court held that the city had notice of the obstruction as it had been there for some time, and that its failure to see that a safe passage was provided for the pedestrians was the proximate cause of the injury.[8]

The court distinguished the previous cases on the ground that in these cases the sidewalk already existed and was negligently maintained, while in the present case no sidewalk was contemplated, and the alleged breach of duty was therefore of a lesser degree. However, since the court assumed negligence in the instant case, and in so doing admitted a breach of duty, it seems somewhat illogical to distinguish the cases on the issue of causation by reopening the issue of negligence.[9]

A better approach to the problem of causation would have been to consider the purpose of the sidewalk, and, in the light of that purpose, the nature of the hazards that might be regarded as falling within the natural and probable consequences of the failure to maintain a sidewalk.[10] Is the sidewalk merely a convenience that is furnished by the city, or is it a safety device to protect the pedestrian? The locale of the sidewalk may be the determining factor, depending upon whether it is in a congested traffic area or along a seldom traveled street. This will determine the "risk of harm," "danger," or "hazard" which will come within the scope of the duty to protect from injury.[11]

It is difficult to understand the grounds upon which the court held the negligence of the city to be too remote from the injury to be, by any possibility, the proximate cause of the injury. In any event there is question raised in the case which reasonable men might answer differently. The decision as to proximate cause should have been left to the jury.[12]

M. O'B. I.

WILLS—HOLOGRAPHS—WHAT CONSTITUTES "ALL IN TESTATOR'S HANDWRITING"—[Tennessee].—An instrument found among testator's valuable papers was offered for probate. It was entirely in the testator's handwriting except for the fact that it contained his wife's signature as well as his own. The judge of the county court held that because of the wife's signature the will was not entirely in the handwriting of the testator as required by the

8. Lindman v. Kansas City (1925) 308 Mo. 161, 271 S. W. 516; Shafir v. Carroll (1925) 309 Mo. 458, 274 S. W. 755; Strother v. Seiben (1926) 220 Mo. App. 1027, 282 S. W. 502; Strother v. Carroll (Mo. 1926) 287 S. W. 810. These cases arose from the same incident mentioned in the text.

Stollhans v. City of St. Louis (1938) 343 Mo. 467, 121 S. W. (2d) 808. (The court imputed liability to the city, though its negligence was incapable of inflicting injury without the intervening negligent act.)

9. Smith v. Mabrey (Mo. 1941) 154 S. W. (2d) 770.

10. Green, *Rationale of Proximate Cause* (1927) 11-13, §3 "The law never gives complete and absolute protection to any interest. The problem therefore is, in any case, whether the particular hazard falls within the radius of protection thrown about the interest."

11. Palsgraf v. Long Island R. Co. (1928) 248 N. Y. 339, 162 N. E. 99, 59 A. L. R. 1253; Harper, *The Law of Torts* (1938) 79-80, §44.

12. Frese v. Wells (Mo. 1931) 40 S. W. (2d) 652; Prosser, *Torts* (1941) 373-374.

Tennessee statute[1] and, therefore, declined to order the instrument probated. The circuit court and the court of appeals held that the instrument was a valid holographic will. *Held:* Affirmed. The signature of the wife could be disregarded as it was no part of the will of the husband, so that the statute was complied with and the instrument could be probated as a holographic will. *Jones v. Myers.*[2]

Holographic wills are defined as wills written entirely in the testator's hand, without subscribing witnesses.[3] Holographic wills are recognized by statute in nineteen states.[4] The basis of the holographic will is that a document entirely in the handwriting of the testator offers an adequate guaranty of its genuineness. But the courts have split on the degree to which they require the testament to be written in the hand of the testator. The general rule is that the mere presence of printed matter or of writing in another's hand on the paper on which the testament is written will not, in itself, invalidate the will.[5] Beyond this the authorities conflict. A noted authority[6] has rationalized the cases by asserting that, in general, they follow two distinct theories: (1) The intent theory and (2) The surplusage theory. Under the intent theory foreign matter becomes a part of the will whenever it appears that the testator intended to make it, or regard it as, part of the will. Under the surplusage theory the courts will ignore anything that may be left out without affecting the sense or completeness of the document. Though in many cases the same result would be reached under either theory, still, the surplusage theory naturally results in the sustaining of wills which under the intent theory would fail. California is the leading exponent of the intent theory and is followed only by Utah.[8]

1. Tenn. Code (Mitchie 1938) §8090: "But a paper writing, appearing to be the will of a deceased person, written by him, having his name subscribed to it, or inserted in some part of it, and found, after his death, among his valuable papers, or lodged in the hands of another for safekeeping, shall be good and sufficient to give and convey lands, if the handwriting is generally known by his acquaintances, and it is proved by at least three credible witnesses that they verily believe the writing, and every part of it, to be in his hand."

2. (Tenn. 1941) 154 S. W. (2d) 245.

3. As defined by most of the statutes; see note 4, infra.

4. Bordwell, Statute Law of Wills (1928) 14 Iowa L. Rev. 1, 25.

5. In re Estate of De Caccia (1928) 205 Cal. 719, 273 Pac. 552, 61 A. L. R. 393; In re Atkinson's Estate (1930) 110 Cal. App. 499, 244 Pac. 425; In re Towle's Estate (1939) 14 Cal. (2d) 261, 92 P. (2d) 555; McMichael v. Bankston (1872) 24 La. Ann. 451; Baker v. Brown (1904) 83 Miss. 793, 36 So. 539, 1 Ann. Cases 371; Brown v. Beaver (1856) 48 N. C. 516; Atkinson, *Wills* (1937) 307, 308. 1 Page, *Wills* (3d ed. 1941) 698.

6. Mechem, The Integration of Holographic Wills (1933) 12 N. C. L. R. 213, 214-219.

7. In re Thorn's Estate (1920) 183 Cal. 512, 192 Pac. 19; In re Estate of De Caccia (1928) 205 Cal. 719, 273 Pac. 552, 61 A. L. R. 393; In re Oldham's Estate (1928) 203 Cal. 618, 265 Pac. 183; In re Whitney's Estate (1930) 103 Cal. App. 577, 284 Pac. 1067; In re Durlewanger's Estate (Cal. 1940) 107 P. (2d) 477.

8. In re Wolcott's Estate (1919) 54 Utah 165, 180 Pac. 169, 4 A. L. R. 727; In re Yowell's Estate (1930) 75 Utah 312, 285 Pac. 285.

Louisiana[9] heads the states which have adopted the surplusage theory, and is followed by Virginia,[10] North Carolina,[11] Arkansas,[12] Mississippi,[13] and Montana.[14]

It is held, without exception, that the signature of a witness or the presence of a printed attestation clause will not invalidate an instrument as a holographic will.[15] Similarly, with but a single exception, the courts have held that the filling out in the testator's handwriting of a printed stationers' form violated the requirement that the instrument be entirely written in the hand of the testator.[16] Under either theory it has been held that the printed name of the place where the instrument is written does not invalidate it.[17] But in a California case,[18] under the intent theory, where the testator incorporated the printed caption into his will, it was held that the instrument was invalid. A court using the surplusage theory would probably have decided the case differently. In jurisdictions which require by statute that the will be dated, the date must be wholly in the testator's hand. If a part of the date is printed and it is completed in the testator's hand this is insufficient and the instrument is invalid.[19] But there is authority for the proposition that if the written portions of the date are sufficient to satisfy the requirement of a date, then the printed portion may be disregarded and the instrument probated as a holographic will.[20] If a date entirely written by the testator appears in some part of the instrument an additional date partially printed and partially written

9. McMichael v. Bankston (1872) 24 La. Ann. 451; Jones v. Kyle (1929) 168 La. 728, 123 So. 306.

10. Gooch v. Gooch (1922) 134 Va. 21, 113 S. E. 873.

11. In re Lowrance's Will (1930) 199 N. C. 782, 155 S. E. 876.

12. Sneed v. Reynolds (1924) 166 Ark. 581, 266 S. W. 686.

13. Baker v. Brown (1904) 83 Miss. 793, 36 So. 539.

14. In re Noyes' Estate (1909) 40 Mont. 190, 105 Pac. 1017.

15. In re Soher's Estate (1889) 78 Cal. 477, 21 Pac. 8; In re Tanner's Estate (Cal. 1939) 91 P. (2d) 170; Harl v. Vairins Ex'r. et. al. (1917) 175 Ky. 468, 194 S. W. 546; Jones v. Kyle (1929) 168 La. 728, 123 So. 306; Brown v. Beaver (1856) 48 N. C. 516; Perkins v. Jones (1888) 84 Va. 358, 4 S. E. 833, 10 Am. St. Rep. 86.

16. Estate of Rand (1882) 61 Cal. 468, 44 Am. Rep. 555; In re Bower's Estate (1938) 11 Cal. (2d) 180, 78 P. (2d) 1012; In re Wolcott's Estate (1919) 54 Utah 165, 180 Pac. 169, 4 A. L. R. 727. Contra: Gooch v. Gooch (1922) 134 Va. 21, 113 S. E. 873.

17. In re Oldham's Estate (1928) 203 Cal. 618, 265 Pac. 183; In re Estate of De Caccia (1928) 205 Cal. 719, 273 Pac. 552, 61 A. L. R. 393; In re Whitney's Estate (1930) 103 Cal. App. 577, 284 Pac. 1067; Succession of Heinemann (1931) 172 La. 1057, 136 So. 51; In re Noyes' Estate (1909) 40 Mont. 190, 105 Pac. 1017, 26 L. R. A. (N. S.) 1145; In re Lowrance's Will (1930) 199 N. C. 782, 155 S. E. 876; In re Yowell's Estate (1930) 75 Utah 312, 285 Pac. 285.

18. In re Bernhard's Estate (1925) 197 Cal. 36, 239 Pac. 404.

19. Estate of Billings (1884) 64 Cal. 427, 1 Pac. 701; In re Francis's Estate (1923) 191 Cal. 600, 217 Pac. 746; Succession of Robertson (1897) 49 La. Ann. 868, 21 So. 586, 62 Am. St. Rep. 672; In re Noyes' Estate (1909) 40 Mont. 190, 105 Pac. 1017, 26 L. R. A. (N. S.) 1145; In re Love's Estate (Utah 1930) 285 Pac. 299.

20. In re Durlewanger's Estate (Cal. 1940) 107 P. (2d) 477.

will be disregarded and the instrument held valid, even in jurisdictions which have adopted the intent theory.[21] In jurisdictions which do not require the testament to be dated, a printed portion of the date may be disregarded.[22] Where the will was personally typewritten by the testator and the signature was written in the testator's hand, the proposed holographic will was held invalid.[23]

There are many interesting cases which cannot be placed in the above categories. The presence of the words "to" and "acres" written in another's hand in the body of the instrument was held not to invalidate the testament as a holographic will in *McMichael v. Bankston.*[24] The words "My Will" in a hand other than the testator's at the top of the page containing the testament were held not to prevent the instrument from being probated as a holographic will in *Baker v. Brown.*[25] One of the most interesting cases on this subject is that of *In re Yowell.*[26] In that case the proposed holographic will was written on one of the testator's bill heads. Just below the printed heading the testator pasted a printed sentimental stanza entitled "Farewell." The court, which ordinarily follows the intent theory, held this a good holographic will. The majority of the court held that there was no intention to make the stanza a part of the testament. It reasoned that because the testator wrote the word "All" at the beginning of the stanza his intention was to direct the stanza to all persons and not only to the beneficiary named in the will. The court paid homage to the intent theory but succeeded in getting around the strictness of the test by saying that there was no intent to make it a part of the instrument. It seems clear that the testator intended to make the stanza a part of the will because he cut it out and took great pains to paste it on the paper. This case possibly marks the beginning of a tendency of the Utah court to drop the intent theory and adopt the majority view. A similar tendency may also be noted in California in the recent case of *In re Durlewanger's Estate.*[27]

21. In re Whitney's Estate (1930) 103 Cal. App. 577, 284 Pac. 1067; Jones v. Kyle (1929) 168 La. 728, 123 So. 306; In re Yowell's Estate (1930) 75 Utah 312, 285 Pac. 285. But see In re Francis's Estate (1923) 191 Cal. 600, 217 Pac. 746.

22. Sneed v. Reynolds (1924) 166 Ark. 581, 266 S. W. 686; In re Lowrance's Will (1930) 199 N. C. 782, 155 S. E. 876.

23. In re Dreyfus's Estate (1917) 175 Cal. 417, 165 Pac. 941, L. R. A. 1917F, 391; Adam's Executors v. Beaumont (1928) 266 Ky. 311, 10 S. W. (2d) 1106. But see Comment (1917) 5 Calif. L. Rev. 503 where a unique stand is taken in favor of a typewritten holographic instrument.

24. (1872) 24 La. Ann. 451.

25. (1904) 83 Miss. 793, 36 So. 539, 1 Ann. Cas. 371.

26. (1930) 75 Utah 312, 285 Pac. 285.

27. (Cal. 1940) 107 P. (2d) 477, where the court held that the date, May 3, 1938 (the first two numerals of year being printed) did not invalidate the instrument. The California court has had a great deal of difficulty in attempting to follow the intent theory. The *Durlewanger* case is probably the most liberal decision ever handed down. The trouble was started in In re Thorn's Estate (1920) 183 Cal. 512, 192 Pac. 19 where the court insisted that there must be literal compliance with the statute requiring the instrument to be "entirely written" by the hand of the testator. This case controlled the decision in In re Francis's Estate (1923)

These cases show two considerations fighting for supremacy. On the one hand there is a natural desire to give effect to the testator's wishes by disregarding seemingly trivial foreign matter. On the other hand, unfortunately, in hard cases, it is sometimes necessary to maintain the basis of the validity of holographic wills by rejecting them for seemingly technical reasons.

In the instant case the court reached the desired and correct result. As a precedent it had a North Carolina case directly in point, which held that the signature of the testator's wife was mere surplusage and could be disregarded.[28] As the North Carolina and Tennessee statutes are identical the North Carolina case was very persuasive authority. As a direct analogy the court had the attestation cases, which unanimously hold that an otherwise valid holographic will is not invalidated by the fact the testator had it witnessed. Under both the intent and the surplusage theories the signature of the wife could not affect the validity of the instrument.

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191 Cal. 600, 217 Pac. 746 where the court held that the printed last two numbers of the year invalidated the will even though another date entirely in testator's hand appeared on the envelope also offered for probate. The strict rule was also followed in In re Bernhard's Estate (1925) 197 Cal. 36, 239 Pac. 404. Finally the court relaxed its rule somewhat in the cases of In re Oldham's Estate (1928) 203 Cal. 618, 265 Pac. 183 and In re Estate of De Caccia (1928) 205 Cal. 719, 273 Pac. 552, 61 A. L. R. 393. In In re Whitney's Estate (1930) 103 Cal. App. 577, 284 Pac. 1067 the court intimated that the earlier decisions were distinguished, if not in effect, overruled by the *Oldham* and *DeCaccia* cases. Then came the revision of the California statute which in its altered form is found in Section 53 of the California Probate Code (1931). This revision was criticized by its draftsman in Davis, Comments on the Probate Code of California (1931) 19 Calif. L. Rev. 602, 609 because the statute was not sufficiently liberalized. In In re Bower's Estate (1938) 11 Cal. (2d) 180, 78 P. (2d) 1012 the court reached the desired result in holding that the use of a printed form invalidated the will. But it then went further and attempted to rationalize the previous California decision by distinguishing the *Oldham* and *De Caccia* cases from the *Thorn* case on the ground that the two lines of authority apply to different factual situations, based on whether the printed matter is included or incorporated, directly or indirectly, in the will. The latest authority is the *Durlewanger* case in which the court held that "substantial compliance" with the statute was all that was necessary and that the new statute and the more recent cases indicate a tendency toward liberality, bringing California more in line with the decisions in other states. Although this case is very encouraging, the court has not as yet clarified its position. Either a new statute or a definite overruling of some of the older cases is probably necessary to make the situation clear.

28. In re Cole's Will (1916) 171 N. C. 74, 87 S. E. 962.