[HIGH COURT OF AUSTRALIA.]

CINNAMON . . . . . APPELLANT;
RESPONDENT,

AND

THE PUBLIC TRUSTEE FOR TASMANIA . RESPONDENT.
APPLICANT,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

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MELBOURNE, *May* 9, 10.

SYDNEY, *Aug.* 7.

Gavan Duffy C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

Will — Execution — First page alone executed — Incorporation of other pages — Indication above execution of intention to include subsequent gifts — Interlineation—Pencil alterations—Effect—Wills Act 1837 (1 *Vict. c.* 26), *sec.* 9; 4 *Vict. No.* 9 (*Tas.*); 16 *Vict. No.* 4 (*Tas.*), *sec.* 1.

A document propounded as a will consisted of a single sheet of paper folded to form four pages. On the first page appeared a printed form of will, signed by the testator and the attesting witnesses in the places provided. Written dispositive clauses filled the space provided above the clause appointing executors, the last one ending with a full stop and being followed by the word "over." The second page contained a description of the testator's assets, and further dispositive provisions appeared on the third page. Certain pencilled alterations also appeared on the face of the document.

Held that probate should be granted of the first and third pages, unaffected by the pencilled alterations: The matter on the third page should be regarded as incorporated in the first page, and the testator's signature was at the foot or end of the will within the meaning of sec. 9 of the *Wills Act* 1837 (applied to Tasmania by 4 Vict. No. 9) and sec. 1 of 16 Vict. No. 4 (Tas.).

Decision of the Supreme Court of Tasmania (*Crisp* J.) affirmed.

APPEAL from the Supreme Court of Tasmania.

The respondent, the Public Trustee of Tasmania, propounded a document for probate in solemn form as the last will of Robert

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Cinnamon, and cited David Cinnamon as sole next of kin to attend to support any interest he might have. The document propounded as the will consisted of a single sheet of paper folded down the middle so as to form four pages. The first page contained a printed form of will, which was filled in in writing; and upon the second and third pages there was also writing. Except for the signatures of the attesting witnesses, all the handwriting was that of the testator. The upper half of the first page was filled with written dispositive clauses ending with a completed sentence and a full stop. These clauses consisted of eight bequests to named beneficiaries. Of these bequests two were struck out in pencil. On the right hand side of the page and immediately after the last of the bequests so made was written the word "over." Then followed, on the same page, the appointment of the respondent as executor, below which appeared the attestation clause, the signature of the testator, and the signatures of the attesting witnesses. On the second page there appeared a list of the testator's assets but no dispositive clauses. This was the only writing on the second page, and it occupied about the top third of the page. On the third page the list of bequests to named beneficiaries was continued. This handwriting occupied about the top half of the page, the rest of the third page being left blank. There was no writing at all on the third page except the names and descriptions of the beneficiaries and the amount each was to get. Of the beneficiaries mentioned on the third page, three were struck out in pencil, another was struck out in pencil and another bequest was substituted in pencil, the amount given to another beneficiary was struck out in pencil and another amount substituted in pencil. The final bequest was written in pencil. The attesting witnesses deposed that before signing they glanced through the will: One said he remembered seeing the name of one of the beneficiaries mentioned on the third page, the other witness remembered seeing the same name and also the name of another beneficiary described on the third page. The names so deposed to appeared only on the third page.

The will was propounded in solemn form before *Crisp* J., who held that the third page was incorporated in the first page as an

interpolation above the signature of the testator; that there was both intrinsic and extrinsic evidence to prove what the instrument was which the testator intended to be his will, the intrinsic evidence being "(1) no space on side 1 to continue the list of bequests, (2) the apparent continuation of that list on side 3, and (3) the word 'over' appearing *above* his signature on side 1"; and the extrinsic evidence being "(1) That of the two witnesses to the will and their seeing before the will was executed words in the will which only appear on side 3. (2) Mr. Gibson's evidence as to testator bringing the will to him in its present condition." Mr. Gibson was the respondent's solicitor. His Honor accordingly granted probate of pages 1 and 3 of the document propounded, but as unaffected by the pencilled alterations and additions.

From this decision David Cinnamon now appealed to the High Court.

Shields, for the appellant. No part of the document should have been admitted to probate at all, as the testator's signature was not at the foot or end of the will as required by the *Wills Act* 1837, sec. 9. Alternatively, the first page only should have been so admitted. The word "over" on the first page of the will means only "see over for continuation of my will." The question is not what was intended by the testator, but whether the will was signed at the foot or end thereof. The word "over" is not sufficient to incorporate the words on the following pages. The principle to be applied is contained in the *Wills Act*, which should be strictly construed. If probate of the whole document should not be refused, it should be limited to the first page. In all documents that have been admitted to probate there has been either an uncompleted sentence on the first page or the words on the second page were in some way connected with the first page. [Counsel referred to *In the Will of Ellen Wyatt* (1); *In re Tangey* (2); *In the Goods of Robert Dearle* (3); *In the Goods of Birt* (4); *Sweetland* v. *Sweetland* (5); *In*

(1) (1895) 21 V.L.R. 571; 17 A.L.T. 227.
(2) (1896) 17 A.L.T. 263.
(3) (1878) 47 L.J. P. 45.
(4) (1871) L.R. 2 P. & D. 214.
(5) (1865) 11 L.T. N.S. 749.

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the Will of Edward Joseph Huysmans (1); *In the Will of George Woods* (2); *In re McCarthy* (3); *Lay* v. *Gough* (4); *In the Estate of J. C. Harris* (5); *In re Roberts*; *Roberts* v. *Manning* (6); *Australian Law Journal*, vol. II., p. 138; vol. IV., p. 183; *In re Moroney* (7); *In re Morgan* (8); *Jarman* on *Wills*, 7th ed. (1930), vol. I., p. 100; *In the Goods of Wootton* (9); *In the Goods of Greenwood* (10); *In re Belfrage* (11); *In the Will of John Little* (12); *In the Goods of Rebecca Susan Gilbert* (13); *Palin* v. *Ponting* (14); *Margary* v. *Robinson* (15); *In the Goods of Mary Moorhouse Smith* (16); *In re Heitsch* (17); *In the Goods of Dallow* (18); *In the Goods of Malen* (19); *In the Goods of William Gee* (20); *In re Lawrence* (21).]

Clyne, for the respondent. The word "over" on the first page of the will means that certain other bequests ought to be brought into the disposing clauses of the will. The testator has said, in effect, that he could not fit all his will into the first page and indicated what he wished to be incorporated in his will by the words which appeared on the other pages. The writing on the second and subsequent pages should be incorporated as an interlineation. *In the Goods of Birt* (22) should be approved. That case is an authority for admitting to probate writing on a page other than the first, where it is shown on the face of the will that it was intended to incorporate such writing into the will. If the Court does not consider that the second and third pages should be incorporated, probate should be granted of the first page. [Counsel referred to *Palin* v. *Ponting* (14); *In the Goods of Evans* (23); *In the Goods of Elliott* (24); *In re McCarthy* (3); *In re Roberts*; *Roberts* v. *Manning* (25); *In the Will of Martin* (26); *In re Moroney* (7); *In the Will of Donovan* (27);

(1) (1895) 21 V.L.R. 576, at p. 582; 17 A.L.T. 216, at p. 219.
(2) (1897) 23 V.L.R. 362; 19 A.L.T. 116.
(3) (1922) V.L.R. 216; 43 A.L.T. 172.
(4) (1924) 20 Tas.L.R. 59.
(5) (1924) 42 W.N. (N.S.W.) 25.
(6) (1928) S.A.S.R. 175.
(7) (1928) 28 S.R. (N.S.W.) 553.
(8) (1931) V.L.R. 191.
(9) (1874) L.R. 3 P. & D. 159.
(10) (1892) P. 7.
(11) (1932) V.L.R. 357.
(12) (1896) 17 N.S.W.L.R. 57.
(13) (1898) 78 L.T. 762.
(14) (1930) P. 185.
(15) (1886) 12 P.D. 8.
(16) (1931) P. 225.
(17) (1933) V.L.R. 338.
(18) (1866) L.R. 1 P. & D. 189.
(19) (1885) 33 W.R. 825.
(20) (1898) 78 L.T. 843.
(21) (1928) S.A.S.R. 516.
(22) (1871) L.R. 2 P. & D. 214.
(23) (1923) 128 L.T. 669.
(24) (1931) I.R. 340.
(25) (1928) S.A.S.R., at p. 176.
(26) (1898) 17 N.Z.L.R. 418.
(27) (1915) 32 W.N. (N.S.W.) 100.

In the Estate of J. C. Harris (1); *In the Will of Bull* (2); *In the Will of Wilkinson* (3); *In the Will of Alcorn* (4); *In re Heitsch* (5); *Mortimer* on *Probate*, 1st ed. (1911), p. 220; *Royle* v. *Harris* (6); *Sweetland* v. *Sweetland* (7); *In the Will of Holley* (8); *In re Mahony* (9); *In the Goods of Hall* (10).]

[RICH J. referred to *In the Goods of Kimpton* (11) and *In the Goods of Martha Peach* (12).]

Shields, in reply.

Cur. adv. vult.

Aug. 7

The following written judgments were delivered:—

GAVAN DUFFY C.J. AND DIXON J. The document admitted to probate by the order under appeal consists of a single sheet of paper folded down the middle to make four pages or sides. The first page contains in print the formal parts of a will, and in the testator's handwriting matter filling up the spaces in the body of the will, including the testimonium clause. Opposite the attestation clause there appear the signatures of the testator and of two witnesses. The first dispositive provision in the instrument commences near the top of the page with the printed words: "After payment of all my just debts funeral and testamentary expenses I give devise and bequeath unto." The space, which the form left for the completion of this devise and bequest, extended half way down the page where the print again proceeded with a clause for the appointment of executors, which was succeeded without any break by the testimonium clause. After the words "devise and bequeath unto" the testator wrote "my dear friends" and then the names and additions of eight persons with a sum of money specified for each. The name of each of these intended legatees commences a fresh line and the eighth legacy brings the writing down to the printed appointment of executors, which begins "And I hereby appoint" followed by a

(1) (1924) 42 W.N. (N.S.W.) 25.
(2) (1905) V.L.R. 38; 26 A.L.T. 123.
(3) (1915) V.L.R. 77; 36 A.L.T. 126.
(4) (1923) V.L.R. 67; 44 A.L.T. 127.
(5) (1933) V.L.R. 338.
(6) (1895) P. 163.
(7) (1865) 4 Sw. & Tr. 6, at p. 9; 164 E.R. 1416, at p. 1417.
(8) (1883) 9 V.L.R. (I.P. & M.) 52.
(9) (1892) 18 V.L.R. 482.
(10) (1871) L.R. 2 P. & D. 256.
(11) (1864) 33 L.J. P.M. & A. 153.
(12) (1858) 1 Sw. & Tr. 138; 164 E.R. 664.

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space down the page of about an inch. The word " appoint " ends about five inches from the right hand edge of the paper, and, about three inches from it, and almost level with it, the word " over " is written in the same ink and in the same character of writing as that in which the testator wrote the list of legacies above it. In the space between the printed word " appoint " and the written word " over " are written the words " The public " and underneath " Trustees my." These four words he wrote in characters somewhat different from the list of legacies but in the same ink. It may be safely inferred that " over " was written first and that afterwards " The public Trustees my " were written in two lines to avoid the word " over " Over the leaf upon what, according to conventional numbering, would be the third page, written in the same ink and characters and in the same form as the list of legacies upon the first page, is a further list, just as it would be written in continuation of the first. On the opposite page (conventionally the second) is written what appears to have been intended as a note of assets and investments which his estate comprised. On the right hand top corner are the date, 22nd May 1925, and the testator's name, followed by the word " estate." Under this, but commencing on the left side of the sheet, is a list of investments. On the first page, two of the legacies contained in the list are scored through in pencil, and, on the third page, four are so dealt with. Upon this page a legacy is added in pencil at the end of the list, and, in pencil, a change is made in the name of a brass band to which £50 had been allotted. The paper bears one or two other pencil marks, which may be ignored because it was proved that they were not made by the testator, but by a solicitor for the purpose of preparing another will which in fact was never executed. Evidence was given, which *Crisp* J. accepted, that in the execution of the document the formal ceremony for executing and witnessing a will was carried out, and that the witnesses then saw writing on the second and third page and the names of legatees which occur only on the third page. The testimonium clause gives the date of the will as 1st October 1921, but the evidence shows that it was actually executed at some time between the end of March and the middle of July 1925. Perhaps it was made at or shortly before the date given on the second page

over the list of assets, 22nd May 1925. In 1930, the testator produced it together with another incomplete and unexecuted paper, dated 27th January 1923, to the solicitor whom he commissioned to make another will.

Crisp J. decided that the third page was incorporated as a continuation of the list of legacies and that the will was executed at the foot or end thereof. He rejected the pencilled cancellations and additions as unattested alterations probably made after the execution of the will and deliberatively. Accordingly, he granted probate of the print and writing appearing on the first and third pages.

In *In re McCarthy* (1), one of the many cases in which the testator has continued the dispositions from the first to the third page of a printed will form before executing it upon the first, *Cussen* J., in the course of an instructive judgment, said (1) :—" As the *Wills Act* provides that no will shall be valid unless it is in writing and executed as prescribed, there are in cases like the present four questions which may arise, namely—(*a*) What testamentary writing (including print), if any, appears by direct evidence or by legitimate presumptions, to have been on the paper when testator signed it ? (*b*) Was the whole of such writing, or what, if any, part thereof, intended to be the testator's written will ? (*c*) Where is the ' foot ' or end of such written will ? (*d*) Is the signature ' at ' the ' foot ' or ' end ' ? " To these issues we would add another, namely : (*e*) Is every part of the writing which is so intended to be the written will included, whether by incorporation or otherwise, in what the signature operates to verify and authenticate ?

We shall deal with these questions in order.

(*a*) The evidence accepted by the learned Judge is sufficient to establish without the aid of any presumption that almost all that appears in ink upon the third page of the paper had been written before the execution of the document. For one of the names seen by the witnesses occurs second last upon the list and those before it are written in due order in the same handwriting and ink. Having regard to the regular position thereunder of the last name, and the fact that it is in the same ink and style of writing, it may be presumed

(1) (1922) V.L.R., at p. 223 ; 43 A.L.T., at p. 173.

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also to have been written at the same time. The writing on the second page contains nothing testamentary, and, although probably all written at the time of execution, it would form no part of the will. On the other hand, the presumption is against the existence at that time of the pencilled cancellations, alterations and additions. Prima facie they may be taken to have been placed there at some time after the instrument was executed when new testamentary dispositions were in contemplation. There is nothing, in our opinion, to displace the presumption. It is true that the incomplete and unexecuted script, dated 27th January 1923, repeats many of the legacies of the document in question, and that two of those there crossed out in pencil are also crossed out in pencil in that script. But two crossed out in the document in dispute are not crossed out in this script, and one crossed out in the script is not crossed out in the will. No inference can be drawn that the testator had crossed out any of the names before 1925.

(*b*) From the use of the word " over " on the first page at the end of the space provided for bequests, from the existence of the list on the third page and from its appearing to be a continuation of the list of legacies on the first page, we think it ought to be inferred that the ink contents of the third page as well as the print and ink contents of the first page were intended by the testator to constitute his written will. The writing on the second page is non-testamentary and pretty clearly was intended as a memorandum informing the testator's executors of the nature of his estate.

(*c*) The foot or end of the present will must either be after the writing on the third page, or after the testimonium clause on the first. To treat the third page as the foot or end of the will is to regard the appointment of executors, the testimonium clause and the attestation clause as interposed in the middle of the catalogue of legacies governed by the words " I give devise and bequeath unto my dear friends." To treat the first page as containing the foot or end of the will is to regard the matter on the third page as intended to be read in continuation of the list of legacies before the appointment of executors is read. If, for instance, the testator had ruled a line across the page just above the appointment of executors and had written " page one " on that portion of the sheet above it, and

" page three " on that below it, and " page two " on the conventional third page, there would be no doubt, we think, that the attestation clause stood at the foot or end of the will and the only question would have been whether the signature sufficiently authenticated the page thus numbered 2. When a single sheet of paper is used for the purpose of writing any lengthy statement or matter, whether or not the paper is folded, the order in which the writing is to be read depends on the manner in which the writer distributes it over the paper, and, although more usually he is guided by convention in using the paper, he is not precluded from adopting any other order. So long as a reader of the paper can ascertain from inspection in what order the script is to be read, it appears to us that its foot or end is determined by that order.

In the present case we think any person reading through the will with care and attention would, when he got to the word " over," perceive that at that point, before proceeding to read the clause appointing executors, he was directed to turn the leaf and when he obeyed that direction he would understand its purpose to be that he might go on reading the list of legacies there continued and conclude it before proceeding with the will. He would thus see that the order in which the writing was distributed on the paper required him first to read the upper half of page one, then page three and then conclude the will on page one. Page two he would see contained nothing testamentary. These considerations appear to us to establish the testimonium clause as the foot or end of the will.

(*d*) It is there the signature actually occurs.

(*e*) This conclusion means that page one of the will, at least, must be admitted to probate. It does not follow that page three must be included in the probate, because, consistently with the conclusion that the foot or end of the will is on page one, it might be held :— (1) that the matter on page 3 was not sufficiently identified by the word " over " and by the sense of the document, as part of a disposition which it was apparent that the testator intended to give effect to by his signature ; or (2) that it contains dispositions which are underneath, or which follow the signature. What we have already said goes a long way to negative the first of these possible views.

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The word " over " constitutes a direction to the reader, which, if obeyed, enables him to conclude with reasonable certainty that the writing he sees on the third page should be read in before proceeding. When a separate existing document is intended to be incorporated in the document executed as a will, there must be a description which will enable it to be identified clearly as the document intended to be referred to. But, when the additional writing is on the same sheet of paper, any indication that the place on the paper where it is written is to be resorted to necessarily suffices to identify it. The word " over " serves the double purpose of showing that something overleaf is to be looked at and of directing at what stage in the reading of the first page this is to be done. The sense of the upper half of the first page and of the third page complete the evidence of the testator's intention that the third page should at that place be read into the first page. The second of the possible views we have mentioned has occasioned us more difficulty. No signature may operate to give effect to any disposition or direction which is underneath or which follows it. Illustrations of the application of this proviso to documents where writing occurring after the signature was considered to be sufficiently incorporated in the text which preceded it will be found in *In the Goods of Dallow* (1); *In the Goods of Dearle* (2); *In the Goods of Malen* (3); *In the Goods of Anstee* (4); *Royle* v. *Harris* (5); *In the Goods of William Gee* (6); *Millward* v. *Buswell*; *Parker Intervening* (7); and *In the Will of Robert Glass* (8). In the present case the legacies set out on the third page are certainly not " underneath " the signature on the first page. It is not so clear that they do not " follow " it. This expression refers to sequence or order. But in a written document the sequence or order is established by the writer. If upon inspection the arrangement which he has adopted appears and adherence to that arrangement results in a writing which terminates in the signature, the circumstance is not fatal that, according to a conventional use of the paper, the signature is upon an earlier fold or side, or even stands higher on the same side

(1) (1866) L.R. 1 P. & D. 189.
(2) (1878) 47 L.J. P. 45.
(3) (1885) 54 L.J. P. 91.
(4) (1893) P. 283.
(5) (1895) P. 163.
(6) (1898) 78 L.T. 843.
(7) (1904) 20 T.L.R. 714.
(8) (1906) 6 S.R. (N.S.W.) 426.

than part of the written matter. In *In the Goods of Sarah Kimpton* (1), Lord *Penzance* said: "I am inclined to say that where any portion of the writing appears to the satisfaction of the Court to form part of the context, anterior to the signature, it ought to be considered as following that context, though the position it may occupy in the paper may be different." This view has been acted upon or recognized repeatedly (see *In the Goods of Birt* (2); *In the Will of Henry Martin* (3); *In the Goods of Greenwood* (4); *In the Will of John Little* (5); *In the Goods of Rebecca Susan Gilbert* (6); *In the Will of Bull* (7); *In the Will of Donovan* (8); *In the Goods of Evans* (9) (where *Hill* J. said that a reference above the signature to something below drags it up to its proper place); *In re Moroney* (10); *In the Goods of Martin* (11) (where the "P.T.O." was below the signature); *Palin* v. *Ponting* (12); *In the Goods of Mary Moorhouse Smith* (13); *In the Goods of Elliott* (14); *In re Heitsch* (15)). This course of authority is uniform in its recognition of the principle stated by Lord *Penzance*. That principle has been applied, we think, in every case in which an intention has sufficiently appeared that the further writing should be considered part of the body of the will preceding the signature and read as incorporated therein, unless the relative positions on the paper of the writing and the place of signature have been such as unavoidably to establish a sequence in which the writing followed the signature or occurred underneath it.

We think that our decision is not consistent with the views adopted in the Victorian cases of *In the Will of Ellen Wyatt* (16); *In the Will of Edward Joseph Huysmans* (17); *In the Will of George Woods* (18); *In re Tangey* (19), but those views do not appear to us to follow the current of authority.

For these reasons we think the appeal should be dismissed.

(1) (1864) 3 Sw. & Tr. 427, at pp. 428, 429; 164 E.R. 1340, 1341; 33 L.J. P. 153.
(2) (1871) L.R. 2 P. & D. 214; 40 L.J. P. & M. 26; 24 L.T. 142.
(3) (1898) 17 N.Z.L.R. 418.
(4) (1892) P. 7.
(5) (1896) 17 N.S.W.L.R. (B. & P.) 57.
(6) (1898) 78 L.T. 762.
(7) (1905) V.L.R. 38; 26 A.L.T. 123.
(8) (1915) 32 W.N. (N.S.W.) 100.
(9) (1923) 128 L.T. 669.
(10) (1928) 28 S.R. (N.S.W.) 553.
(11) (1928) N.I. 138.
(12) (1930) P. 185.
(13) (1931) P. 225.
(14) (1931) I.R. 340.
(15) (1933) V.L.R. 338.
(16) (1895) 21 V.L.R. 571; 17 A.L.T. 227.
(17) (1895) 21 V.L.R. 576; 17 A.L.T. 216.
(18) (1897) 23 V.L.R. 362; 19 A.L.T. 116.
(19) (1896) 17 A.L.T. 263.

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RICH, EVATT AND MCTIERNAN JJ. In determining whether *Crisp* J. was correct in admitting to probate what he called side 3 of the will in addition to side 1, the important feature to remember is the original form of the whole document when the testator obtained it for the purpose of using it for his will. Printing appeared on the first page only. That printing contained a declaration that what was to follow was the last will and testament of the person making use of it. The print provided for payment of debts and funeral and testamentary expenses and went on to say: "I give devise and bequeath unto." Then followed a blank of five or six inches before the further printing: "And I hereby appoint (blank) executor of this my will." There immediately followed without further gap the printed attestation clause with the word "SIGNED" printed in very large type and sufficient space for the signature of the testator and the two witnesses.

Now it is clear that the relation of the printed matter to the spaces on this document was such as (1) to determine in advance by the very form adopted (*a*) where the signature of the testator should be affixed, i.e., opposite the printed word "SIGNED" at the bottom of side 1 and (*b*) where the end of the will should be, i.e., at the same place, and (2) to invite, or at least permit, of writing upon sides 2, 3, and even 4 of the same document.

The first question is whether a person using such a document for the purpose of making his will may use the space already provided for his signature, the place being situated at what purports to be the end of the will, and may also take advantage of the implied invitation or permission accorded by the other sides of the document by incorporating into the dispositive part of the will on side 1 additional particulars to be written down on sides 2, 3, or 4.

The answer to this question should be in the affirmative. In *Allen* v. *Maddock* (1), a case where the question of incorporating another paper into the paper duly executed as a will or codicil was discussed, it was pointed out that the question always was "what reference in the valid paper is sufficient to let in evidence to identify the invalid paper" (2).

(1) (1858) 11 Moo. P.C.C. 427, at pp. 456, 457; 14 E.R. 757, at p. 768.

(2) (1858) 11 Moo. P.C.C., at p. 457; 14 E.R., at p. 768.

The next question is whether, by the use of the word " over " at the end of the space provided on side 1 for dispositions, the testator made a sufficient reference to side 3 of the document to justify and require the admission of the latter document (side 3) as a testamentary document in addition to side 1. Is the incorporation sufficient in this case ? Again, the answer is yes. The word " over " means that, the dispositions made on side 1 being unfinished, other dispositions which are to be found " over " are to be included in the list. This being the natural meaning of " over," one turns " over " and finds on side 2 no dispositions at all, but only what purports to be a schedule of the testator's assets, but one finds on side 3 a series of dispositions which upon their face and from " the obvious sequence and sense of the context," purport to belong to the same category as those on side 1.

Not only does the word " over " clearly refer to the dispositions on side 3 of the document. Side 3 of the document itself requires an explanatory introduction. It does not describe itself in any way. For the explanation of side 3 one has to turn back to the printed words on side 1, " I . . . bequeath unto " and to the filling up of the space on that side. Not only therefore does the dispository clause on side 1 expressly call for a reference to side 3, but side 3 itself is meaningless without the key which one finds in the document, and finds only on side 1 of it.

It follows that there has been a sufficient incorporation of side 3 of the document into the will at the point marked " over " on side 1, so that (1) the will is signed at the foot and end by the testator, but (2) into the will is incorporated by sufficient reference the further list of dispositions contained on side 3.

This view is in line with a large number of decisions, of which *In the Goods of Birt* (1) is a leading authority, and is to be preferred to the decisions of the Full Court of Victoria upon which Mr. *Shields* relied.

In a case resembling that under consideration, where the chief dispositive part of the codicil was literally underneath the signature of the testatrix, Sir *J. P. Wilde* said :—" I think this codicil ought to be included in probate. It is entirely within the spirit of the

(1) (1871) L.R. 2 P. & D. 214.

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Wills Act and the Amendment Act referred to. It may not be possible to lay down any general rule for the construction of the proviso in the Amendment Act, but I am inclined to say that where any portion of the writing appears to the satisfaction of the Court to form part of the context, anterior to the signature, it ought to be considered as following that context, though the position it may occupy in the paper may be different. I think, from the case of *Martha Peach, deceased* (1), that the late Sir *C. Cresswell* was inclined so to hold, though it does not appear that that case was brought to a final decision " (*In the Goods of Sarah Kimpton* (2)). The decisions on the *Wills Act* seem to show that the optimism of Sir *Edward Sugden*, as he then was, was hardly warranted. In the second edition (1862) of his book on *Real Property Statutes*, at p. 336, note 1, the learned author said :—" The language of the Act (15 Vict. c. 24) may be unusual, but it was not unnecessary ; it was required in order to prevent the Courts from adopting any of the absurd constructions which had been put on the plain words of the former Act. Happily, it has completely answered the purpose for which it was framed."

A further question was raised in relation to certain pencil erasures, additions and alterations on sides 1 and 3. The question is whether it is sufficiently established that these alterations were on side 1 or side 3 at the time when the will was executed in 1925. *Crisp* J. thought they were not and refused to admit them to probate. He was right both as a matter of presumption and as a matter of inference. The presumption is that alterations of this character are made after the execution of the will (*Jarman* on *Wills*, 7th ed. (1930), at pp. 114, 143). Further, apart from presumption, this is the inference that should be drawn from the evidence of the attesting witnesses. The blots and alterations were so numerous and so prominent that it is almost impossible that either attesting witness, each of whom was regarded by his Honor as a witness of truth, could have failed to notice them at the time of execution. The fact that they did not notice them strongly suggests that they were not there at the time of execution. This probability is greatly

(1) (1858) 1 Sw. & Tr. 138 ; 164 E.R. 664.

(2) (1864) 3 Sw. & Tr., at pp. 428, 429 ; 164 E.R., at pp. 1340-1341.

strengthened when it is remembered that a sufficient explanation of the alterations is to be found in the fact that, late in the year 1930, five years after the execution of the will, the testator instructed Mr. Gibson, solicitor to the Public Trustee, to prepare a new will for him in accordance with side 1 and side 3 giving effect to the pencilled alterations. This indicates that the alterations were part of a draft of the then proposed will and were merely deliberative.

The appeal should be dismissed.

STARKE J. In this case, a document was propounded for probate as the last will of Robert Cinnamon. It is partly in print and partly in writing, and is, so far as material, as follows :—

First page :—

" This is the last will and testament of me " (in print) " Robert Cinnamon of Westerway Tasmania " (in writing). " After payment of all my just debts funeral and testamentary expenses I give devise and bequeath unto " (in print) " my dear friends " (in writing).

Pecuniary legacies (all in writing) follow, to named persons, and underneath the last of the pecuniary legacies so given, on the right hand side of the document, is then written the word " over." The appointment of an executor and a testimonium clause follow, partly printed and partly written. Then come the attestation clause and the signature, thus :—

Attestation Clause (in print)	" Robert Cinnamon. Stanley Edward Suttrell. Gordon Triffett."

The second page of the document was blank ; there is written upon it, however, particulars of Cinnamon's estate, but no testamentary dispositions. The third page was also blank, but there is written upon it what purports to be further pecuniary legacies to named persons.

Crisp J., who heard the application for probate, found that the pecuniary gifts appearing on page 3 of the document were there written before Cinnamon executed it. Probate was granted to pages 1 and 3 of the document, unaffected by certain pencilled alterations and additions, to which I shall refer subsequently.

The Tasmanian law provides, *inter alia*, that no will shall be valid unless it shall be in writing and signed at the foot or end thereof by

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the testator (4 Vict. No. 9; 1 Vict. c. 26, s. 9). It was once held that the signature must follow immediately at and after the conclusion of the will (*Smee* v. *Bryer* (1)). Perusal of this case gave pain to Sir *Edward Sugden* (*An Essay on the New Statutes*, 1st ed. (1852), p. 314); and, as Lord *St. Leonards*, he introduced into the House of Lords an amending Bill, which became law. (See *Sugdens' Real Property Statutes, New Statutes*, 2nd ed. (1862), p. 336.) This amendment was adopted in Tasmania, and is to be found in the Act 16 Vict. No. 4, sec. 1. But the section provides that no signature shall be operative to give effect to any disposition or direction which is underneath or which follows it. The foot or end, or the conclusion, of the will now before us is clearly, I think, on the first page, and the dispositions on the third page just as clearly, to my mind, follow the signature. Consequently, I should have thought that the will was not executed in the manner required by law, and that, for the reasons assigned in *Sweetland* v. *Sweetland* (2) and *In the Will of Huysmans* (3), probate of the whole document should have been refused. (Compare *In re McCarthy* (4).) But the Acts relating to the execution of wills are overlaid with decisions, and some of those relevant to this case must be considered.

It is well settled that a paper unattested may be held sufficient in certain circumstances, that is that a paper duly executed may so clearly and indisputably refer to an unexecuted paper that the latter, whether of a testamentary form or character or not, will be considered as identified with and forming part of the will duly executed, just in the same manner as if it had been repeated *totidem verbis* in the will itself (*Countess De Zichy Ferraris and J. W. Croker* v. *Marquis Hertford* (5)). But that principle is of no avail here, because the written matter upon page three is relied upon as part of the will itself, and " it would be directly contrary to the statute, which requires a will to be signed at the foot or end thereof, to grant probate " of that matter (*In the Goods of Dallow* (6)). Again, it has been held that where any portion of the writing appears to form

(1) (1848) 6 Notes of Cases, pp. 20, 406; 1 Rob. 616; 6 Moo.P.C.C. 404; 13 E.R. 739.

(2) (1865) 4 Sw. & Tr. 6; 164 E.R. 1416.

(3) (1895) 21 V.L.R. 576; 17 A.L.T. 216.

(4) (1922) V.L.R. 216; 43 A.L.T. 172.

(5) (1843) 3 Curt. 468, at p. 492; 163 E.R. 794, at p. 802.

(6) (1866) L.R. 1 P. & D., at p. 191.

part of the context anterior to the signature, it ought to be considered as following that context, though the position it may occupy in the paper may be different (*In the Goods of Sarah Kimpton* (1)). The present case is not one of that type.

It has been further held that words which physically follow a signature may be admitted to probate, if they can be regarded as in the nature of an interlineation in the will. All the cases illustrating this doctrine are, I think, founded upon *In the Goods of Birt* (2). There, a will was written on two sides of a sheet. On the first page, there was a disposition in favour of testator's wife and the commencement of another disposition, marked with an asterisk and the words " see over " ; the signature of the testator appeared at the bottom of the first page. On the second page, the testator completed the disposition which was commenced on the first page, and introduced it with an asterisk and the words " see over," thus : " see over *." The heir-at-law consenting, Lord *Penzance* admitted the whole document to probate. " It seems to be the better course " he said " to look upon these words as an interlineation, for the clause without them would be unmeaning. . . . He clearly intended that the words should be introduced where he made the first mark. . . . I think that these words, although, as written, they follow the signature, must be read in the place in which the testator intended they should be read, and therefore preceding the signature " (3). The editors of *Jarman* on *Wills*, 6th ed. (1910), p. 112, note (*u*) ; 7th ed. (1930), p. 100, note (*x*), assert that the decision is clearly wrong. But the case seems to have been generally acted upon, and even extended in its application (*In the Goods of Greenwood* (4) ; *Palin* v. *Ponting* (5) ; *In the Goods of Elliott* (6) ; *In the Will of Bull* (7) ; *In re Heitsch* (8) ; *In the Will of Donovan* (9) ; *In the Will of Henry Martin* (10)).

In *Moroney's Case* (11), *Harvey*, the Chief Judge in Equity of the Supreme Court of New South Wales, said that the Court might admit to probate writing on pages subsequent to the attestation

(1) (1864) 3 Sw. & Tr. 427 ; 164 E.R. 1340.
(2) (1871) L.R. 2 P. & D. 214.
(3) (1871) 2 P. & D., at p. 215.
(4) (1892) P. 7.
(5) (1930) P. 185.
(6) (1931) I. R. 340.
(7) (1905) V.L.R. 38 ; 26 A.L.T. 123.
(8) (1933) V.L.R. 338.
(9) (1915) 32 W.N. (N.S.W.) 100.
(10) (1898) 17 N.Z.L.R. 418.
(11) (1928) 28 S.R. (N.S.W.) 553.

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clause under either one of two sets of circumstances : (1) if there is something on the first sheet, and authenticated by the testator's signature to his will, such as an asterisk or the words " P.T.O.," which incorporates on the front sheet the writing on the subsequent sheets ; (2) if by some folding or manipulation of the paper the testator's signature can be regarded as being placed at the foot or end of the will within the meaning of the language of the Act. (See also *In the Goods of Evans* (1) ; *In the Estate of J. C. Harris* (2) ; *In the Will of George Woods* (3) ; *In re Roberts* ; *Roberts* v. *Manning* (4).) The first proposition stated by the learned Chief Judge is applicable to this case. The word " over " on the first page of Cinnamon's will suggests a continuation of his will over the page, and that the dispositions " over " the page should be taken in or read immediately after the dispositions on the first page. The only dispositions " over " the page are on page three, and this word therefore identifies them. According to the decisions, the dispositions over the page in the present case may be looked upon as an interlineation or an incorporation in the will, immediately following the dispositions on the first page—and so do not follow, but precede, the signature. This conclusion is founded upon *Birt's Case* (5) ; the other cases of that type merely profess to follow it. *Birt's Case* has stood and been acted upon for more than sixty years in England, Australia and New Zealand, and this Court must, I think, in these circumstances, accept it as law, though it appears to me contrary to the express terms of the Wills Acts. It has, however, enabled the Courts to save wills in many cases from invalidity, and thus give effect to the intention of testators.

Some alterations appear in the will that require notice. On the first page, gifts to Mrs. Margaret Robertson and Mrs. Elvie Windsor are struck out : a pencil line has been run through each gift. On page three, gifts to Mrs. Willamina Lawson, Miss Winnie Nevin, and Miss Myra Jane Ribbon, have been similarly struck out. " Hobart City Band £50 " had also been struck out in pencil, and the words " St. Josephs Band £50 " substituted in pencil. A gift of £100 to Laurell Marvel appears in pencil. " Alterations appearing

(1) (1923) 128 L.T. 669, at p. 670.
(2) (1924) 42 W.N. (N.S.W.) 25.
(3) (1897) 23 V.L.R. 362 ; 19 A.L.T. 116.
(4) (1928) S.A.S.R. 175
(5) (1871) L.R. 2 P. & D. 214.

on the face of the will are, in the absence of satisfactory evidence, intrinsic or extrinsic, to the contrary, presumed to have been made after the execution, and are therefore held not to form part of the will" (*Hayes and Jarman, Forms of Wills*, 15th ed. (1926), pp. 42, 43). I have examined the scripts which were filed in the proceedings and the evidence, but there is nothing to displace this presumption. It appears to me probable that the alterations appearing on the first and third pages of the will were made in 1930, about the time the testator saw the solicitor to the Public Trustee, and instructed him to prepare a will on the lines of the document now propounded. But although the solicitor did prepare such a will, the testator never executed it.

The result is that the judgment below should be affirmed.

Appeal dismissed. Costs of both parties out of the estate. Costs of executor as between solicitor and client.

Solicitors for the appellant, *Butler, McIntyre & Butler.*
Solicitor for the respondent, *Marcus Gibson.*

H. D. W.