the court followed the intent theory and held invalid as a holographic will a document in which the first two figures of the year were printed. The printed figures, although not necessary to an adequate dating

<sup>61</sup>Other cases holding that the date need not be the correct date: *Barney v. Hayes* (1891) 11 Mont. 99, 27 P. 384, 28 Am. St. Rep. 495; In re *Noyes' Estate*, *supra*, note 15; In re *Clisby's Estate*, *supra*, note 46. In *Jones v. Kyle*, *supra*, note 44, the court said that a will dated five years after it was written and signed was valid, the subsequent dating indicating that the testator intended to "persist" in the disposition made in the will.

<sup>62</sup>In re *Lakemeyer's Estate*, *supra*, note 54; In re *Chevallier's Estate*, *supra*, note 54.

<sup>63</sup>In re *Price's Estate*, *supra*, note 55; In re *Anthony's Estate* (1913) 21 Cal. App. 157, 131 P. 96; In re *Carpenter's Estate*, *supra*, note 15; In re *Maguire's Estate*, *supra*, note 56; *Fuentes v. Gaines*, 25 La. Ann. 85; *Heffner v. Heffner*, *supra*, note 9; *Robertson's Succession*, *supra*, note 43; *Succession of Lasseigne* (1938) (La. App.) 181 So. 879; *Montagne v. Street* (1930) 59 N. D. 618, 231 N. W. 728; In re *Love's Estate* (1930) 75 Utah 342, 285 P. 299.

<sup>64</sup>*Gaines v. Lizardi* (1877) 3 Woods 77.

<sup>65</sup>In re *Hall's Estate*, *supra*, note 16.

<sup>66</sup>See 12 N. C. L. Rev. 213, 214.

<sup>67</sup>(1923) 191 Cal. 600, 217 P. 746.

of the will, were assumed to have been adopted by the writer as a part of the instrument. Had the surplusage theory been applied, the court might have discarded the printed figures and still have had a sufficient dating, since California cases in general hold that the century is not essential to a date provided the decade and year are properly written.<sup>68</sup> The view in California has been changing, however. In a recent case,<sup>69</sup> a holographic will was upheld although the year used in the date consisted of the figures "19" printed and figures "38" written. The court said that it would be giving the words a strained construction to hold that the figures "19" were intended as a part of the will, since they were neither expressly nor impliedly referred to in the instrument. It would perhaps have been a more satisfactory explanation of its holding if the court had thrown out the intent theory and adopted the surplusage theory. In any event the trend appears to be towards greater liberality in construing the dating requirement of the holographic will.<sup>70</sup>

In the light of principles and interpretations enunciated by the courts, what can be said of the decision in the recent Montana case of *Irvine's Estate*?<sup>71</sup> The court held valid as a holographic will a written document dated "this day of May, 1938." In the "majority" opinion, Justice Adair considers in some detail the etymology of the word "date." It is doubtful, however, that this investigation is of much assistance to a modern court in deciding what a legislature may be presumed to have meant by the requirement that a holographic will be "entirely written, dated, and signed" in the testator's own handwriting. Reference is made to cases which hold that an incorrect date does not invalidate a written instrument; but the question before the court concerns the adequacy of an incomplete date, not an incorrect one. Attention is also called to cases involving the proper dating of instruments other than holographic wills, but here also the irrelevancy of the citations is obvious. The court has before it a set of facts, and it is called

<sup>68</sup>"4-14-07" was held sufficient in *In re Chevallier's Estate*, *supra*, note 54. See *In re Plumel's Estate* (1907) 151 Cal. 77, 90 P. 192, 121 Am. St. Rep. 100, in which the date was held not sufficient where "190" of the year "1904" was printed. See also *In re Lakemeyer's Estate*, *supra*, note 54; *In re DeCaccia's Estate*, *supra*, note 43.

<sup>69</sup>*In re Durlwanger's Estate* (1940) 41 Cal. App. (2d) 750, 107 P. (2d) 477.

<sup>70</sup>The surplusage theory is applied in *Baker v. Brown* (1904) 83 Miss. 793, 36 So. 539, 1 Ann. Cas. 371; *Gooch v. Gooch* (1922) 134 Va. 21, 113 S. E. 873. The theory is implied, as dictum, in *In re Noyes' Estate*, *supra*, note 15.

<sup>71</sup>*Supra*, note 1.

upon to apply the statute on holographic wills and decide whether or not the requirements of that statute have been fulfilled. One of those requirements is that the will be "entirely . . . dated" in the testator's own handwriting. In other states having a similar statute, the courts are almost unanimous in reaching the conclusion that "entirely dated" requires that day, month and year be given. To determine what the legislature meant when it enacted the provision is clearly not usurping a legislative function, for what alternative exists if the statute is to be applied? In the light of the unanimity of the decisions in California and the other states, the result reached in the Montana case is highly questionable.

Justice Morris bases his concurrence in the result upon the immateriality of the date in the circumstances of the present case. The implication of his opinion is that "entirely dated" is a requisite to the validity of a holographic will only when the date is important in determining which will is the testator's latest will, or when the question of the testator's mental capacity is raised. Since neither question is an issue in the present case, Justice Morris agrees that the date need not be complete. Upon this reasoning, however, could not the entire date be omitted? The statute clearly requires that a holographic will be dated. To fulfill this requirement it is essential that courts determine what constitutes a "date;" and the almost unanimous opinion of the courts has clearly set forth the answer. Since wills are creatures of statutes, presumably the statutory requirements must be satisfied on every occasion where the validity of a will is to be determined, without regard to the court's opinion as to the "materiality" of any requirement in a given situation.

An interesting aspect of the *Irvine* case is the division of opinion shown by the court. Only one justice concurred in the "majority" opinion written by Justice Adair. Justice Morris concurred in the result, but based his conclusion upon entirely different reasoning. Chief Justice Johnson wrote a strong dissenting opinion in which Justice Anderson concurred. This opinion fairly reflects the state of existing authority and interpretation under this kind of statute. Thus only two justices, of a court of five, were in agreement on the proposition that a holographic will is properly dated when only the month and year are given. According to the weight of authority, an opinion can not be cited as a precedent unless it is written

## NOTE AND COMMENT

93

or concurred in by a majority of the justices sitting on the case."<sup>2</sup>

In a recent Missouri case,<sup>3</sup> the court stated in the following words the rule as to non-majority opinions: "The Halliburton case could not have been overruled by the Stokes case because the principal opinion in the latter had the full concurrence only of its author and two other judges, another judge concurring only in the result, and three judges dissenting. It therefore was binding only as to the result reached therein, and did not overrule prior inconsistent decisions."

A Michigan court,<sup>4</sup> referring to a case cited by counsel as authority, said: "This language is not authority because it was concurred in by only two justices and not by a majority of the court."

The conclusion is inescapable that there is no opinion in the *Irvine* case which may be cited as a precedent. The case decides that the holographic will under consideration is valid; yet no principle of law has been formulated or approved. What is essential to the fulfillment of the "dated" requirement of the statute on holographic wills in Montana is precisely what it was before Mrs. Irvine wrote her will and before that will was litigated in the courts of Montana.

Claude W. Stimson.

<sup>2</sup>*Off v. U. S.* (1929) 35 F. (2d) 222; *Shepherd v. People* (1942) 109 Colo. 582, 129 P. (2d) 104; *Codd v. McGoldrick Lumber Co.* (1929) 48 Ida. 1, 279 P. 298, 67 A. L. R. 580; *State v. Gochenour* (1920) (Mo.) 225 S. W. 690, 691; *Viquesney v. Kansas City* (1924) 305 Mo. 488, 266 S. W. 700; *State ex rel. Columbia National Bank of Kansas City v. Davis* (1926) 314 Mo. 373, 284 S. W. 464, 467; *State v. Frost* (1926) (Mo.) 289 S. W. 895, 897; *Coleman v. Haworth* (1928) 320 Mo. 852, 8 S. W. (2d) 931, 934; *Coates and Hopkins Realty Co. v. Kansas City Terminal Ry. Co.* (1931) 328 Mo. 1118, 43 S. W. (2d) 817, 823; *Moseley v. American Nat. Ins. Co.* (1932) 167 S. C. 112, 166 S. E. 94, 96.

<sup>3</sup>*Moore v. Brown* (1942) .....Mo....., 165 S. W. (2d) 657, 661.

<sup>4</sup>*Groening v. McCambridge* (1937) 282 Mich. 135, 275 N. W. 795, 796.

## Stimson: When is a Holographic Will Dated?