North East
Inheritance

Wills and Testaments

Wills as commonly understood are in fact two different instruments, the will and the testament. In practice, testators usually made their 'last will and testament' in the form of a single document, and a will is understood to mean both. Together they are a means for a testator to dispose of his property after his death.

Who could and couldn't make a will?

A clear qualification for executing a legal instrument such as a will was the testator's sanity, and thus insane or inebriated persons were disqualified, and their wills, if they existed, would be voided. Also voided would be the wills of (unpardoned or unabsolved) convicted felons, attainted traitors, outlaws, suicides and persons under greater excommunication or coercion. Slaves and prisoners were not free to make wills, while married women could make wills, but only with the consent of their husband, which consent might be rescinded at any time up until probate was granted. While married women might have suffered under this disablement (not removed until 1882), spinsters and widows were perfectly free to act. Children also could make wills, which term was defined in this period as boys aged between 14 and 21, and girls between 12 and 21. The mere possession of goods or property to pass on was also a clear prerequisite, but the fee structures of the probate courts also sometimes acted as a disincentive to poor persons to use them to obtain probates. Comparable disincentives and incentives existed across many groups and segments of society over this period, and thus while there was a large proportion of society qualified to make and prove a will or to obtain probates or letters of administration, in practice the surviving records contain significant biases in terms of testators' wealth, age and gender.

Why make a will at all?

Wills were and are a formal means of disposing of one's property after death, and perhaps of regulating the care and education of any surviving dependents. As well as providing a means to secure one's descendents' title to one's property, it is also noted by many testators that their will is an explicit means of ensuring that peace prevails after their death and that family disputes might be avoided. Past unpaid dues and disputes might also be finally settled - both among a testator's family and neighbours and also with the church, most often in the form of 'unpaid or forgotten tithes'. Testators frequently also make pious statements and provisions for the health of their soul - the charitable disposition of their temporal goods was after all one of the

last good works a person could commission. All in all, a will offers testators the opportunity to make a final reckoning of the goods and property accumulated throughout their life, and to have a last throw at reining in their descendants from the usual excesses, as inexcusable to the one generation as they are inevitable to the next.

Two different instruments - two kinds of property

After the Statute of Wills came into force in 1540, heritable property was divided into immovable and moveable, corporeal and incorporeal property, the former being divestments devised by will to devisees, the latter being legacies or bequests bequeathed by testament to legatees. The former, sometimes described as real estate, included freehold and copyhold land and tenements. Incorporeal hereditaments and moveable goods included the deceased's goods and chattels. Such chattels could be both real and personal property - the former including leases and rents, the latter any money, household goods, plate, cattle, crops, credits (and debts) etc. Strictly speaking, a will did not require an executor, while a testament did.

The devisement of land was clearly defined and limited within customary rules of primogeniture and inheritance, and those prevailing in the relevant manorial court. In the medieval period only purchased land and land held for a specified number of years might be devised freely by will, thus excluding heritable land. Land tenure at this time was still held of the king (albeit increasingly indirectly). However, the Statute of Wills in 1540 allowed a person freely to devise all his lands held in socage and two thirds of his lands held in knight service (with the remainder passing automatically to the heir-at-law).

In 1660 it became possible to devise all one's heritable land freely by will (except land held in serjeanty). Disputed corporeal hereditaments fell under the jurisdiction of the civil Chancery courts, and not the church courts. Researchers should also note that where a testator includes divestments of land in his will, such lands may by no means be a complete summary of his real estate at the time of his death - prior settlements, trusts and entails may have been the preferred or pre-ordained instrument in many cases. A person's temporal goods, his goods and chattels, fell under the care of the bishop and hence his diocesan court. Personal property was also subject to long-established laws of distribution, safeguarding one third shares to any surviving widow and any children. While these laws of distribution largely fell out of use later with regard to testaments, they remained longer in force in the administration of intestates' estates. Certain distributive customs within the province of York also differed from those that prevailed in the rest of England, for which details researchers are for now advised to consult Burn's *Ecclesiastical Law*.

Why the church courts and not the civil courts, as it is now?

The church is known to have been granting probate from the early 13th century, and by the 1340s this fact was acknowledged as established custom in English law. The church's jurisdiction extended to testamentary business and a testator's personal property for two linked reasons. Firstly the deceased's disposition of his personal property would include religious bequests, mortuaries and instructions for his burial etc. which directly affected the health of his soul and his justification to God. There was therefore a moral duty to execute properly these explicit last wishes. Secondly, the temporal goods that made up a testator's chattels were only such that, as a Christian, he believed God had seen fit to bless him with, and over which he had some latitude to express his wishes via his testament.

That his land could not be so bequeathed was due to the historical legacy of feudalism and land tenure in England, by which all land and tenements were held of the king. With no freedom to divest his lands by testament, the inheritance of a deceased person's land was therefore not a moral matter for the ecclesiastical courts to monitor. Confusingly, the sovereign in England after the Reformation also held supreme spiritual jurisdiction as well as civil, but this jurisdiction rarely impinged upon the ecclesiastical courts. So, while the church court did not have jurisdiction over the proving of wills, in practice testators usually made their 'last will and testament' in the form of a single document, and thus if the court proved strictly only the testament, it in fact validated the deceased's wishes concerning his entire estate, and preserved both the will and testament together in its Registry.

Should these wishes be disputed at a later date, however, the church or chancery courts' respective jurisdictions would be strictly applied. Nevertheless, once the will (and testament) had been proved the devisee was immediately empowered to access or occupy the real property that had been devised to them. Such wills devising corporeal hereditaments function then as deeds of gift and could be used as such to secure a person's title to a property. Under these circumstances, the pragmatic utility of the diocesan registry operating as a place of probate and record for such important documents or deeds is obvious. In fact, testators would most often draw up mixed wills - i.e. a last will and testament - and consequently the term will has long been used to describe both wills and testaments, and it is this sense that is adopted for the remainder of this article.

Publishing a will

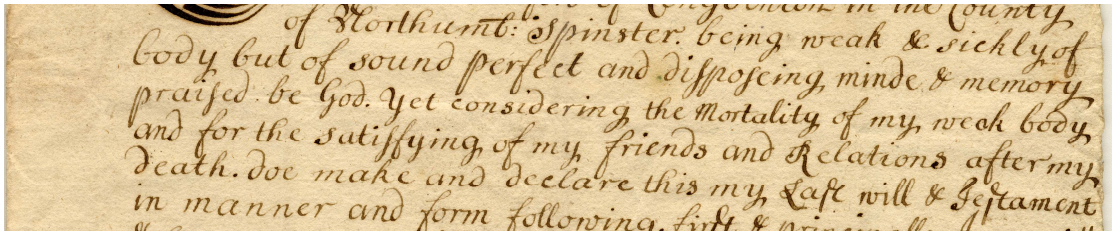
There are three types of will - holographic, third party and nuncupative - which define how the will was drawn up and published. Holographic wills were drawn up by the testator himself in his own hand. Such wills often might not be properly published, and frequently required the oaths of the persons who could attest that the handwriting was that of the testator. Third party wills, the

most common type, were drawn up by an attorney, a local clerk or any literate person. Usually the testator would outline his wishes to the scribe in front of witnesses, and the will would be drawn up. It would then be read aloud in front of witnesses to the testator, who would then state 'I publish this my last will and testament' whilst impressing his seal to the document - much akin to the publication of a formal deed. A certain number of independent witnesses needed to be present, and to testify themselves later to the sanity and clear intention of the testator: at probate such witnesses might each have to take oaths to this effect. Note that it was not necessary that witnesses should hear or know the explicit terms of the will. The interval between the drafting and publication of a signed, sealed and witnessed document was usually not long, but occasionally a testator died before his will might be properly published. Where this was the case, or where only his verbal intentions were known - frequently outlined on the deathbed - this was called a nuncupative will. While perfectly legitimate, such wills required a higher standard of proof in the court.

The elements of a will

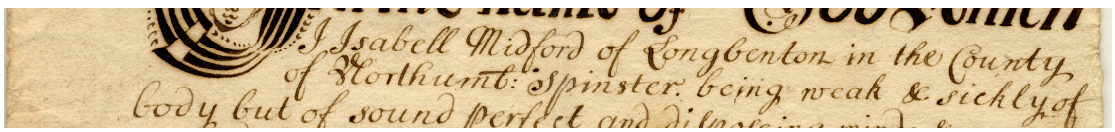
A will usually comprises a number of elements whose presence is necessary to its validity: a will must be in writing; it must be signed by the testator; it must also be witnessed by three or four creditable witnesses where lands are devised, or two witnesses where only chattels are bequeathed. There are in addition standard elements that recur in most wills, and which ensure a smooth process of probate.

First, and most importantly, there is a clear and explicit statement of the testator's intention and sanity.



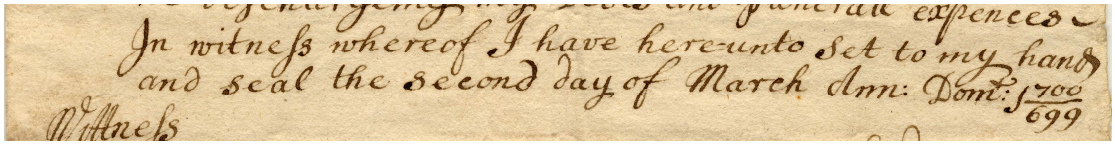
["*...being weak and sickly of body but of sound perfect and disposeing minde & memory praised be God. Yet considering the Mortality of my weak body and for the satisfying of my friends and Relations after my death doe make and declare this my Last will and Testament*"]

Testators will also record their identity and abode.



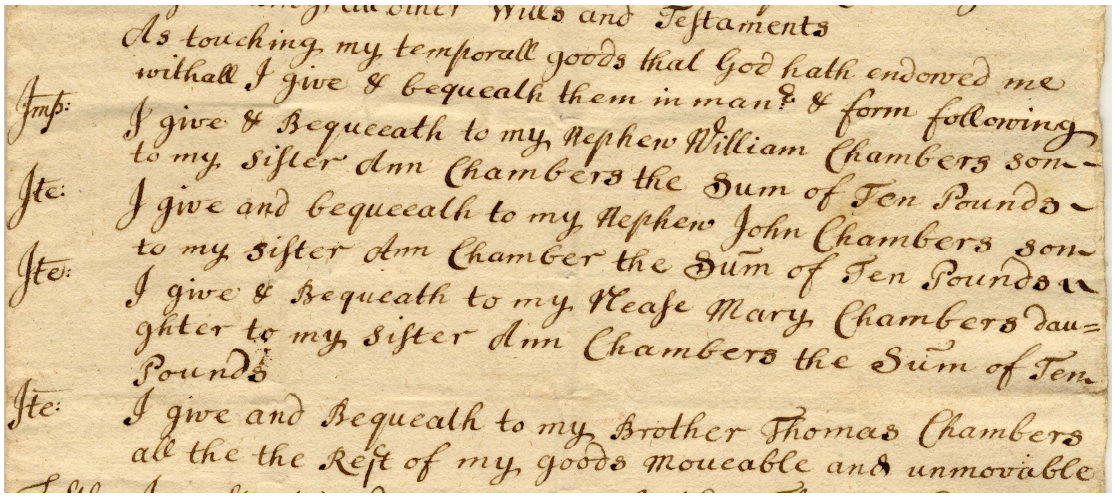
["*I Isabell Midford of Longbenton in the County of Northumberland spinster*"]

The date when the will was made and published is also almost invariably included.


In witness whereof I have hereunto set to my hand
and seal the second day of March Anno Dom: 1700/699
Witness

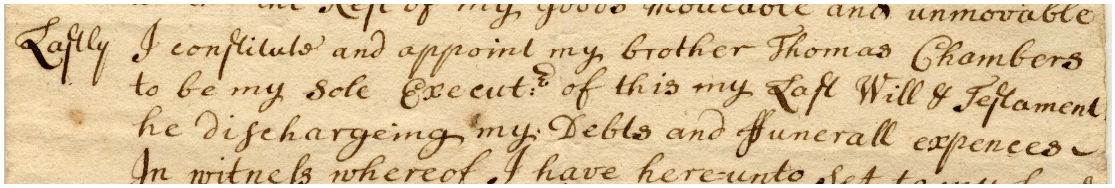
["*In witness whereof I have hereunto set to my hand
and seal the second day of March Anno Domini 1699/1700*"]

Bequests form the main body of the document, with the testator concluding by nominating a residuary legatee.


As touching my temporall goods that God hath endowed me
withall I give & bequeath them in manr & form following
Imp: I give & Bequeath to my Nephew William Chambers son
to my Sister Ann Chambers the Sum of Ten Pounds
Ite: I give and bequeath to my Nephew John Chambers son
to my Sister Ann Chamber the Sum of Ten Pounds
Ite: I give & Bequeath to my Nease Mary Chambers daughter to my Sister Ann Chambers the Sum of Ten Pounds
Ite: I give and Bequeath to my Brother Thomas Chambers
all the the Rest of my goods moveable and unmoviable

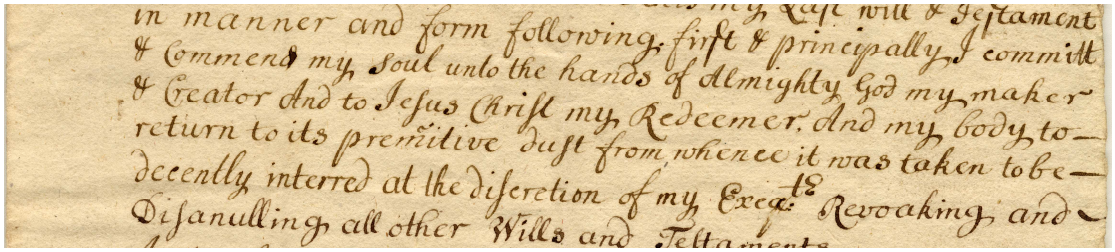
["*As touching my temporall goods that God hath endowed me
withall I give & bequeath them in manner & form following
First I give & Bequeeath to my nephew William Chambers son
to my Sister Ann Chambers the Sum of Ten Pounds
Also I give and bequeeath to my nephew John Chambers son
to my Sister Ann Chambers the Summ of Ten Pounds
Also I give & Bequeath to my Nease Mary Chambers daughter to my Sister Ann Chambers the Summ of Ten
Pounds
Also I give and Bequeath to my Brother Thomas Chambers
all the Rest of my goods moveable and unmoveable*"]

Most testators appointed one or more executors, and perhaps also trustees or supervisors, particularly if dependents were left whose freedom to act subsequently might be restricted by their age or sex. Failure to appoint an executor would necessitate the appointment by the court of an administrator who would then be obliged, with sufficient sureties, to enter into a will bond.


Lastly I constitute and appoint my brother Thomas Chambers
to be my Sole Execut.r of this my Last Will & Testament
he discharging my Debts and funerall expences
In witness whereof I have hereunto

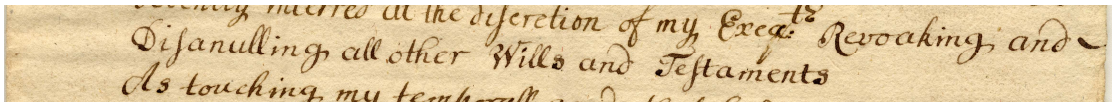
["*Lastly I constitute and appoint my brother Thomas Chambers to be my Sole Executor of this my Last Will & Testament he discharging my Debts and Funeral expenses.*"]

Pious statements, religious bequests and instructions are also a standard part of a will. Formerly testators were required to bequeath a fixed proportion of their personal estate to the church, usually in the form of mortuaries. Here the testatrix instructs her executor to bury her body in a place chosen at his discretion, so that it might 'return to its primitive dust'.


in manner and form following, first & principally I committ
& Commend my Soul unto the hands of Almighty God my maker
& Creator And to Jesus Christ my Redeemer. And my body to
return to its premitive dust from whence it was taken to be
decently interred at the discretion of my Exec.tr Revoaking and
Disanulling all other Wills and

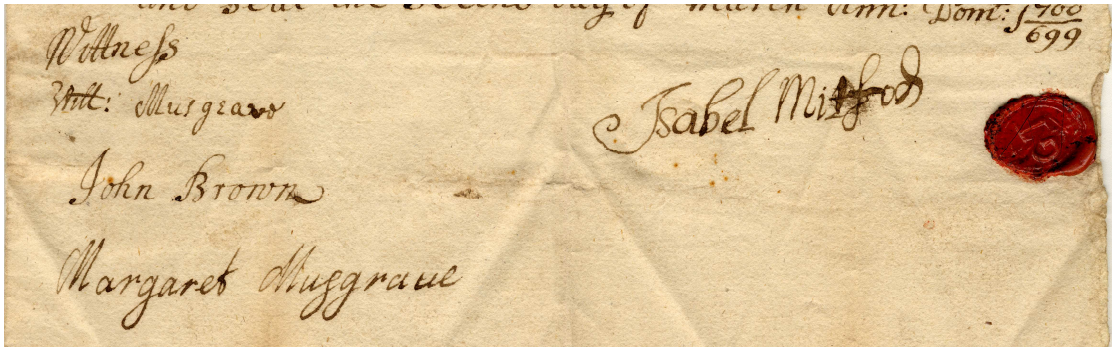
["*…first and principally I commit & Commend my Soul unto the hands of Almighty God my maker & Creator And to Jesus Christ my Redeemer. And my body to return to its premmitive dust from whence it was taken to be decently interred at the discretion of my Executor*"]

Testators often then explicitly revoke any prior wills.


decently interred at the discretion of my Exec.tr Revoaking and
Disanulling all other Wills and Testaments
As touching my

["*Revoking and Disannulling all other Wills and Testaments*"]

Finally, the testator would sign and seal the document, either with their signature or, if illiterate or too weak, with a simple mark. A seal, although not essential, gave force to the document as a formal deed.



["*Isabel Mitford [with seal]*
Witness
William Musgrave
John Brown
Margaret Musgrave."]

This final act must have been witnessed, in this case by two or more witnesses who were neither 'infamous nor interested', that is that they neither stood under some disqualification nor that they benefited from the provisions of the will, and who would in turn add their signatures or marks to the will.

Proving a will

Following the death of the deceased, their executor would find and bring the will to the consistory court for probate. There, the executor and - in the province of York - at least one witness to the will would be sworn to the validity and proper execution of the will. Frequently short memoranda would be added to the will by the probate clerk or the Surrogate reporting that certain persons had been duly sworn, and perhaps noting any other relevant information. Sometimes these oaths would be administered by a clerk in the deceased's local parish, empowered by commission to do so and to grant probate: the will, inventory, commission and any other documents would then be sent in to Durham for formal probate, entry in the Probate Act book and deposit in the Registry. Should a will be deficient in any essential attributes, perhaps if it was not signed or marked by the testator or if the names of witnesses were not subscribed, then its validity was in theory contentious. Even then probate might still be obtained by successfully proving the will in Solemn Form of Law in open court, as distinguished from the more usual and uncontentious probate in Common Form.

Proved wills' importance as proofs of title has already been discussed, and it was quite common for executors or residuary legatees to request the delivery of the original will out from the Registry archive, perhaps in order to pursue a case in chancery, or merely to facilitate a sale. In such cases a Registry copy of the original will was usually made, with a certificate of its accuracy endorsed by a court official. Even then the original will was usually only delivered to the person upon their having entered into a bond to redeliver the original will should it be needed by the court – uncancelled and unaltered in any way. Executors and other interested parties such as creditors might also

ensure that no-one else might withdraw the original will without their permission, and did so by entering a 'caveat' or caution that was filed with the will. Copies of wills in the Registry archive were also frequently made or extracted for the use of interested parties, and were often issued with a supplementary document recording the date of the grant of probate, and the name of the authorised executor or administrator.

[The exemplar will used in this article is that of Isabel Mitford of Longbenton, spinster, dated 2 March 1700. Reference: DPRI/1/1706/M1/1]

This resource was created as a part of the North East Inheritance project (2006-2009): http://familyrecords.dur.ac.uk/nei/.