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In the Matter of the estate of John William Ingram : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT

UNIVERSITY UTAH

of the

FILED

AUG 28 1957

STATE OF UTAH

AUG 28 1956

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Clerk, Supreme Court, Utah

In the matter of the estate

of

JOHN WILLIAM INGRAM,

Deceased.

} Case No. 8542

APPELLANTS' BRIEF

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IN THE SUPREME COURT
of the
STATE OF UTAH

In the matter of the estate
of
JOHN WILLIAM INGRAM,
Deceased.

} Case No. 8542

APPELLANTS' BRIEF

STATEMENT OF FACTS

John William Ingram died on November 17, 1954, and left as his heirs at law, two brothers, M. S. Ingram and H. L. Ingram, and three sisters, Maggie I. Coulson, Ruth E. Marshall and Olive I. Boswell. In addition, the decedent left him surviving many nieces and nephews among whom are the four children of M. S. Ingram whose names are Violet Manila Brock, Bonnie Holm, Blain Ingram and Earl Ingram. The four nieces and nephews just named are the beneficiaries under the documents in dispute in this case and have nominated their father to be administrator with will annexed. All of the brothers and

sisters of the decedent except said M. S. Ingram oppose the admission of the documents to probate as wills and oppose the appointment of M. S. Ingram as administrator with will annexed. The brothers and sisters of the decedent who oppose the admission of the documents to probate have nominated one of their own number, Maggie I. Coulson, to serve as administratrix in the event probate is denied the documents offered as wills.

The trial court below appointed M. S. Ingram as administrator with will annexed, and admitted to probate as the last will and testament of John William Ingram a letter dated May 21, 1940 and addressed to Manila I. Brock and a writing dated November 28, 1944 which was enclosed in an envelope containing Thirteen Hundred Dollars (\$1,300.00) in government bonds. The said brothers and sisters of the decedent prosecute this appeal. For the purpose of this brief, the brother and sisters of the decedent, to-wit, H. L. Ingram, Maggie I. Coulson, Ruth E. Marshall and Olive I. Boswell will be known as the "objectors" and M. S. Ingram and his four children will be referred to as the "proponents" of the will. The two documents above referred to will be called the "will," but in so denominating the documents the appellants do not mean in any way to admit that the documents, or either of them, are in fact wills.

On May 21, 1940, John William Ingram, the decedent, wrote a letter to his niece, Manila I. Brock. The letter is admitted in evidence as Exhibit 1. and the envelope in which it was contained is admitted as Exhibit 2.

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That letter reads in whole as follows:

"Nephi Ut May 21, 40

Dear Neice

Now doubt this letter will be a grate surprise to you are several surprises but never the less it will half to come. I wish I could talk to you but everybody is so buissy that there is no chance of you coming over. Well Nila I am on the down hill cline and dont feel right at all this spring so I have decided to fix up my property and make it air tight and this is the only way that will stand so am trusting to you to be as good to me as I am to you. And am deading it to you but reserve the right to control it till I die but iff I half to sell part of it to live on you would half to sign the deads which I hope you will be willing to do. And what ever is left I want you to divide eaquill with Earl-Bonie and Kennie and Blain and your self this way none of the others can do any thing iff I left the deads not recorded till I die then they could stop you from recording them and come in for their share and besides Alice has come back. And if she is here when I go give her enough money to take her back ore go where she pleases. I am sending the deads to you then you can send them back to the recorder, and have them recorded. Then send them back to me and I will put them in a safety box in at the bank in your and my name with other papers and things of value I wish that I could talk to you. Now dont get worried at all nothing searies at all. but just dont want to take the chances any longer the corts would get a \$1000 and then it would go to the Sisters and brothers and they never done me any good. I will close now with the same love as ever. Your uncle J.W.I."

On May 28, 1940, the decedent did the following things:

1. He executed a warranty deed, deeding the whole of the 466 acres of land comprising his farm property to Manila Ingram Brock (Exhibit 3), but reserving a life estate in himself. This deed was witnessed by P. N. Anderson, his attorney, and was acknowledged before Mae B. Petty, then the Juab County Recorder, on the same day. This deed also included all personal property then owned by him which was not covered by the bill of sale referred to below.

2. He executed a warranty deed, deeding his town lots to Blain M. Ingram but reserving a life estate in himself. That deed was witnessed by P. N. Anderson and acknowledged on the same day by said Mae B. Petty.

3. He executed a bill of sale of his livestock and all household furniture and other personal property on the city lots to Blain M. Ingram, Earl and Kenneth (Exhibit 9) and that document was witnessed by P. N. Anderson.

4. He endorsed in blank his two shares of water stock in the Nephi Irrigation Company, and had his signature witnessed by Mrs. Clifton Belliston in the presence of P. N. Anderson (Tr. 35-36).

5. At six o'clock p.m., he mailed the letter referred to above to Manila I. Brock. This letter is the one which was admitted to probate as a will.

There is nothing in the record to indicate the order

in which these acts were done; however, in view of the fact that the documents were prepared and witnessed by the attorney of the decedent and were acknowledged before the County Recorder, it seems fair to imply that the documents were executed before the letter was sent to Mrs. Brock, since the letter was mailed one hour after the close of business in the community.

On May 29, 1940, Blain Ingram recorded his deed. Some time within a few days subsequent to May 28, but prior to June 5, Manila I. Brock received her deed from the decedent by mail at Greenriver, Utah, (Tr. 75) and mailed it to the Juab County Recorder at Nephi for recording. It was recorded at nine o'clock a.m., on June 5, 1940.

According to the uniform and uncontroverted testimony of two of the proponents of the will, the two deeds and the bill of sale covered *all* the property the decedent then owned (Tr. 80 and 97). The date of delivery to Blain M. Ingram of the bill of sale is not stated with certainty but is believed to be about the time of the delivery of the warranty deed to him. However, actual possession of the subject of the bill of sale was not delivered to Blain M. Ingram until some five years later, after he had returned from service in the armed forces in World War II (Tr. 98).

Sometime between May 28, 1940, and November 28, 1944, the decedent acquired U.S. Government Bonds of the face value of Thirteen Hundred Dollars (\$1,300.00). The testimony of Manilla I. Brock is to the effect that

those bonds were in her name and the decedent's name, although she is not certain of the exact wording by which that was accomplished. The bonds were placed in an envelope by the decedent and a writing on a piece of note paper was also placed in the envelope (Tr. 75-6). That writing was admitted for probate as a part of the will of the decedent and reads in whole as follows:

"Nephi Utah

November 28—1944

Dear Nnese

In case ffo death Divide these after expenses
is all paid equile.

(s) J. W. Ingram"

The only evidence as to where this envelope and the enclosed writing were kept is the evidence of one of the proponents and beneficiaries of the will, Manila I. Brock. She states that the bonds and notes were kept in the possession of the decedent until March, 1954, when he handed them to her as part of a whole group of papers bundled together with elastic bands. He made no particular reference to the bonds and the writing attached to them at the time he handed the same to Mrs. Brock nor at any time subsequent thereto (Tr. 72-73).

Evidence was adduced by the proponents showing that the person to whom the decedent referred in his letter of May 21, 1940, as "Neice" was Manila I. Brock and the persons referred to as "Earl, Bonie, Kennie and Blain" in that letter were here brothers and sisters.

No evidence was adduced by the proponents showing to whom the decedent referred by the word "nnese" in the writing attached to the government bonds, nor was any evidence adduced designating the persons among whom the bonds attached to the writing of November 28, 1944, were to be divided "equile" (equally).

The only evidence which could by any interpretation be conceived to bear on the question of to whom the decedent referred by the word "Nnese" (Niece) in the writing of November 28, 1944, and the persons among whom the bonds concerned in that writing were to be divided equally is the testimony relating to oral statements of the decedent. It is the contention of the objectors that that evidence was evidence of to whom the decedent had already distributed his property by gifts and deeds already executed, delivered and recorded, rather than statements clarifying an uncertain will. It is also the appellant's contention that no connection is shown by the evidence between the oral statements and the written document. The summary of the transcript of testimony as it regards this matter is as follows:

1. Mr. Paul Booth, the banker, testified that the decedent discussed with him arrangements for placing his bank accounts in joint tenancy with his niece, Manila I. Brock, and that the decedent told him he wanted the funds *in his bank accounts* to go to said Manila I. Brock upon his death.

2. Leora Belliston, a neighbor and, for a period, close associate of the decedent, lived at the home of the

decedent until the year 1941. She stated that, around May, 1940, the decedent said he was going to get his deeds fixed in Smith's (M. S. Ingram) kids' names, and he had them recorded, (Tr. 37) and that he was having his property "fixed up for his kids, having it fixed so nobody else could touch it." (Tr. 38) He said, at the time Mrs. Belliston purchased a piece of city property from the decedent, that he had to have permission from Smith Ingram to sell it to her for the reason that he had had the deeds to the property all recorded and that it was supposed to be in Blain's name (Tr. 39); that the relation between the decedent and the four children of Smith Ingram was one where they treated each other "nice." (Tr. 40). At the end of her direct examination, in summary, she answered the question as to statements made by the decedent as to what was and what was not to be done with his property as follows (Tr. 58):

"Q. What discussion did you have about his property?

A. Well, he would just say he had it fixed up so it would go to the Ingram children, and nobody else could touch it, because he had fixed it up.

Q. He said he had made the deeds?

A. Yes, sir.

Q. That it was already in their,—

A. And that he had recorded them.

Q. Yes, so that he said to you he had already put the property in their names?

A. Yes, sir.

Q. In his discussions with you, Mrs. Belliston, did he ever reflect a concern that if his estate had to be probated, the court or someone else would get a substantial sum of money, that he wanted to avoid their getting it?

A. No, he hadn't. He thought he had it fixed so nobody could bother it.

Q. He conveyed to you—

A. He gave me that idea, that is what he meant.

Q. He conveyed to you the idea that he had it fixed so it wouldn't have to go to court.

A. Yes, sir.

Q. So it would not have to be probated.

A. Yes."

3. Mrs. Louise Ingram, the wife of M. S. (Smith) Ingram and the mother of the four persons who are the proponents of the will, testified that during 1940 and immediately prior thereto the association between her children and the decedent was friendly (Tr. 64) and that they administered to the decedent's wants during the year 1940 and prior thereto; that during the period just after the spring of 1940 the decedent told her that he hadn't been feeling well, had fixed up his properties, had made his deeds out and fixed his will (Tr. 65); that, in that connection, he had written to her daughter, Manila I. Brock and explained everything to her and what she should do and that he had everything fixed up by a lawyer (Tr. 65-66); that, at this same time in 1940, he said he had everything fixed and that he had left it to her children (Tr. 66); that he used to say quite a few

times that he had his property all fixed up so that no one else could get it, because he wanted it to go to her children (Tr. 67). In summary of her testimony and the cross examination she testified as follows (Tr. 67-69):

“CROSS EXAMINATION by Mr. Tanner:

Q. Mrs. Ingram, at the time of which you speak where Will Ingram said he had things fixed up so your children would get that property, at that time he had already given the property by deeds to your children, hadn't he?

A. Yes, sir.

Q. His statement to you was that he had already given them the property, wasn't it?

A. Yes, sir.

Q. Not that he was going to, but that he had?

A. Yes, sir.

Q. Your answer was yes, was it not?

A. Yes.

Q. He was concerned, was he not, with getting his property fixed up at this time, about 1940, in such a manner that it wouldn't have to go to court, wasn't he?

A. Yes, sir.

Q. And he reflected to you in his conversations that he had fixed it up so it would not have to be dealt with by a court, did he not?

A. He didn't say court. He said there wouldn't be any trouble.

Q. Did he ever reflect to you any concern whether or not his property would have to be probated?

A. No, sir.

Q. Never said anything about that one way or the other?

A. No, sir.

Q. He told you he had written to Manilla?

A. Yes, sir.

Q. Did he say that that writing was the one in which he gave her the deeds to the property?

A. No, sir.

Q. Didn't say anything about whether or not it was that letter.

A. He said he had written and informed her.

Q. As a matter of fact, Will Ingram wrote to Manilla, oh, every month, or perhaps more often than that.

A. I don't know.

Q. Well, can you give us an estimate?

A. No. Because she was in Green River, and I was here.

Q. Didn't they write quite often?

A. Yes.

Q. Kept in pretty close touch, did they not?

A. Yes, sir.

Q. There would have been a lot of letters to Manilla, would there not?

A. Well, yes, I imagine."

4. Manila I. Brock, the principal proponent of the will, said in relation to the writing attached to the bonds, that her uncle gave her a whole lot of papers in the hospi-

tal in March of 1954 among which was the envelope and the writing concerning the bonds (Tr. 88) and that he said to her "I have some papers here for Blain and yourself, take care of them." On cross examination her testimony in relation to the bonds and the writing in the envelope with them was as follows (Tr. 77-78):

"Q. When you got those bonds in the first instance, they were not referred to by your Uncle Will individually in any way, were they? By that, I mean he just handed you a lot of papers, among which was this envelope including the bonds.

A. The bonds was among the papers.

Q. Yes, there were a number of papers.

A. Yes.

Q. And among the papers was an envelope which you received that was unopened?

A. Yes.

Q. And your uncle didn't make any special reference to that envelope, did he, when he handed the paper over to you?

A. Not that one in particular.

Q. He just gave you the group of papers?

A. Yes.

Q. Then subsequent to that time you opened the envelope and saw the bonds and this paper, is that right?

A. After that, yes.

Q. And when did you open that? Was it —

A. Well —

- Q. — before or after his death?
- A. Before, when I had the papers in my possession I glanced through them.
- Q. And when you glanced through them was the first time you saw them?
- A. Yes.
- Q. After your uncle handed you these bonds, which were included among the other papers, did he ever make any individual or separate reference to you other than what he had written in the envelope?
- A. Well, not pertaining to the bonds, no, he didn't make any particular mention."

5. Bonnie Holm, one of the proponents states that she came into the ward where the decedent was at the time he was handing Manila some papers and heard him say to her "Now these are for you and Blain. Take care of them."

The only mention in the entire transcript of the word "will" was a statement of Mrs. Louise Ingram to the effect that, shortly after the spring of 1940, Will Ingram said to her that he had made a will. There is no evidence or testimony whatever in the entire proceeding relating that statement to any document. Particularly, there is no evidence relating that statement to either of the documents admitted to probate herein as wills.

STATEMENT OF POINTS

POINT I

THE TRIAL COURT ERRED IN ADMITTING THE DECEDENT'S LETTER OF MAY 21, 1940, TO PROBATE AS A WILL FOR THE REASON THAT THE PROPONENTS HAVE FAILED TO SUSTAIN THEIR BURDEN OF PROOF AND OVERCOME THE PRESUMPTION THAT A LETTER, NOT PURPORTING ON ITS FACE TO BE A WILL, WAS NOT EXECUTED ANIMO TESTANDI.

POINT II

THE TRIAL COURT ERRED IN ADMITTING THE DECEDENT'S LETTER OF MAY 21, 1940, TO PROBATE AS A WILL FOR THE REASONS THAT THE EVIDENCE ADDUCED BY THE PROPONENTS CLEARLY AND UNEQUIVOCALLY SHOWS THAT IT WAS NOT INTENDED TO BE A WILL, BUT WAS, INSTEAD, A LETTER ADVISING ITS RECIPIENT OF A GIFT IN PRAESENTI BEING MADE TO HER BY THE DECEDENT AND AN OUTLINE OF DECEDENT'S PLAN FOR MAKING INTER VIVOS GIFTS OF HIS PROPERTY IN ORDER TO AVOID PROBATE.

POINT III

THE TRIAL COURT ERRED IN ADMITTING THE DECEDENT'S LETTER OF MAY 21, 1940, TO PROBATE AS A WILL FOR THE REASON THAT THE ONLY PROVISION IN SAID LETTER WHICH COULD, BY ANY INTERPRETATION, BE CONSTRUED TO BE OF A TESTAMENTARY NATURE IS NOTHING MORE THAN AN INSTRUCTION TO THE DONEE OF AN INTER VIVOS GIFT AS TO THE USE TO WHICH THE SUBJECT OF THE GIFT IS TO BE PUT AT THE TERMINATION OF THE DONOR'S LIFE ESTATE THEREIN.

POINT IV

THE TRIAL COURT ERRED IN ADMITTING DECEDENT'S LETTER OF NOVEMBER 28, 1944, TO PROBATE AS A WILL FOR THE REASON THAT IT IS SO AMBIGUOUS AND UNCERTAIN AS TO BE WHOLLY INCAPABLE OF BEING ADMINISTERED AS A WILL.

POINT V

IN THE EVENT THE DOCUMENTS ADMITTED TO PROBATE HEREIN AS THE WILL OF THE DECEDENT ARE HELD NOT TO BE WILLS, THE APPOINTMENT OF M. S. INGRAM AS EXECUTOR HEREIN SHOULD BE VACATED FOR THE REASON THAT HIS INTERESTS ARE ADVERSE TO AND IN CONFLICT WITH THE INTERESTS OF THE HEIRS AT LAW OF THE DECEDENT.

STATEMENT OF THE CASE

John William Ingram, the decedent, owned, either at the time of his death or immediately prior thereto, a substantial amount of property including in the neighborhood of \$20,000.00 in bank accounts and mortgages receivables and \$1,300.00 in government bonds. All of this property has been taken into the possession of Manila I. Brock on the theory that she was a valid joint tenant with the decedent in the bank accounts, government bonds and receivables and became the owner of the property upon the decedent's death. As to the government bonds, and some minor assets stated to be in the estate of the decedent, as reflected by the petition of M. S. Ingram for letters of administration with will annexed, there is a conflict between the two groups in-

volved in this litigation, i.e., on one side, M. S. Ingram and his four children, the proponents of the so-called will, and on the other side, brothers and sisters of the decedent, called the objectors as mentioned earlier in this brief. However, the real controversy relates to the bank accounts and the receivables which have not been listed by said M. S. Ingram as being assets of the estate. The struggle reflected in this matter to date centers around the appointment of M. S. Ingram as administrator and the admission of the documents as the will of the decedent. The appointment of the administrator is deemed of key importance by both groups for the reason that the administrator can select his attorney and can govern whether or not a serious attempt will be made to secure the return of the cash and receivables to the estate as assets, or not. The objectors believe that, if a genuine effort is made, those assets can be shown to properly be the property of the estate, but that, if a half-hearted effort, or no effort at all, is made, an opposite result may be anticipated. In addition it is deemed important by the objectors that someone other than M. S. Ingram be appointed in order that the estate itself may carry the financial burden of the litigation concerning the bank accounts and the receivables rather than the objectors having to carry that financial burden themselves and having to force the administrator to seek those assets. It is apparent then, that the issues of law involved in this brief concern substantially larger assets than are reflected in the petition over which this conflict now centers.

The essence of the argument of the objectors is that the letter written by the decedent to Manila I. Brock is not a testamentary document at all, but is simply a letter explaining to her the steps taken by the decedent, under the advice of his attorney, P. N. Anderson, to then dispose of all of his property in order to avoid probate. The objectors believe this is proved both by the wording of the letter itself and by the evidence introduced both by the proponents and by the objectors in connection with that letter. That evidence shows conclusively that M. S. Ingram made deeds or bills of sale, in praesenti, passing title to all the property he owned in May 1940. The only effect his death was expected to have upon his property would be that it would terminate his life estate in the real property. If a present disposition of his property was what the decedent intended and accomplished in 1940, the requisite *animo testandi* is missing and the letter cannot be admitted to probate as a will.

The objectors claim that the document attached to the bonds, and reading "Dear Nnese, In case ffo death Divide these after Expenses is all paid equile" is so lacking in necessary certainty that, by itself, it could not be expected to stand as a testamentary document. However, the proponents claim that, if it is viewed as a codicil to the letter of 1940, it then takes on the requisite certainty. The objectors claim that there is no evidence in the record whatever either giving that document sufficient certainty to be admitted as a will or connecting

the document in any manner whatever with the letter of 1940.

After hearing and argument below, the trial court, the Honorable Will L. Hoyt presiding, admitted both letters to probate as a single will and this appeal is taken by the objectors. The question as to whether the assets of the estate of the decedent which are not covered by either of the documents admitted to probate below should pass to the objectors as the heirs at law of the decedent, being a question of the interpretation of a will rather than its admissibility, has been reserved until such time as there is a determination by this court as to whether or not the controverted documents are in fact wills.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN ADMITTING THE DECEDENT'S LETTER OF MAY 21, 1940, TO PROBATE AS A WILL FOR THE REASON THAT THE PROPONENTS HAVE FAILED TO SUSTAIN THEIR BURDEN OF PROOF AND OVERCOME THE PRESUMPTION THAT A LETTER, NOT PURPORTING ON ITS FACE TO BE A WILL, WAS NOT EXECUTED ANIMO TESTANDI.

The essential issue in this appeal is whether the evidence adduced herein shows that the two letters admitted to probate as a will were in fact wills, or were in fact jointly a single will, or were in fact not wills at all, either separately or jointly. In determining that matter, the court is guided by certain presumptions, the first of which presumptions is that an informal instrument, such

as a letter, not purporting on its face to be a will, was not executed *animo testandi* and therefore is not a will. This presumption is pointed up in two comprehensive A.L.R. annotations covering most of the problems presented in this appeal. The annotations discuss the admissibility of a letter as a will or codicil. The first of these annotations is at 54 A.L.R. 917 and the second, bringing the propositions in the first article up to a very recent date, is at 40 A.L.R. 2d 698. These annotations have direct application to the letter of May 21, 1940, upon which the devolution of all of decedent's property save and except the \$1,300.00 worth of government bonds, must depend.

At Page 932 of 54 A.L.R., the subject of presumption is discussed as follows:

"It is generally conceded that in addition to the usual burden of proof resting upon the proponent of a will in probate proceedings, it is also presumed that an informal instrument, such as a letter, not purporting on its face to be a will, was not executed *animo testandi*. 1 Redfield, Wills, Fourth Edition, 167."

(This is cited as being the rule in Texas, England, California and Montana, and no jurisdictions are cited as dissenting from this rule.)

"Although it has been erroneously referred to as applicable in some of the cases, the presumption against intestacy, being a rule for the *construction* of wills, should not be applied to the issue of testamentary character, which arises only in the probate of the will, and not in its construction. In re Anthony (1913), 21 Cal. App. 157, 131 P. 96."

This presumption is discussed in the article in 40 A.L.R. 2d at Page 728, citing cases approving the rule set forth in the earlier annotation.

It is clear then that the proponents of the letter of May 21, 1940, have not only the usual burden of proving that said letter was executed with testamentary intent, but, in addition, must overcome the presumption that it was not executed with testamentary intent.

In connection with this point and the points raised in the balance of this brief it may be well to consider as background the comprehensive discussion in *Page on Wills, Lifetime Edition*, setting forth the tests by which one can ascertain whether a given document is a will, or some other kind of instrument, such as, in the instant case, a mere letter of explanation. In this regard it should be pointed out that the appellants do not urge that the controversial letter lacks the formal requirements for an olograph. The point of the appellants is that, although the letter would suffice as an olograph, being entirely written, dated and signed in the hand of the decedent, it lacks the inherent, intrinsic and essential elements of a will. The following extracts from *Page on Wills*, supra, set forth that author's authoritative views on the subject at hand:

"Sec. 44. Elements of the will.

"In Anglo-American law the will is a distinct legal concept; as distinct as the deed or the contract. Its characteristic elements distinguish it, and mark it off, from other legal concepts.

"In part, for convenience of discussion, and in part, because they are frequently confused, in spite of their essential difference, the elements of a will must be grouped under two general classes. One of these consists of the essential, intrinsic, or inherent elements; and the other of the extrinsic, or formal elements. Although this distinction, as a rule, is not made by the courts in so many words, it is constantly recognized by the courts; and serves as the basis of their treatment of the entire subject.

"The formal or extrinsic elements of a will are the elements which may be modified without changing the essential nature of the will. These elements deal with the form in which the will must be executed in order to be operative; such as the signature by testator and attestation and subscription by witnesses. While these elements are of the greatest practical importance, as a will which is executed without complying with the necessary requirements is of no effect, the law may be altered, so as to require signature by testator, or signature at a given place; or so as to dispense with signature altogether; or so as to require attestation and subscription by any number of witnesses, or so as to dispense with it altogether, without changing the essential nature of the will or its place in the law. For this reason, these elements are spoken of as extrinsic or formal. In almost every state, they are now regulated and controlled by statute. They are discussed in detail elsewhere.

"The inherent, intrinsic, or essential elements of a will are those which can not be altered without changing the nature of the will itself, and affecting its position in our law. The essential

idea of a will is that it takes effect only upon the death of the testator, and that it passes no interest in property until his death; although it may create property rights which do not vest until after testator's death.

* * *

"In order to have an operative instrument, the formalities or extrinsic elements must be those which the law requires for an instrument of the type which the instrument in question is finally determined to be, after a study of its essential or inherent elements."

"Sec. 45. The Origin and Classes of Inherent Elements.

"The inherent elements of a will at Anglo-American law do not depend on legislation. They depend on principles of law which do not depend upon legislation. Some of these principles can be traced back through the law of Germanic England before the Norman Conquest, and others were worked out by the English ecclesiastical law, or by equity.

"Whatever their ultimate source, they had been developed by the English and American courts into a distinctive body of law.

"It is frequently said that these inherent elements consist of (1) the intention to make a will; and (2) revocability. As will be seen later, the latter of these elements follows from the former. It is rather a consequence of the first, than a separate class."

Section 46. Intention to Make Will — Use of the Word 'Will.'

"The courts have said again and again that

the test whether or not an instrument is testamentary in character is whether it was executed with animus testandi; with testamentary intent. While this is standard form of orthodox statement, it is, in itself, of little help, since it does not explain what the animus testandi is.

“Animus testandi does not necessarily mean that the word ‘will’ or ‘testament’ must be used in the transaction. A man may make his will animo testandi, though he is so ignorant of law that he thinks it is called a deed or contract; or though he does not know what to call it. The test is not what he thinks is the legal name of the instrument which he is executing, but what its legal effect is in view of its nature, and of the real intention of the maker as deduced from the instrument and from all facts and circumstances. The fact that the testamentary provisions form a very small part of the entire document, the bulk of which is not intended to operate as a will, does not make such small part of the instrument inoperative as a will.

* * *

“The animus testandi, then, does not turn on the presence or absence of the words ‘will’ or ‘testament’, but on the intention of the testator as shown by the nature of the instrument and the surrounding facts and circumstances.”

“Sec. 57. Intention to Make Testamentary Gift by Instrument in Question.

“In order that an instrument may amount to a will, it must show testator’s intention to make a testamentary gift *by that instrument, as distinguished from a gift to be made, or spoken of as already made, by some other instrument.* (Cit-

ing among other cases, *In re Jensen's Estate*, 37 Utah 428, 108 Pac. 927.)

* * *

"If testator's intention appears to be to make a gift by *the instrument in question*, to take effect on his death, the instrument is a will, although no formal words of devise or bequest may appear, and the instrument itself is chiefly a recital of facts or says that testator 'wants to make a deed'.

"Section 60. Intention That Instrument Shall Take Effect Only At Death of Testator.

"If an instrument is executed *animo testandi*, the person who executes it intends such instrument to take effect only at his death. This is inevitable if the instrument merely appoints an executor, or a guardian for testator's minor children to act on testator's death. In each of these cases testator must intend that his own death shall take place before such appointment shall take effect. If the instrument disposes of property, it is just as possible for the donor to intend to give such property during his lifetime as after his death. The important distinction between the will and the other instruments with which it may be confused is that the will does not take effect until the death of the testator, and no interest of any kind passes under it until the death of the testator; while under most of the instruments, which must be distinguished from the will, some interest is intended to pass, and the instrument is intended to take effect, during the lifetime of the parties thereto. . . ."

Notes to Section 60.

"A rule recognized by this court, which seems

to have the united support of the authorities, furnishes an unerring test to determine the character of the instrument. It is this: *If the instrument passes a present interest, although the right to its possession and enjoyment may not occur until some future time, it is a deed or contract; but if the instrument does not pass an interest or right until the death of the maker, it is a will or testamentary paper.*" *Owen vs. Smith* 91 Ga. 564, 18 S.E. 527.

"The essence of a testamentary disposition of property is that it be merely a declaration of the testator's intention as to what shall take place after his death." *Eaton vs. Blood*, 201 Ia. 834, 44 A. L. R. 1516, 208 N.W. 508.

"A will is an instrument by which a person makes disposition of his property to take effect after his death." *Austin vs. First Trust and Savings Bank*, 343 Ill. 406, 175 N.E. 554.

Section 71. Revocability.

"Revocability is an essential element of a will. It follows from the idea that the will passes no present interest in the property devised or bequeathed. Such property still belongs to the original owner. He has parted with no interest in it by making the will. He can still sell the property or exchange it, or pledge it or give it away. He may revoke the will already made and make a new will, or die intestate, as he pleases. So closely is revocation tied up with the fact that a will passes no interest during the life of the testator, that it seems as though one of these statements were only a repetition of the other in different words. It is possible that a system of law might be imagined in which a will was ir-

revocable and yet passed no interest during the lifetime of testator; but this is not the way we think or talk about the legal institution of the will.

* * *

“If the instrument executed is such that the maker can not revoke it, it may be a deed, a contract, and the like, but it can not be a will. And on the other hand, if the instrument is a will, it is revocable.” (*Italics added.*)

With the above discussion in mind, let us proceed to other points of this brief.

POINT II

THE TRIAL COURT ERRED IN ADMITTING THE DECEDENT'S LETTER OF MAY 21, 1940, TO PROBATE AS A WILL FOR THE REASONS THAT THE EVIDENCE ADDUCED BY THE PROPONENTS CLEARLY AND UNEQUIVOCALLY SHOWS THAT IT WAS NOT INTENDED TO BE A WILL, BUT WAS, INSTEAD, A LETTER ADVISING ITS RECIPIENT OF A GIFT IN PRAESENTI BEING MADE TO HER BY THE DECEDENT AND AN OUTLINE OF DECEDENT'S PLAN FOR MAKING INTER VIVOS GIFTS OF HIS PROPERTY IN ORDER TO AVOID PROBATE.

POINT III

THE TRIAL COURT ERRED IN ADMITTING THE DECEDENT'S LETTER OF MAY 21, 1940, TO PROBATE AS A WILL FOR THE REASON THAT THE ONLY PROVISION IN SAID LETTER WHICH COULD, BY ANY INTERPRETATION, BE CONSTRUED TO BE OF A TESTAMENTARY NATURE IS NOTHING MORE THAN AN INSTRUCTION TO THE DONEE OF AN INTER VIVOS GIFT AS TO THE USE TO WHICH THE SUBJECT OF THE GIFT IS TO BE PUT AT THE TERMINATION OF THE DONOR'S LIFE ESTATE THEREIN.

These two points will be discussed together.

On May 28, 1940, the decedent disposed of all the property, real and personal, then owned by him, and he made that disposition, irrevocably, by present warranty deeds delivered and recorded and by bills of sale. After those transfers were made, he mailed to his niece, Manila I. Brock, the letter dated May 21, 1940, but mailed at six o'clock p. m., May 28, 1940. The effect of that letter and its essential nature must be considered in connection with the facts surrounding its execution and delivery. The fact that the letter was written, though not mailed, prior to the actual execution of the documents executed May 28, 1940, shows only that it is one of a sequence of events intended to carry out the wish of the decedent as it existed in May 1940. When the decedent got everything taken care of, he mailed the letter of instruction and information to his niece and, in a separate cover, mailed the deeds referred to in it. The testimony is uniform and unequivocal that the warranty deed to Manila I. Brock is the deed referred to in that letter.

Did the decedent intend to accomplish anything by the letter itself? If he did not intend to govern the passage of his property after his death by this letter itself, it is not a will. As stated in Page on Wills, supra, : "In order that an instrument may amount to a will, it must show testator's intention to make a testamentary gift *by that instrument as distinguished from a gift to be made or spoken of as already made by some other instrument.*"

The decedent intended to accomplish the following things by the letter itself:

1. To advise his niece that he had deeded to her his farm and the personal property covered in the deed.

2. To advise his niece that he reserved the right to control the property until he died and that he had accomplished that control by reserving a life tenancy.

3. To advise his niece that, in connection with the gift presently being made, he expected her to be good enough to him to deed back any portion of the property which he might have to sell to live on. This, however, was precatory and was recognized to be, and understood to be a reservation not enforceable at law.

4. To advise his niece that whatever portion of the property he did not request to be deeded back to him in order to pay his living expenses, was not hers to hold for herself alone but was hers to divide equally with her two brothers and sister.

5. To advise his niece that it was necessary for the deeds to be recorded so that there then be a present completed gift of his property in order to avoid the probate of his property.

6. To advise his niece that he was concerned with the status of his property because his ex-wife, Alice, had come back to Utah and to tell his niece that if Alice is in Utah at the time of the death of the decedent, his niece is to give her enough money to take her back to wherever she pleases.

The only portion of this document which can, by any stretch of the imagination, be interpreted to be of a testamentary nature rather than of a discussion of a gift praesenti, is the following:

“And whatever is left I want you to divide eaquill with Earl-Bonnie and Kennie and Blain and yourself”

That sentence cannot be lifted out of the context of the letter without completely altering its clear intent. When viewed in light of the contemporaneous events and the rest of the letter, that sentence clearly means that Manila I. Brock is to divide equally with her two brothers and sister all portions of the property then being deeded to her which have not been deeded back prior to the death of the decedent to furnish him with money upon which to live. To give it any other construction is to do violence to the clear meaning of the whole of the letter and is to do violence to the plan of the decedent then being carried out, that is, a series of gifts in praesenti passing all of his property to the objects of his benevolence, but reserving a life estate to himself. The pertinent portions of the letter in this regard are as follows:

“Well Nila I am on the down hill cline and dont feal right at all this spring so I have decided to fix up my property and make it air tight and this is the only way that will stand so am trusting to you to be as good to me as I am to you. And am deading it to you but reserve the right to control it till I die but if I half to sell part of it to live on you would half to sign the dead which

I hope you will be willing to do. And what ever is left I want you to divide eaquill with Earl-Bonie and Kennie and Blain and your self * * * I am sending the deads to you then you can send them back to me and I will put them in a safety Box in at the bank in your and my name with other property and things of value I wish that I could talk to you."

In addition to the clear meaning of these words as relating solely to the residuum of the property being deeded to Manila Brock with life tenancy reserved, there is the rule of law set forth in Point I to the effect that the presumption is against the consideration of this letter as a will.

As is apparent from the evidence as summarized in the statement of facts herein, the only testimony adduced by the proponents of this letter as a will was evidence that the decedent orally stated a number of times that he had already fixed up his property so that it would not have to go to court. The issue in this case is whether he fixed up his property in that manner by making present gifts of it or by making a will to control the devolution of his property upon his death. It is clear from the evidence that he was referring to present gifts already executed and completed and did not intend that the letter should pass any interest upon his death.

POINT IV

THE TRIAL COURT ERRED IN ADMITTING DECEDENT'S LETTER OF NOVEMBER 28, 1944, TO PROBATE AS

A WILL FOR THE REASON THAT IT IS SO AMBIGUOUS
AND UNCERTAIN AS TO BE WHOLLY INCAPABLE OF
BEING ADMINISTERED AS A WILL.

Ordinarily the question of the construction of a will would not concern the court at the time the document is proposed for probate. The rules for the construction of wills are detailed by statute in this state and generally have no application until such time as the will has been admitted to probate and the problem of what property has been bequeathed to whom arises. However, a document can be so uncertain and ambiguous as to be incapable of administration as a will. In that event, the rule is that it ought not to be admitted to probate at all. That rule is set forth in Page on Wills, Lifetime Edition, Sec. 54, as follows:

"Sec. 54. Expression of Intention in Definite Terms.

The intention of testator to make a testamentary disposition of his property, or to appoint an executor or a testamentary guardian, must be expressed in such terms as the court can determine what was his wish without resort to conjecture. Both the thing given and the person to whom it is given must, in testamentary dispositions of property, be set forth with such certainty that the court can give effect to such gift when the estate is to be distributed."

The whole of the pencil-written note, wholly written, dated and signed by the decedent and enclosed in an envelope together with \$1,300.00 worth of government bonds is as follows:

"Dear Nnese

In case ffo death
Divide these after expenses is all paid
equile.

/s/ J. W. Ingram"

It is apparent that there is nothing in this note to connect it in any way with the letter written more than four years previous at the time the decedent deeded away all the property he then had. Apparently the decedent acquired some bonds in the intervening period and intended to dispose of them after his death by the note he enclosed with them. The very existence of that note is strong argument against the interpretation of the letter of May 21, 1940 as a will. Had that letter been intended to be a will, and had the decedent intended that all of his property go to his nieces and nephews under that letter of May 21, there would have been no need for any supplemental writing.

One cannot tell from the face of this document to whom it is addressed, other than that it is addressed to one of the many nieces of the decedent. One cannot tell from the face of this document among whom the residuary of the proceeds of those bonds, after expenses in case of death, are to be divided equally. If these deficiencies are clearly supplied by the parol evidence adduced by the proponents of this document as a will, the document should be admitted to probate, but it should be the whole of the will and the sole will of the decedent and should pertain only to the bonds to which it was

attached and to which it refers. This would leave the balance of the estate of the decedent to pass to the objectors by virtue of their position as heirs of the decedent.

What, then, does the parol evidence adduced by the proponents establish? All Paul Booth's testimony was to the effect that the decedent wanted his bank accounts placed in joint tenancy with his niece, Manila I. Brock. Leora Belliston testified that, in 1940, the decedent believed he had already fixed his property so that it then had passed to his nieces and nephews. Louise Ingram's testimony likewise was confined to the period of about May 1940 and likewise was to the effect that the decedent believed he had already passed his property to his nieces and nephews and the property would not have to go to court. Nowhere in any of the oral testimony of the proponents is there any evidence that, in the writing of November 28, 1944, it was intended by the decedent that the persons among whom the bonds were to be divided were the two nieces and the two nephews. There is testimony that, in March 1954, the decedent handed a large number of papers, including all his personal papers, to Manila I. Brock and said "I have some papers here for Blain and yourself, take care of them."

To give this document effect as a will, this court would have to hold that the delivery of it to Manila I. Brock among other papers completely without any specific reference to it, either before or after the handing of this large number of papers to Manila, is sufficient

evidence that she is the “nnesse” to which the writing referred. Further the court would have to find from the words “I have some papers here for Blain and yourself, take care of them” that sufficient certainty was given to the words “divide these equile” to enable this document to be probated. In the field of wills, such uncertain and unsubstantiated conclusions ought not to be reached on the basis of such evidence. There are sound reasons of public policy for the avoidance of fraud which ought to be given consideration in this regard.

POINT V

IN THE EVENT THE DOCUMENTS ADMITTED TO PROBATE HEREIN AS THE WILL OF THE DECEDENT ARE HELD NOT TO BE WILLS, THE APPOINTMENT OF M. S. INGRAM AS EXECUTOR HEREIN SHOULD BE VACATED FOR THE REASON THAT HIS INTERESTS ARE ADVERSE TO AND IN CONFLICT WITH THE INTERESTS OF THE HEIRS AT LAW OF THE DECEDENT.

If this court finds that the letter of May 21, 1940, was in fact a will and is entitled to probate and finds that the letter of November 28, 1944, was a part of that will and is entitled to probate as a part of said will, M. S. Ingram ought properly to be the administrator of this estate for the reason that his function will be to preside over the passing of the property of this estate, or at least that portion of said property which is covered by the wills to his sons and daughters. This is a function which a father can carry out in good conscience and without such abnormal strain as would render him competent or unwise or subject to undue influence.

However, in the event this court finds that the letter of May 21, 1940, was not a will, whether or not this court finds that the note of November 28, 1944, is admissible to probate, M. S. Ingram ought not to be appointed administrator. For to give him that appointment would be to place upon him the burden of getting back from his own sons and daughters the proceeds of the bonds and the \$20,000.00 in bank accounts and other receivables which they have already distributed to themselves.

The heirs at law of the decedent, save and except M. S. Ingram himself, all oppose and object to his administration of the estate. This objection should be given no countenance if the heirs at law have no interest in the estate or if they have an interest only in a minority portion of the estate; however, if the bulk of the estate of the decedent is to pass to the heirs at law, their almost unanimous wishes ought to be respected. Not only would this be equitable and just but, in the instant case, it would be simple humanity. M. S. Ingram ought not, in that event, to be placed in the position of having to pursue his sons and daughters for the return of substantial amounts of property for the benefit of their antagonists. He could not be expected to do this job fairly or without substantial conflict with the other heirs at law who have evidenced that they can have no faith in his fairness or his justice.

The cross examination of Mrs. Coulson, who has petitioned to be, and has been designated by her brother and sisters to be, the administratrix, throws some doubt

upon her capacity to act as administrator. In the event this court feels that she cannot, in conjunction with competent counsel of her choice, properly handle the affairs of this estate, the solution is not the appointment of the controversial M. S. Ingram as administrator but is an instruction that some other capable person be nominated by the objectors and be properly appointed with bond to carry out his lawful duty.

CONCLUSION

For the reasons set forth above, that is, that the letter of May 21, 1940, is not a testamentary document and that the note of November 28, 1944, is not sufficiently certain to be probated, the appellants respectfully request this court to reverse the order of the trial court admitting said documents to probate and appointing M. S. Ingram as administrator with will attached. Further, the appellants request that the order of the trial court dismissing the petition of the appellant Maggie I. Coulson for appointment as administratrix be reversed.

Respectfully Submitted,

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