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THEOBALD ON WILLS

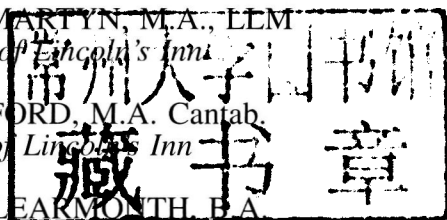
SEVENTEENTH EDITION

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THEOBALD ON WILLS

SIR HENRY THEOBALD

Sir Henry Studdy Theobald was born in Calcutta on June 7, 1847. After a distinguished academic career at Oxford, he practised successfully as a junior barrister at the Chancery Bar until he took silk. By his own account as given in his amusing reminiscences, "*Remembrance of Things Past*", he totally failed to build up a silk's practice, and therefore accepted the offer of an appointment as a Master in Lunacy. He died on June 8, 1934.

His account of the genesis of *Theobald on Wills* both illustrates his dry sense of humour and illuminates the different world of legal authorship and publishing of the 1870s.

"Very early in my career I was invited by Messrs Stevens & Sons to write a book on the Construction of Wills which might be a useful text-book for the Chancery practitioner. . . . there were many books on the subject and they mostly proceeded on the theory that the wills were to be set out in full with a summary of the judgment, but to proceed in this manner would have led to intolerable length. The only possible procedure appeared to be to summarize the cases into chapters. This was a laborious task as the mass of matter to be handled was very large. My first edition was a small, mean looking volume, but it found favour with Sir George Jessell [*spelt thus in the book—the correct spelling is Jessel*], then Master of the Rolls, who had occasion to commend my discussion of a particular branch of the law and thence forward the success of the book was assured. I was paid an arranged sum per sheet, and as the volume subsequently went through seven editions it brought in a fairly good annuity."

PREFACE

The law of Wills is rather like one of those country houses that have been altered and enlarged over time. In the remains of a monastery, perhaps, a Tudor mansion was constructed. Then, in the eighteenth century, a fine new wing was built, in the style of Palladio. In the alternative, perhaps, the new wing was not built until the reign of Queen Victoria, and the style was not Palladian, but Gothic Revival.

At this point, however, the analogy breaks down. The size and structure of the house will have changed little, if at all, during the twentieth century. If the house had followed the example of the law of Wills, by contrast, it would have seen extensive alteration, both internal and external. Picturesque cubby-holes and winding staircases would have been removed. Many rooms would have been redecorated in a new style. Modern knowledge would have improved the experience of living in the house, not least by opening new windows to let in more light (that is to say, extrinsic evidence). Above all, completely new buildings would have been added, attached to but to some degree separate from the older house. One would have been the family provision building, another the breach of duty building. These new buildings would have been used as much as any of the older parts of the house, and more than many of them.

Readers of this book may well make most use of two classes of chapter. One class is made up of the modern, or relatively modern, subjects of family provision, breach of duty, proprietary estoppel and constructive trusts. The other class comprises those subjects that are of ancient origin, but are central to the law of Wills, come before the lawyer frequently, and continue to develop. The principles governing the formal and substantial validity of wills is the most important of these old but thriving subjects.

Much of the book covers subjects that do not fall into either of these two classes. Pre-eminent here is the material dealing with the meaning and effect of the language used in Wills, that is to say the construction of Wills. The chapters concerned with this may not be consulted as often as those in the two classes already mentioned. They will receive fewer “hits”, in the language of the Internet. They are nevertheless very important, for at least three reasons. First, some lawyers are regularly concerned with problems of construction. Secondly, many others have to consider them from time to time. The plaintive requests for views on such problems in the Trusts Discussion Forum are evidence enough of that (and prompt our regret that the authors of the requests had not equipped themselves with a copy of Theobald). Thirdly, knowledge of problems and potential problems helps the drafter to understand why precedents use language in the way they do, and is very useful when he or she leaves the manicured lawns and clear paths of the printed precedents, to create by bespoke drafting the pathway required by the client.

In order to tie Will construction to drafting, we have included references to drafting points in some of the chapters, either expressly as Practice Notes, or as comments in the text and in footnotes. As in the last edition, we have included precedent books in the Table of Books and Reports.

We have pleasure in thanking for their help:—

The staff at Sweet & Maxwell.

The colleagues of John Ross Martyn, Alexander Learmonth and Charlotte Ford at New Square Chambers, especially Anna Littler

The colleagues of Mika Oldham at Cambridge University

The clerks and staff at New Square Chambers

Francesca Quint of Radcliffe Chambers for her comments on charity matters.

The librarians who have much assisted us. They are Guy Holborn and his staff at Lincoln's Inn, and David Wills and Peter Zawada and their staff at Cambridge.

Last but by no means least, we thank our families for their tolerance and support, especially in bearing with the erosion of leisure time inevitably caused by the editing of a legal textbook.

As we wrote at the end of the preface to the last edition, we have not been able to thank by name everyone who has helped us. We can only apologise, and ask those we have not named to take the benefit of thanks by representation, as if under Part 19 of the Civil Procedure Rules.

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LIST OF BOOKS

Barnsley	Land Options, by Martin Day and Adam Rosenthal (5th edn, 2009)
Chamberlain and Whitehouse	Trust Taxation, by Emma Chamberlain and Chris Whitehouse (2nd edn, 2008)
Cheshire and North	Cheshire and North on Private International Law, by J.J. Fawcett and J.M. Carruthers (14th edn, 2008)
Cretney	Cretney's Principles of Family Law, by J. Masson, R. Bailey-Harris, and R.J. Probert 8th edn, 2008)
Cross	Cross and Tapper on Evidence, by Colin Tapper (11th edn, 2007)
Dicey and Morris	The Conflict of Laws, by Lord Collins of Mapesbury and others (14th edn, 2006, and Supplement, 2009)
Feeney	Feeney's Canadian Law of Wills, by James Mackenzie (2000)
Flenley and Leech	Solicitors' Negligence (2nd edn, 2008)
Frost, Reed and Baxter	Risk and Negligence in Wills, Estates and Trusts (2009)
Gray and Gray	Elements of Land Law, by Kevin Gray and Susan Francis Gray (5th edn, 2009)
Haines	Construction of Wills in Australia, by David M. Haines (2007)
Halsbury's Laws	Halsbury's Laws of England (4th and 5th edns)
Hardingham	Wills and Intestacy in Australia and New Zealand, by I.J. Hardingham M.A. Neave and H.A.J. Ford (2nd edn, 1989)
Hawkins	Hawkins on the Construction of Wills, by Roger Kerridge (5th edn, 2000)
Heywood and Massey	Court of Protection Practice, General editor Denzil Lush (13th edn, looseleaf, 2001 onwards)
Ing	Bona Vacantia, by Noel D. Ing (1971)
Jackson and Powell	Jackson & Powell on Professional Negligence, by John Powell, Roger Stewart and others (6th edn, 2007, and Supplement 2010)

Jackson and Powell	Professional Liability (6th edn, 2007, and Supplement, 2010)
Jarman	Jarman on Wills, by R. Jennings (8th edn, 1951)
Lewin	Lewin on Trusts, by W.J. Mowbray, L. Tucker, N. Le Poidevin, E. Simpson and J. Brightwell (18th edn, 2008, and Supplement)
Maudsley	The Modern Law of Perpetuities, by Ronald H. Maudsley (1979)
Megarry & Wade	The Law of Real Property, by Charles Harpum, Stuart Bridge and Martin Dixon (7th ed., 2008)
Morris & Leach	The Rule against Perpetuities, by J.H.G. Morris and W. Barton Leach (2nd edn, 1962)
Mortimer	Mortimer's Practice of the Probate Division (2nd edn, 1927)
Parry & Kerridge	The Law of Succession, by Roger Kerridge and A.H.R. Brierly (12th edn, 2009)
Phipson	Phipson on Evidence, general editor Hodge M. Malek (17th edn, 2010)
Picarda	The Law and Practice Relating to Charities, by Hubert Picarda (4th edn, 2010)
Professional Negligence and Liability	"Professional Negligence and Liability", general editor Mark Simpson (looseleaf, 2010)
Snell	Snell's Principles of Equity, by John McGhee and others (31st edn, 2005 and Supplement (new edition forthcoming)
Spencer Bower and Turner	The Law relating to Estoppel by Representation, by Sir A.K. Turner (3rd edn, 1977)
Tolley's Administration of Estates	General editor, Christopher Whitehouse, consultant editor David Hayton (looseleaf, 1997 onwards)
Tolley's Administration of Trusts	General editors, John Dilger, Simon Jennings (looseleaf, 1999 onwards, with a section on money laundering)
Tristram and Coote	Probate Practice, by J.I. Winegarten, T. Synack and R.R. D'Costa (30th edn, 2006, and Supplement, 2010)
Tudor	Tudor on Charities, by N.E. Riddell (9th edn, 2003)
Tyler	Tyler's Family Provision, by E.L.G. Tyler (1971)

Tyler (ed. Oughton)	Tyler's Family Provision, by R.D. Oughton (3rd edn, 1997)
Underhill & Hayton	Underhill & Hayton's Law Relating to Trusts and Trustees, by David Hayton, with Paul Matthews and Charles Mitchell, (17th edn, 2007)
Wigram	Admission of Extrinsic Evidence in Aid of the Interpretation of Wills, by Sir James Wigram (5th edn, 1914, by C.P. Sanger)
Williams	Williams' Law Relating to Wills, by Francis Barlow (consulting editor), Christopher Sherrin, Richard Wallington, Susannah Meadway and Michael Waterworth (9th edn, 2008, and Supplement, 2009)
Williams, Mortimer & Sunnucks	Executors, Administrators and Probate, by John Ross Martyn and Nicholas Caddick (19th edn, 2008)

Precedents

Practical Will Precedents, by Murray Hallam, Keith Bruce Smith, Robin Paul, Paul Clark and Richard Underwood (looseleaf)

Drafting Trusts and Will Trusts, A Modern Approach, by James Kessler and Leon Sartin (9th edn, 2009, 10th ed. forthcoming)

Butterworths Wills, Probate and Administration Service (looseleaf)

Brighthouse's Precedents of Wills, by David Endicott and Andrew Jones (14th edn, 2007)

Other material

Relevant articles frequently appear in the Trusts and Estates Law and Tax Journal, and in Private Client Business. They sometimes appear in the Solicitors Journal and the New Law Journal.

The Trusts Discussion Forum, a moderated mailing list on the Internet, is useful for information and education on will and trust topics: <http://www.trustsdiscussionforum.co.uk>

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