In conclusion, it may be said that it is morally right to punish those who have offended, where the offence was against the law and also a breach of the collective morality. Such punishment should be proportionate to the moral gravity of the offence. It should also only be inflicted on those who can truly be said to be responsible for what they did. (Aside from the cases where the treatment is purely preventive). It should be inflicted only on responsible persons because only then will it be of real value. If it is imposed on any other grounds at all the result will be a great sacrifice of liberty for an illusory advantage. This is not necessarily to perpetuate the retributive theory of punishment, but to substitute a just system based on a mixture of the justifications of reform and deterrence. Above all, it is necessary to reduce substantially the attitude that punishment is no more than a payment for past wickedness.

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WILLS—STATIONER'S PRINTED FORM—PART HOLOGRAPH. SIGNED BY TESTATOR—EFFECT OF DOCUMENT—WILLS ACT, R.S.A. 1955, c. 369, s. 5—*Re Austin.*

In the law of wills it is becoming more apparent that, just as nature abhors a vacuum, so do the courts abhor an intestacy. What may have been a leaning against intestacy seems to have become an aversion to it. The most recent example of such a situation in the Alberta courts is *Re Austin.*[1] In this case the testator used a stationer's printed will form on which he had filled in the blank spaces with his name, address and the date. Following this the testator, in the space provided, added in his own handwriting words disposing of his entire estate to certain named beneficiaries. Then in a blank space provided he inserted the name of his executor, followed by his signature. The will failed as a formal will because it was improperly witnessed[2] but was tendered for probate as a holograph will.[3]

The majority, Cairns J.A., Smith C.J.A. concurring (McDermid J.A. dissenting) held that the appointment of the executor was superfluous and that the part in the handwriting of the testator was his "will" and permitted probate. It was not the "document" presented for probate which had to be "wholly" in the testator's handwriting, it was the "will" of the testator.

Cairns J.A., speaking for the majority, was able to distinguish, on the facts, a former Alberta supreme court decision where Egbert J. stated:[4]

> If any part of the will, however small, is either typewritten or printed, it cannot be said to be wholly in the handwriting of the testator, and is accordingly not a holograph will within the meaning of sec. 5(b).

This distinction was "permissible" because the document under consideration in that case had as the first page a duly executed formal will where as the second and third pages were written after the attestation

1 (1967), 61 D.L.R. 582; also reported as *Sunrise Gospel Hour et al* v. *Twiss* (1967), 59 W.W.R. 321.
2 The Wills Act, R.S.A. 1955, c. 369, s. 5.
3 *Id.*, s.5(b).
4 *Re Brown* (1953-54), 10 W.W.R. (N.S.) 163, 170.

and there was no signature following these dispositive portions. Cairns J.A. continues:[5]

> He [Egbert, J.] also held specifically that he was not dealing with a holograph will. This, I assume, for the reason that he found a completed will on page one, and no signature on the subsequent pages, and therefore it is apparent that his observation quoted above was *obiter*, and although entitled to the greatest respect, I feel I cannot agree with it as a general statement of the law.

It is respectfully submitted that Egbert J. specifically said that he was not dealing with a holograph will because the will was not "wholly" in the handwriting of the testator and pages two and three of the will could not constitute a holograph will or codicil, because they had not been signed by the testator "at the foot or end thereof."

The court was also able to distinguish, on the facts, two other cases *In re Rigden Estate*[6] and *In re Griffiths Estate.*[7] In both of these cases the holograph portions would not make sense apart from the printed form in that one had to look at printed portions to find the words of disposition which did not appear in the handwriting.

The decisions above which were distinguished follow the American decisions[8] relating to holograph wills:

> . . . an instrument written on a stationers will form by filling in the blank space is not a valid holographic will, even though the matter written by the decedent in his own hand would, standing alone, constitute a complete testamentary disposition.[9]

The court however in the case under discussion found itself able to disregard this position and find the will valid. The cases[10] relied on in support of its position reflect the position taken by Scottish courts as illustrated by Lord Jamieson in *Bridgeford's Executor* v. *Bridgeford.*[11]

> The proper method of approach appears to me to be to consider both the writing and the print. If the former contains the essentials of a will, and the latter, but only if the latter, is non-essential or superfluous, effect will be given to the whole instrument as a holograph testamentary writing.

The position taken by the majority appears to be one influenced greatly by attitude. The dissent by McDermid J.A. serves to illustrate the two diametrically opposing positions or attitudes that may be taken with regard to wills. Superficially the judges seem to be at odds over the significance of an executor but fundamentally it is a divergence of opinion as to which is to be given the greater weight of priority, the intention of the testator not to die intestate or the provisions of a statute which gives the right to the testator to dispose of his property by a will.

The position taken by the majority is best summed up by Cairns J.A.:[12]

> I think the overriding consideration should be an inquiry as to whether a testator intended to make a testamentary disposition and whether the document can be read to carry this into effect.

And from the headnote of the report:[13]

> It is clear that the deceased intended to make a will and that intention ought not to be defeated if such can be avoided, in accordance with the well established principle that the courts lean against an intestacy.

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5 *Supra*, n. 1, at 586.
6 [1941] 1 W.W.R. 566 (Sask. Surr. Ct.).
7 [1945] 3 W.W.R. 46 (Sask. Surr. Ct.).
8 *Re Wolcott* 4 A.L.R. 727; 180 Pac. 169 (Utah Supreme Ct.).
9 94 *Corpus Juris Secundum, Wills*. 205, at 1043.
10 *In Re Ford Estate* (1954), 13 W.W.R. (N.S.) 604 (Alta. D.C.); *Re Laver Estate* (1957), 21 W.W.R. 209 (Sask. Q.B.). In both cases there was complete disposition of the testators estate in his handwriting.
11 [1948] S.C. 416, 438. Our courts have not gone this far for the Scottish courts do not have to deal with a statute peculiar to wills.
12 *Supra*, n. 1, at 589.
13 *Supra*, n. 1, W.W.R.

McDermid J.A. after setting out the facts, defining a "Holograph" will and discussing the power of a Court of Probate to disregard portions of a will voices his opinion of holograph wills:[14]

> . . . in my opinion, wills made in solemn form with professional assistance lead to less litigation than home made wills. It causes me no concern to come to the conclusion that I have, although in this case it may defeat the intention of the testator, for in my opinion it is usually better that property descend according to law rather than by holograph wills which are generally conceived in ignorance and written in haste.

This coupled with a different inflection on importance[15] leads him to the conclusion that this is not a valid holograph will.

This is a similar attitude as that expressed by Egbert J. in *Re Brown*:[16]

> In my opinion neither the desire of the court to give effect to the intentions of the testator nor its desire to interpret if possible, a will so as to prevent an intestacy can override the specific stipulations or prohibitions of a statute.

Perhaps McDermid J.A. was correct in holding that the will was not "wholly" in the handwriting of the testator because the designation of the executor was within the printed portions. In this instance however, the executor had no discretionary powers and the exclusion of this part from probate would not affect the "will" of the testator. The majority has shown that the "will" of the testator is not the whole document, rather it is that part of the document which constitutes his dispositive intentions and this alone may be entered for probate provided it is properly executed. Morally and equitably this is by far the better position to take, particularly if one interprets the primary legislative intent of The Wills Act to be to permit a man to dispose of his property and only secondarily to require the form to be that as provided for by The Wills Act. The trend appears definitely to be placing the priority on the former and relaxing the stress on the latter. The Alberta courts have not gone as far as the Scottish courts in permitting holograph wills nor have they gone as far as the British Columbia Supreme Court[17] in disregarding legislative requirements to give effect to a testator's intention but they have shown far more than a "leaning" against intestacy.

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14 *Supra*, n. 1, at 596.

15 *Supra*, n. 1, at 595: We are here concerned with the interpretation of a statute and it is not a question of what the testator intended but what the legislature intended in passing the Act.

16 *Supra*, n. 4, at 174.

17 *Re Fiszhaut Estate* (1966), 55 W.W.R. 303, per Macdonald J. where a will was held valid even though it was not signed by the testator but was signed on his behalf by a third party and in the name of the third party. This decision came in the face of a change in the B.C. Wills Act requiring that the will be signed in the name of the testator.