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# Incidents of Testamentary Execution

Alvin E. Evans  
*University of Kentucky*

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## INCIDENTS OF TESTAMENTARY EXECUTION.

Involved in the problem of the execution of wills are the various questions: What is sufficient publication of the will in those jurisdictions which require it; what constitutes acknowledgment under a statute requiring that a will be signed or acknowledged in the presence of witnesses; what is the significance of attestation by witnesses and what is the purpose of subscribing by them; what is the necessary order, if any, as to signing by the testator and subscribing by the witnesses; may the former signature of witnesses be adopted by them in a subsequent proceeding; may one witness validly subscribe the name of another for that other at the latter's request; what is the effect of the signature of the testator being covered up so that the attesters cannot see it at the time of subscribing; under what particular form of name, if any, must attesters subscribe; what are the requirements as to physical place on the instrument where testator and witnesses should sign; and what is the test of "presence" under the requirement that a will must be subscribed in the presence of the testator? Each of these questions is being continually litigated. Solutions of some of these problems should have been clear long ago, but in some of them the great variety of situations which the mind can devise, or the exigencies of the moment create, require the courts to attack such problems time and again.

The most important of these problems because they have in the past created the major difficulties, are probably (1) the significance of "in his presence" (testator's); (2) the order of proceedings, especially as to signing by testator and subscribing by the witnesses; (3) the place of signing particularly under a statute which requires the signature to be placed "at the end thereof"; (4) the character of the name subscribed by

the attesters, and (5) the question of the adoption by attesters of their former subscriptions.

#### 1. IN THE PRESENCE OF THE TESTATOR.

Several considerations intrude in the determination of the question, what does "in his presence" signify? The ability of the testator to see the attesters while they subscribe is of course important. Inclosure within the walls of the same room has significance, if the room be not too large. Spacial contiguity alone is significant as well as the possibility of communication between the parties while the transaction is taking place.

It would seem apparent that if the attester is in the presence of the testator, the latter is also generally in the presence of the former, though this converse proposition is usually not considered. Any sight test alone which refuses to be concerned with the other named considerations seems to be unsatisfactory. The primary object of the statute is undoubtedly to prevent fraud, and it should be interpreted in the light of the purpose of the legislature. But when that is done no further requirements should be made by the courts.

The sight test is universally applied in England<sup>1</sup> and in most of the American jurisdictions<sup>2</sup> but is open to various objections. Ability to see the subscriber is not expressly required

<sup>1</sup> *Davy v. Smith*, 3 Salk. 395 (K. B. 1795). But if the parties be in the same room it is not necessary for testator to see the act of subscribing, says the dictum; and the same dictum appears in *Shires v. Glascock*, 2 Salk. 688 (C. P. 1687); *Hudson v. Parker*, 1 Rob. Eec. 14 (1844) (mental and not mere bodily presence required); *Casson v. Dade*, 1 Bro. C. C. 99 (1781); *Doe v. Mainfold*, 1 M. & S. 294 (K. B. 1813). (Testator must be in a position to see without more movement than inclining the head. Lord Ellenborough said, "If testator can see, he did see, but I am afraid that if we went beyond the rule which requires that the witnesses should actually be within the reach of the organs of sight we shall be giving effect to an attestation out of the devisors' presence").

<sup>2</sup> *Burney v. Allen*, 125 N. C. 314; 34 S. E. 500 (1899) (testator must be able to turn his head so as to see the act when parties are in same room. Court goes further than the English requirements of *Davy v. Smith*; *Lamb v. Girtman*, 33 Ga. 289 (1860); *Drury v. Connell*, 177 Ill. 43, 52 N. E. 368 (1898) (no mere contiguity is sufficient if testator cannot see them subscribe); *Schofield v. Thomas*, 236 Ill. 417; 86 N. E. 122 (1908); *Calkins v. Calkins*, 216 Ill. 458, 75 N. E. 182 (1905); *Turner v. Cook*, 36 Ind. 129, 136 (1871) (it is not necessary that testator see but that he be able to see the act if he so chooses); *Healey v. Bartlett*, 73 N. H. 110, 59 A. 617 (1904) (regards a man with infirmities so that he cannot move as similar to a blind man); *In re Biggan's Will*, 68 N. J. Eq. 572, 59 A. 874 (1905) (where attesters subscribe in another room it is necessary for the proponent to prove that the testator placed himself in a position where he could see the act of subscribing); *Mandeville*

by the statute. The possibility of seeing the hands of the attesters and the instrument at the time of the subscribing is quite inadequate if the testator is unable to see the instrument continuously from the time it is handed to the attester until it is subscribed and redelivered by him; yet the cases do not comment on this phase of the transaction; the attester may be within the range of vision and still be so far away that ordinary communication between the testator and attester is impossible and it is difficult in any rational way to say that the attester is in the presence of the testator. In *Bradford v. Vinton*<sup>3</sup> the Michigan court, referring to the sight test, put the matter thus:

"If this is the correct criterion, then the rule instead of being uniform, is subject to great fluctuations according to the degree of eyesight a person has. What would be in the presence of a far-sighted person would be in the absence of a near-sighted one; and what would be a valid execution of a will for one would be wholly worthless for another with equal mental capacity; and a person wearing eye glasses would have a larger presence than when he laid them aside. Under such a rule the oculist would appear to be the most important witness the testator must be in a position to behold the act unless he is blind. Presence is not a technical or scientific word."

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*v. Parker*, 31 N. J. E. 242 (1879); *Jones v. Tuck*, 3 Jones L. 207 (48 N. C., 1855); *Graham v. Graham*, 32 N. C. 219 (10 Ired. L.) (1849) (testator could see their backs but not their hands); *Hopkins v. Wheeler*, 21 R. I. 33, 45 Atl. 551 (1900); *Ray v. Hill*, 3 Strobbart L. 297 (S. C. 1848); *Nock v. Nock*, 10 Gratt. 106 (Va. 1853); *Neil v. Neil*, 1 Leight 6 (Va. 1829) (subscribing in the same room is *prima facie* in the presence of the testator but subscribing in a different room is *prima facie* without his presence); *Moore v. Moore*, 8 Gratt. 307 (Va. 1851) (testator might have seen the subscribing if he had gotten out of bed or had changed his position and this he was physically able to do. The probate decree upholding the will was sustained by an evenly divided court); *Sturdivant v. Birchett*, 10 Gratt. 67 (Va. 1853) (will subscribed out of testator's range of vision but it was brought back to him after one or two minutes and one of the attesters said, "Here is your will which we have witnessed," and showed him the subscriptions. It was held that this demonstration and acknowledgment by the witnesses and the adoption of their act by the testator cured the defect. But surely this is erroneous. If it was not originally subscribed within the presence of the testator the subsequent proceeding could not make the original act comply with the statute). *Cf. contra In Re Downie's Will*, 42 Wis. 66 (1877).

<sup>3</sup> 59 Mich. 139, 143, 26 N. W. 401, 405 (1886). In *Cook v. Winchester*, 81 Mich. 581, 46 N. W. 106 (1890) also the attesters subscribed in another room and testatrix could not have seen the act without moving and this she could not do, yet the act was held sufficient. The will was brought back in and shown to her. While it is not thought that demonstration will cure the defect if the subscribing is done out of the presence of the testator, yet this act is one of the circumstances to be regarded in determining what in this case constitutes the presence of the testator. In an earlier case (*Aiken v. Weckerly*, 19 Mich. 482, (1870)), it was held that when the subscribing is performed in another room, the testator must be in a position to behold the act unless he is blind.

Such a test causes the attestation and subscription of a blind man's will to be a special case if the will is sustained, and yet there is little difference spiritually between the presence of a blind man and that of any other person<sup>4</sup>.

Massachusetts has held that the question of being able to see the subscribing is not alone the sole test. The testator may from physical infirmity not be able to turn so as to see the act of subscribing and even though that act be performed in another room, the transaction as a whole must be looked at. He must be conscious of what is going on and understand what is being said when he cannot see the attesters<sup>5</sup>.

So in *Cunningham v. Cunningham*<sup>6</sup> the will was subscribed in another room some ten feet away from the testator. He conversed with the attesters while they were subscribing and he could have seen them by moving some two or three feet. They were gone about two minutes and then returned and showed him their signatures. The will was valid.

If two blind men can be in the presence of each other, it would seem to follow that two men with seeing eyes might be in each other's presence in the dark. So it would follow that though two men were not in the same room nor in sight of each other they could still be in the presence of each other if they were engaged in conversation with each other and conscious of the whereabouts and the general doings of each other. Under such circumstances, if the attesters return and demonstrate their signatures to the testator, this does not cure a previous defect, but is an element affecting the question whether they were continuously in the presence of each other.

There are of course, many cases where there can be no question but that the parties were not in the presence of each

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<sup>4</sup> *Goods of Piercy*, 1 Rob. Ecc. 278 (1845); *State v. Martin*, 2 La. Ann. 667 (1847); *Bynum v. Bynum*, 33 N. C. 632 (1850); *In re Allred's Will*, 170 N. C. 153, 86 S. E. 1047 (1915); *Pickett's Will*, 49 Ore. 127, 89 Pac. 377 (1907); *Ray v. Hill*, 3 Strobb. L. 297 (S. C. 1848); *Reynolds v. Reynolds*, 1 Speers 253 (S. C. 1843).

<sup>5</sup> *Raymond v. Wagner*, 178 Mass. 315, 59 N. E. 811 (1901); *Riggs v. Riggs*, 135 Mass. 238 (1883) (court says, however, "It is true as stated in many cases, that witnesses are not in the presence of the testator unless they are within his sight"); *Cf. Mendell v. Dunbar*, 169 Mass. 74; 47 N. E. 402 (1897).

<sup>6</sup> 80 Minn. 180, 83 N. W. 58 (1900); *Cf. Neil v. Neil*, 1 Leight 6 (Va. 1829) where testator's face was turned in opposite direction from attesters, though attestation was in same room and by testator's bedside, the will failed.

other, as when the testator falls asleep after he signs and before the attestors have subscribed<sup>7</sup> or where the testator is in one room in bed and an attester is in another room but the testator does not know where the latter is and is not in communication with him<sup>8</sup>; or when the will is taken beyond the sight and hearing of the testator although perhaps the subscribing is done within the same building<sup>9</sup>; or is taken to a remote place and signed.

So again, when the testator is in a shop where the two attestors are, and procures one of them to subscribe at a time when the other is engaged with a customer who stands between the testator and the second attester and the latter observed nothing of the transaction between the testator and the first attester, the parties were not in the presence of each other<sup>10</sup>.

## 2. THE PROPER ORDER OF EVENTS.

As to the order of signing by the testator and subscribing by the attestors there are two distinct views. One is the English view that the testator must sign first<sup>11</sup>. The other is sometimes called the American view that the order is immaterial and the attestors may subscribe before the testator signs if the whole matter is a single transaction and the acts are substantially synchronous. There is a pretty square split in the American cases<sup>12</sup>. It is sometimes insisted that the English view is over

<sup>7</sup> *Orndorf v. Hummer*, 12 B. Monroe 619 (Ky. 1851). It was held in *Blanchard v. Blanchard*, 32 Vt. 62 (1879) that inattention on the part of attester would not prevent attestation and subscription in his presence.

<sup>8</sup> *McKee v. McKee*, 155 Ky. 738 (1913).

<sup>9</sup> *Mendell v. Dunbar*, supra n. 5.

<sup>10</sup> *Brown v. Skirrow*, 1902 P. D. 3.

<sup>11</sup> *Goods of Olding*, 2 Curt. 865 (Ecc. 1841). *Goods of Byrd*, 3 Curt. Eccl. 117 (1842). *Cooper v. Bockett*, 3 Curt. Eccl. 648 (1843).

<sup>12</sup> *Brooks v. Woodson*, 87 Ga. 379, 13 S. E. 712 (1891); *Horn's Estate v. Bartow*, 161 Mich. 20, 125 N. W. 696 (1910); *Lane v. Lane*, 125 Ga. 386 (1906) 54 S. E. 90; 114 A. S. R. 207 note; *Duffit v. Corridon*, 40 Ga. 122 (1869); *Jackson v. Jackson*, 39 N. Y. 153 (1868); *Reed v. Watson*, 27 Ind. 443 (1867); *Chase v. Kittridge*, 11 Allen 49 Mass. (1865); *In re Karer's Will*, 63 Misc. R. 174 (118 N. Y. S. 427 (1909)); *Sisters of Charity v. Kelly*, 67 N. Y. 409 (1876); *Müller v. McNeal*, 35 Pa. St. 217 (1860); *Fowler v. Stagner*, 55 Tex. 393 (1881); perhaps *Allen v. Griffin*, 69 Wis. 529, 35 N. W. 21 (1887) accord with the English view. *O'Brien v. Gallagher*, 25 Conn. 228 (1856); *Gibson v. Nelson*, 181, Ill. 122, 54 N. E. 901 (1899); *Swift v. Wiley*, 1 B. Monroe Ky. 114 (1840); *Culter v. Cullter*, 130 N. C. 1, 40 S. E. 689 (1902); *Cox's Will*, 46 N. C. (1 Jones L.) 321 (1854); *Kaufman v. Caughman*, 49 S. C. 159, 27 S. E. 16 (1897) contra.

technical, or that the object of subscribing is to identify the instrument as the one whose execution was attested and the accomplishment of this object is not embarrassed by the following of the reverse order of events<sup>13</sup>.

It is admitted however, by all, that the statutes both of those states which follow in general the Statute of Frauds and those which follow substantially the Wills Act, imply that the testator should sign first. "Devises . . . shall . . . be . . . signed . . . and shall be attested and subscribed," or "no will shall be valid unless . . . it shall be signed . . . and such witnesses shall attest and shall subscribe."

Again there is a distinct significance in this order. The statutes provide that wills shall be attested. To attest means to bear witness to some fact observed in some way. It is clear that in general witnesses need not know the instrument attested is a will, hence they do not attest this fact. The Wills Act requires the will to be signed by the testator or that he acknowledge his signature in the presence of attestors. They therefore attest that they saw him sign or heard him acknowledge. The two are precise alternatives. They could not attest that they saw him sign if he signed later; hence it should follow that they cannot attest his acknowledgment if he acknowledges later. But why may they not attest the observance of an act which occurred after they have subscribed? The answer is that subscription cuts off all further effective attestation. Subscription is the last act. It not merely identifies the paper and the witnesses but it also shows that the transaction is concluded. If they can attest an act occurring after the subscription it might as well happen days after as minutes after. As to what they attest after they subscribe they are not superior attestors to those who may attest but never subscribe. Surely effective attestation ceases at the instant of subscribing. It would seem as justifiable to sustain an insertion in the will made after the signing and subscribing as to sustain a signing written after the subscribing. The writer has observed no cases which sustain the former view.

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<sup>13</sup> Rood on Wills, 2nd Ed., 1926, §292.

## 3. THE PLACE OF THE SIGNATURE.

If the name of the testator appeared at the beginning of the will or in the exordium<sup>14</sup> it was regarded as a signature in

<sup>14</sup> Under this heading the following situations arise:—

(a) The signature in the exordium. *Lemayne v. Stanley*, 3 Lev. 1 (C. P. 1681); *Armstrong v. Armstrong*, 29 Ala. 538 (1857); *Miles' Will*, 34 Ky. 1 (1836); *Meade v. Earle*, 205 Mass. 553, 91 N. E. 916 (1910); *Everhart v. Everhart*, U. S. C. C., S. D. Miss., 34 Fed. 82 (1888); *Armstrong v. Walton*, 105 Miss. 337, 62 So. 173 (1913); *In re Phelan's Estate*, 82 N. J. Eq. 316, 647, 87 Atl. 625, 91 Atl. 1070 (1913); *Plate's Estate*, 148 Pa. St. 55 (1892); *Adams v. Field*, 21 Vt. 256, (1849); *Waller v. Waller*, 1 Gratt. 454 (Va. 1845); *Ramsey v. Ramsey's Exr.*, 13 Gratt. 664 (Va. 1857); *Roy v. Roy*, 16 Gratt. 418 (Va. 1863); *Savage v. Bowen*, 103 Va. 540, 49 S. E. 668, (1905).

(b) The signature may occur prior spatially to the last part of the will though written later in time. (Some English cases are cited, though they do not afford great assistance, having in most cases been decided either before the Statute of Wills or after the Lord St. Leonard's Act); *Roberts v. Phillips*, 4 El. & Bl. 450 (K. B. 1855); *Goods of Woodley*, 3 Sw. & Tr. 429 (1864); *Margary v. Robinson*, L. R. 12 P. D. 8 (1887); *Sweetland v. Sweetland*, 4 Sw. & Tr. 6 (Ecc. 1865); *Dallow's Case*, L. R. 1 P. & D. 189 (1866); *Goods of Milward*, 1 Curt. 913 (Ecc. 1838); *Goods of Ainsworth*, L. R. 2 P. & D. 151 (1870); *Goods of Maaden*, (1905) 2 Ir. K. B. 612; *Reed v. Watson*, supra n. 12; *Ward v. Putnam*, 119 Ky. 889 (1905); *Brady v. McCrosson*, 5 Redf. Sur. 431 (N. Y.); *Sisters of Charity v. Kelly*, supra note 12; *In re Hewitt's Will* 91 N. Y. 261 (1883); *In re O'Neil's Will*, 91 N. Y. 516 (1883); *Tonnele v. Hall*, 4 N. Y. 140 (1850); *In re Blair's Will*, 152 N. Y. 645, 46 N. E. 1145 (1897); *In re Diehl's Will*, 112 N. Y. S. 717 (Sur. 1908); *In re Talbot's Will*, 154 N. Y. S. 1083 (Sur. 1915); *Baker v. Baker*, 51 Oh. St. 217, 37 N. E. 125 (1894); *Glancy v. Glancy*, 17 Oh. St. 135 (1866); *Wineland's Appeal*, 118 Pa. St. 37; 12 Atl. 301 (1888); *Goods of Milward*, 1 Curt. 912 (Ecc. 1838); *Baker's Appeal*, 107 Pa. St. 381 (1884); *Heise v. Heise*, 31 Pa. St. 246 (1858); *Hays v. Harden*, 6 Barr 409 (Pa. 1847); *In re Young's Will*, 153 Wis. 337; 141 N. W. 226 (1913).

(c) The signature in the margin:—*Goods of Coombs*, L. R. 1 P. & D. 302 (1866); *Graham v. Edwards*, 162 Ky. 771 (1915); *Collins' Goods*, Ir. L. 3 Eq. 241 (1849); *Murguiondo v. Nowlan*, 115 Va. 160, 78 S. E. 600 (1913); *Thomson v. Carruth*, 218 Mass. 524, 106 N. E. 159 (1914).

(d) Writing in the margin:—*In re Gibson's Will*, 128 App. Div. 769, 113 N. Y. S. 266 (1908); *Irwin v. Jacques*, 71 Ohio 395, 73 N. E. 683 (1905); *in re Swire's Estate*, 225 Pa. 188, 73 Atl. 1110 (1909).

(e) Insertions and incorporations:—*Goods of Birt*, L. R. 2 P. & D. 214 (1871); *In re Conway*, 124 N. Y. 455, 26 N. E. 1028 (1891); *In re Whitney*, 153 N. Y. 259, 47 N. E. 272 (1897); *In re Schlegel's Will*, 62 Misc. Rep. 439, 116 N. Y. S. 1038 (Sur. 1909); *In re Field's Will*, 204 N. Y. 448, 97 N. E. 881 (1912); *Baker's Appeal*, 107 Pa. St. 381 (1884); *In re Maginnis' Estate*, 278 Pa. 89, 122 Atl. 264 (1923).

(f) Inverted pagination:—*Goods of Wathen*, L. R. 3 P. & D. 159 (1874); *In re Andrew's Will*, 162 N. Y. 1, 56 N. E. 529 (1900); *In re Peiser's Will*, 140 N. Y. S. 844 (Sur. 1913); *Baker's Appeal*, supra e. note 14; *In re Maginnis' Estate*, 278 Pa. 89, 122 Atl. 264 (1923).

(g) Horizontal space between the body of the will and signature:—*Smee v. Bryer*, 1 Rob. Ecc. 616 (1848); *Ayres v. Ayres*, 1 Rob. Ecc. 466 (1847); *Goods of Shadwell*, 2 Rob. Ecc. 140 (1849). (These English cases are governed by the original Wills Act of 1837.) *Barne-*



the early English cases, when written by the testator's own hand<sup>15</sup>. Most American jurisdictions have followed this view where the statute did not require the name to appear elsewhere<sup>16</sup>. They however usually require the will to have been holographic and will not give effect to such writing of the name as a signature if another was draftsman of the will including testator's name. But some jurisdictions hold the will is valid when so signed, though it is not holographic, if the testator has acknowledged the instrument as his will<sup>17</sup>. This seems an exceedingly questionable position to take when the statute requires a will to be signed by the testator or by another at his direction. That is, a distinction is universally made between the dispositive parts of the will and the so-called execution part and a general direction to draft a will is not specifically a direction to sign the testator's name. So in Virginia where the statute requires that the signature by the testator be made so as to make it manifest that the name was intended as a signature, it has always been held that the name appearing in the exordium was insufficient as a signature whether written by the testator or by another<sup>18</sup>.

Even though the name appear in the exordium if it be clear that the testator intended to sign on the completion of the will, the first appearance of his name will not be regarded as a signature because it was not so intended. So when he began the

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*wall v. Murrell*, 108 Ala. 366, 18 So. 831 (1895); *Owens v. Douglas*, 121 Ark. 448, 181 S. W. 896 (1915); *In re Seaman's Estate*, 146 Cal. 455, 80 Pac. 700 (1905); *Estate of Blake*, 136 Cal. 306, 68 Pac. 827 (1902); *Lucas v. Brown*, 187 Ky. 502, (1920); *Thomson v. Carruth*, 218 Mass. 524, 106 N. E. 159 (1914); *Younger v. Duffie*, 94 N. Y. 535 (1884); *In re Kunkler's Will*, 147 N. Y. S. 1094 (Sur. 1914); *In re Busch's Will*, 150 N. Y. S. 419 (Sur. 1914); *Mader v. Apple*, 80 Oh. St. 691, 89 N. E. 37 (1902); *In re Morrow's Estate*, 204 Pa. 479, 54 Atl. 313 (1903); *In re Young's Will*, 153 Wis. 337, 141 N. W. 226 (1913).

(h) Signature spatially after the subscriptions:—*Roberts v. Phillips*, 4 El. & Bl. 450 (Q. B. 1855) (Wills Act applicable); *Goods of Casmore*, L. R. 1 P. & D. 653 (1869).

<sup>15</sup> *Lemayne v. Stanley*, supra note 14 (a).

<sup>16</sup> *Meads v. Earle*, 205 Mass. 553, 91 N. E. 916 (1910); *Adams v. Field*, 21 Vt. 256 (1849); contra *In re Phelan's Estate*, 82 N. J. Eq. 316, 647, 87 Atl. 625, 91 Atl. 1070 (1913).

<sup>17</sup> *Armstrong v. Armstrong*, 29 Ala. 538 (1857); *Miles' Will*; *Armstrong v. Walton*, supra (a) note 14.

<sup>18</sup> *Waller v. Waller*; *Ramsey v. Ramsey's Exr.*; *Ray v. Ray*, supra; *Savage v. Bowen*, supra (a) note 14.

writing of his name at the end and from weakness was unable to complete it, there is no signature<sup>19</sup>.

The view taken by the Virginia courts under their statute might very well have been taken without such a statute. It is highly questionable whether a testator beginning his will with his own name thinks he is authenticating the instrument as his act. It is more likely that he means merely to identify the writer. The Virginia court believes that the position of the signature, whether at the end or not, should indicate finality of the whole act,<sup>20</sup> and that the name appearing in the exordium is at most equivocal.

The earlier English cases were liberal in their construction of the phrase "at the end thereof" in the Wills Act, and allowed a considerable space between the end of the disposing part of the will and the signature<sup>21</sup>. It was early held, however,<sup>22</sup> that if he signed the will spacially too soon it failed though the later words, as for example, the date were unnecessary and unimportant. In *Sweetland v. Sweetland*<sup>22\*</sup> it was held that a will must be signed at the end and not sooner. Here the instrument consisted of five pages of dispositive matter. The writing on the fifth sheet ended in the middle of a sentence and in the sixth sheet provision was made for the remuneration of trustees, a revocatory clause, and an attestation clause. The signature was at the bottom of the fifth sheet and the will failed. But in a later case<sup>23</sup> where testator made his mark in the middle of a card the will was sustained though the whole card was occupied with the will, the subscriptions of the attestors being on the reverse side. In another case where the testator wrote his name in a slanting direction beginning at a word in the third line from the end of the writing and terminating his signature in the last line of the writing, the will was held valid and the clause over which the name extended was also probated<sup>24</sup>. In *Goods of Malen*<sup>25</sup> the draftsman copied the pro-

<sup>19</sup> *Everhart v. Everhart*, supra (a) note 14; *Plate's Estate*, 148 Pa. St. 55, 23 A. 1038 (1892).

<sup>20</sup> *Ramsey v. Ramsey's Exr.*, supra (a) note 14.

<sup>21</sup> Cf. *In re Seaman's Estate*, 146 Cal. 455, 80 Pac. 100 (1905).

<sup>22</sup> *Goods of Milward*, 1 Curt. 912 (Ecc. 1838).

<sup>22\*</sup> 4 Sw. & Tr. 6 (Ecc. 1865).

<sup>23</sup> *Margary v. Robinson*, L. R. 12 P. D. 8 (1886); Cf. *Goods of Ainsworth*, L. R. 2 P. & D. 151 (1870) (The statute had been amended in 1852).

<sup>24</sup> *Goods of Woodley*, 3 Sw. & Tr. 429 (Ecc. 1864).

<sup>25</sup> 54 L. J. Prob. 91 (1885).

visions of the will upon a printed form and was unable to get all in above the testimonium clause. The unfinished sentence was continued on the next page. The signature preceded the unfinished non-dispositive sentence and the attester's subscriptions followed it. Probate without the last sentence was granted.

This case then, raises the question what shall be done when the signature comes too soon. There are four alternatives; (a) let the entire will fail; (b) let the portion of the will written above the signature stand; (c) let the part above the signature stand if no essential or dispositive part follows the signature or (d) as in England under the Lord St. Leonard's Act, let both parts stand if the signature is so placed at or after or under or following or beside or opposite to the end of the will that it should be apparent that the testator intended to give effect to the writing as his will.

A number of courts have adopted the first alternative<sup>26</sup>. This result however, does not seem to be required under the statute and in many cases an otherwise perfectly valid will will fail when it ought to be sustained. Other courts take the second alternative<sup>27</sup>. But the will ought not to stand if the result from such partial failure would cause an inequality in the testator's bounty such that he would not wish this part of the will to stand alone. The only safe rule would be to hold that if substantial dispositions appear after the signature, the will must fail.

The third alternative seems sound in all cases where the statute requires a will to be signed at the end thereof. The Kentucky court has stated the rule thus: "If the part following the signature is dispositive which adds to or revokes previous bequests, the whole instrument is invalid; but if the clause added does not affect the disposition of the estate, it does not invalidate the instrument." It was therefore held that the naming of executors written under the place of the signature did not invalidate the will<sup>28</sup>. In order to reach a result substan-

<sup>26</sup> *Goods of Milward*, supra (b) note 14; *In re Hewitt's Will*, 91 N. Y. 261 (1883); *In re O'Neil's Will*, supra (b) note 14; *In re Blair's Will*, supra (b) note 14; *In re Diehl's Will*, 112 N. Y. S. 717 (Sur. 1908); *Hays v. Harden*, 6 Barr 409 (Pa. 1847).

<sup>27</sup> *Heise v. Heise*, supra (b) note 14; *Wikoff's Appeal*, 15 Pa. St. 281 (1850); *In re Taylor's Estate*, 230 Pa. 346, 79 Atl. 632 (1911).

<sup>28</sup> *Ward v. Putnam*, 119 Ky. 889 (1905). See also *Dallow's Case*, L. R. 1 P. & D. 189 (1866); *Wineland's Appeal*, 118 Pa. St. 37, 12 Atl. 301

tially like that reached by the English Courts under Lord St. Leonard's Act, it has been held that if the testator writes "see next page," near the place where he later signs his name, what follows is incorporated by reference. Such writing can scarcely be technically incorporated by reference. If incorporated at all it is by attachment similar to an insertion. In one case a map attached below the signature was likewise said to have been incorporated<sup>29</sup>. In *in re Jacoby's Estate*<sup>30</sup> the testator wrote on a paper which he signed and left lying on his strong box, "In case of death I want this box to go to my attorney." The box contained stocks, mortgages and numerous papers evidencing property interests. If we assume that the paper was testamentary then it seems that our further problem is not one of incorporating the box and its contents by reference as the court assumed, nor again should the question be raised whether the will is signed at the end, but rather the questions are is the box identified, and how far will the gift of the container carry with it all manner of contents<sup>31</sup>.

If a will is to be signed at the end precisely what is meant by "the end thereof"? The physical will consists of the substratum or paper together with ink or other substance so distributed and in such form over the surface of the substratum that ideas are thereby conveyed. It is not proper therefore to say either that the substratum is the will or the ink so distributed is the will, but that the whole taken together constitutes the instrument. How are we to determine just what is meant by "the end thereof"? Did the legislature intend the physical end of the paper to be the place for the signature or a place next to that portion of the will last written; or a place near that part of the will which from its position was intended to terminate the provisions of the will?

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(1888); *Glancy v. Glancy*, supra (b) note 14; *Everhart v. Everhart*, supra (a) note 14; *Beaumont's Estate*, 216 Pa. 350, 65 A. 799 (1907); *Teed's Estate*, 225 Pa. 633, 74 Atl. 646 (1909). The Kentucky Statute requires a testator to subscribe his will but does not say "at the end thereof." The court finds that he can subscribe only at "the end thereof." *Soward v. Soward*, 62 Ky. 126 (1863). See on this matter a good note by George Ragland, Jr., in 16 Ky. Law Journal 159, 161 (1928).

<sup>29</sup> *Tonnele v. Hall*, supra (b) note 14;

<sup>30</sup> 190 Pa. St. 382, 42 Atl. 1026 (1899).

<sup>31</sup> See 25 Col. L. Rev. 897, note 31 (1925).

Probably the first alternative was not exclusively intended, for if it were then a signature placed either on the margin or after the last numbered paragraph on the margin would not be sufficient<sup>32</sup>. The second seems excluded because an interlineation written just before the testator signs would be last written and would require the signature to be made in the midst of the will<sup>33</sup>. The last again seems not exclusively intended, for if it were, then if marginal continuations were not allowed by the writing of the signature nearby but the instrument were signed at the physical end of the substratum, the will would fail. Again, it is metaphysically impossible to sign so close to "the end thereof" but that some space will intervene between the end and the signature. A practical, pragmatic interpretation of the requirement is almost necessary. If taking the instrument as a whole into consideration, giving due weight to both the substratum and the surface material, it is possible to say that the will is signed at the end, then the court should reach that conclusion.

The problem does not greatly differ whether the signature appears in the margin, or some of the testamentary provisions are in the margin. In *Irwin v Jacques*<sup>34</sup> it was held that "the end thereof" was a matter of law and not of fact. Here on the margin of the last page beginning at the bottom of the page and slightly below the signature on the opposite side of the page were three vertical lines containing dispositive matter and also a provision against contest. Oral evidence established that these lines were written before the testator signed. The will was held invalidly signed principally because there was no continuity in thought between the marginal lines and the body of the instrument. "There should be some word or character used as a reference to the place it should occupy in relation to the other provisions so that the end may be ascertained." The court also thought that if the marginal matter was the end of the will, the instrument was not signed at the end. The court forgets that the instrument might well be regarded as signed at the end if due

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<sup>32</sup> *Graham v. Edwards*, 162 Ky. 771 (1915); *Collins' Goods, Ir. L. R.* 3 Eq. 241 (1849). In Virginia under the statute a marginal signature may be good; *Murguiondo v. Nowlan*, 115 Va. 160, 78 S. E. 600 (1913).

<sup>33</sup> *Goods of Coombs, L. R.* 1 P & D 302 (1866) under Lord St. Leonard's Act.

<sup>34</sup> 71 Ohio 395, 73 N. E. 683 (1905).

consideration is given to the physical elements of the will. The opposite result was reached in *Swire's Estate*<sup>35</sup>. There, however, the marginal provisions were numbered and thus were shown clearly to be later than those written transversely, the signature being at the physical end of the paper. In another case the will was sustained though the marginal matter was rejected: Such matter extended from slightly above the signature on the left margin to slightly below the place where the attestors subscribed<sup>36</sup>.

In England an incorporation by attaching the writing proposed to be incorporated and showing its relative position in the instrument, does not affect the legality of the position of the signature<sup>37</sup>. But the contrary has been held in New York. In *in re Conway*<sup>38</sup> the words "carried to the back of the will," appeared just after the dispositive part and before the signature. On the back of the will appeared "continued" followed by matter intended for incorporation. This was held invalid. In another case the words "see annexed sheet" were added similarly at the close of the second paragraph and a sheet was attached at that place to the first page of the instrument with metal staples and this sheet had to be turned back in order for one to read the first page. Here again the will was held not signed at the end<sup>39</sup>. But later the New York court changed its mind and held a similar incorporation did not affect the validity of the signature<sup>40</sup>. Parol evidence is admissible to show whether or not the insertion was made prior to the signing<sup>41</sup>. There can be no reasonable doubt but that the latter view was the sound one. The legislature was not concerned with the style of the draftsmanship of the will, nor with the question how forgotten matter might be cared for, but only with the completed result. The signature was at the end of the will if the will should be read in its natural and consecutive order.

Suppose the testator, as letter writers sometimes do, should begin on page one, then pass to page three of the paper and com-

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<sup>35</sup> 225 Pa. 188, 73 Atl. 1110 (1909).

<sup>36</sup> *In re Gibson's Will*, 113 N. Y. S. 266 (Sup. Ct. App. Div. 1908).

<sup>37</sup> *Goods of Birt*, L. R. 2 P & D 214 (1871).

<sup>38</sup> 124 N. Y. 455, 26 N. E. 1028 (1891).

<sup>39</sup> *In re Whitney*, supra note 14 (e). Cf. *In re Schlegel's Will*, supra note 14(e) (Sur. 1909).

<sup>40</sup> *In re Field's Will*, supra (e) note 14.

<sup>41</sup> *In re Swire's Estate*, supra (d) note 14.

plete his writing and sign it on page two; has he signed at the end? In *Goods of Whalen*<sup>42</sup> the testatrix began on page two, continued on page three and completed the instrument on page one where she signed her name. The court treated page one as page three and the will was properly signed. But New York has held the other way<sup>43</sup> and only recently has it come to the view of the English courts<sup>44</sup>. So it has been held in Pennsylvania that the testator may not conform to the order of consecutive pages when writing on foolscap; he may begin on the fourth page and go backwards, or go from the first to the third page and then to the second. But the order of connection should appear on the face of the will<sup>45</sup>. In *In re Stinson's Estate*<sup>46</sup> there was a similar passing from first to third page and from there to the second. The only means of determining the order was by the way the pages were numbered.

In the earlier cases the English courts paid more regard to the question whether a will was signed spacially too soon rather than too late. It was thought that the Act of 1837 was intended to overrule the position taken in *Lemayne v. Stanley*, that the writing of the testator's name by his own hand in the exordium was sufficient. But additions, difficult to trace and easily entered by fraud and forgery would be more easily prevented if the other feature were considered, viz.: that a signature should not be made too far away from the conclusion of the provisions of the will. It was as easy to fill in blank spaces above the signature as below it. Finally in *Smee v. Bryer*<sup>47</sup> where the signature was entered about one-half way down on the fourth page of a folded paper but the dispositions closed nearly one inch from the conclusion of the third page, the will was held to be invalid.

In this connection it should be recalled that a testator may write within his will anything he desires, a poem, the Lord's Prayer, or what not<sup>48</sup>. This is not to be treated as blank space and a signature written thereafter is valid. So a long and fulsome testimonium clause immediately prior to the signature

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<sup>42</sup> Supra (f) note 14.

<sup>43</sup> *In re Andrew's Will*, supra (f) note 14.

<sup>44</sup> *In re Peiser's Will*, supra (f) note 14.

<sup>45</sup> *Baker's Appeal*, 107 Pa. St. 381 (1884).

<sup>46</sup> 228 Pa. 475, 77 A. 807 (1910).

<sup>47</sup> Supra (g) note 14.

<sup>48</sup> *Barnewall v. Murrell*, 108 Ala. 366, 18 So. 831 (1895).

does not prevent the will from being duly signed<sup>49</sup>. Likewise the signature placed after rather than before the attestation clause is valid since it is entirely possible to regard that clause as a part of the will<sup>50</sup>. So where testator signs at the close of the dispositive part and again at the close of the attestation clause but later erases the first signature, the will is still well executed<sup>51</sup>. It is generally held that if the signature comes somewhere within the attestation clause there is the same result<sup>52</sup>. Again though space is left between the testimonium clause and the dispositive provisions, the will is valid since that clause is clearly a part of the will, though not an essential part<sup>53</sup>, and naturally precedes the signature. For an extreme case see *Mader v. Apple*<sup>54</sup> where a blank space of about twenty-four inches occurred between the provisions of the will and the testimonium clause<sup>55</sup>. It also appears that although blank spaces between paragraphs afford opportunities for later additions, difficult to detect, yet the requirement that the signature be at "the end thereof" can not control that matter<sup>56</sup>. It would be exceedingly embarrassing to frame an effective and equitable statute that would prevent such a possibility.

Again, the will should not be invalid just because the signature of the testator follows the subscriptions of the attestors. The chief difficulty here is likely to be that *prima facie* it would be assumed that appearing later, the signature was written later in time. If evidence is forthcoming to show that the proper order in time was observed, then the spacial order should not defeat the will. It is still possible to say that it is signed at "the end thereof"<sup>57</sup>. It is sometimes urged that signing at "the end thereof" refers to time as well as to space<sup>58</sup> and for that reason again the time order between signing by the testator and subscribing by the attestors should be observed. It

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<sup>49</sup> *Younger v. Duffie*, 94 N. Y. 535 (1884).

<sup>50</sup> *In re Kunkler's Will*; *In re Busch's Will*, supra (g) note 14.

<sup>51</sup> *In re Young's Will*, supra (b) note 14.

<sup>52</sup> *In re DeHart's Will*, 122 N. Y. S. (Sup. Ct.) 220 (1910); *In re Kunkler's Will*, supra (g) note 14. *Sears v. Sears*, 77 Oh. St. 104, 82 N. E. 1067 (1907) contra.

<sup>53</sup> *Estate of Blake*, 136 Cal. 306, 68 Pac. 827 (1902).

<sup>54</sup> Supra note 14 (b).

<sup>55</sup> Cf. *In re Morrow's Estate*, supra 14 (g).

<sup>56</sup> *Barnewall v. Murrell*, 108 Ala. 366, 18 So. 831 (1895); *In re Field's Will*, 204 N. Y. 448, 97 N. E. 881 (1912).

<sup>57</sup> *Roberts v. Phillips*, 4 Bl. & Bl. 450 (Q. B. 1855).

<sup>58</sup> *In re Foley's Will*, 136 N. Y. S. 933 (Sur. 1912).



seems doubtful, however, whether the legislature meant anything further than the spacial end. *Thomson v Carruth*<sup>59</sup> reaches a curious result. The testator signed his will in the margin and then it was subscribed. Later the suggestion was made that the appearance was "sloppy" and the testator again signed the will between the testimonium and the attestation clauses. The latter signature was invalid because of the temporal order. The court held that testator could not sign a will twice and it is a question of fact whether he intended the first to be his signature. Would a jury be warranted in finding that the latter was intended as his signature and that therefore the first one was not? We apprehend not<sup>60</sup>.

#### 4. THE FORM OF THE SIGNATURE OR SUBSCRIPTION.

Difficulty is occasionally experienced with respect to the form of the signing, either by the testator or by the attestors. The difficulties may be described as follows: the signature is by mark and occasionally someone present adds to it an erroneous name; the signature is illegible; the signature is made in some other way than by writing, as for example by seal; a fictitious name is assumed; the signature is incomplete; the wrong name is inadvertently signed; the testator or attester intentionally assumes a fictitious name.

When the signature is by mark<sup>61</sup> and the mark is identified by another person who purports to indicate the maker by writing his name near to it, it is the mark, not the identification, that is effective to make valid the will; hence an erroneous identification should not cause the will to fail<sup>62</sup>; if the signature is illegible as a signature, it should still be good as a mark<sup>63</sup>. The statute requires a will to be signed but does not declare the method, hence a seal should be sufficient<sup>64</sup>.

A description of the signer should be as good as his name—"Your miserable father"<sup>65</sup> identifies the person; signing also

<sup>59</sup> 218 Mass. 524, 106 N. E. 159 (1914).

<sup>60</sup> Cf. *In re Young's Will*, supra note 14 (b).

<sup>61</sup> *Re Bryce*, 2 Curt. Eccl. 325 (1839); *Shanks v. Christopher*, 3 A. K. Marsh 144, 10 (Ky.) (1820); *Garnett v. Foston*, 122 Ky. 195, 91 S. W. 668 (1906).

<sup>62</sup> *Re Ashmore*, 3 Curt. Eccl. 756 (1843); *Re Clark*, 1 Sw. & Tr. 22 (Ecc. 1858); *Goods of Douce*, 2 Sw. & Tr. 593 (Ecc. 1862).

<sup>63</sup> *Sheehan v. Kearney*, 82 Miss. 638, 21 So. 41 (1896).

<sup>64</sup> *Goods of Emerson*, Ir. L. R. 9 Eq. 443 (1883).

<sup>65</sup> *In re Brennan's Estate*, 244 Pa. 574, 91 A. 220 (1914) (but this case holds contra).

“Servant to Mr. Spurling’ is sufficient<sup>66</sup>. A limitation attached to the name of the attester, as for example “written by A’<sup>67</sup> will not prevent his subscription from being valid as an attester unless it is clearly shown that he did not intend to subscribe as such, since there was no occasion for him to subscribe as draftsman. But the signature or mark must identify the signer and writing the name of the town from which he comes will not have that effect<sup>68</sup>. A mark or even the given name made in the attempt to sign one’s name is not sufficient when not intended as a completed act<sup>69</sup>. But if the signing was a completed act it is sufficient though the given name only is written<sup>70</sup> or even the initials only<sup>71</sup>.

The statutes require a will to be signed by the testator and attested and subscribed by the attestors. If they or any of them write a fictitious name have they complied with the statutory requirement? It is to be observed that the statute does not say that they are to use their own or their true name. It is also true that a man may identify himself and bind himself in other transactions by signing some other than his baptismal name. There is no sufficient reason why this practice if followed with respect to wills, should invalidate them, and it was so held in Kentucky<sup>72</sup>.

Should it make a difference if, instead of an intentional assumption of a false name the signer should inadvertently do so? California has held<sup>73</sup> that the statute requiring a witness to sign his name is not complied with if he does not sign his true name. On the other hand, in the case of *In re Jacob’s Will*<sup>74</sup> the New York Supreme Court held that when an attester inadvertently signed the name of the testator instead of his own name the will was validly subscribed. It is believed that the New York view complies with the requirements of the statute and also is more in accord with the spirit of it. The testator has done all we

<sup>66</sup> *Goods of Spurling*, 3 Sw. & Tr. 272 (Ecc. 1863).

<sup>67</sup> *Wells v. Lewis*, 190 Ky. 626 (1921).

<sup>68</sup> *Goods of Trevanion*, 2 Rob. Eccl. 311 (1850).

<sup>69</sup> *Goods of Maddock*, L. R. 169, 3 P. & D. (1874); *Everhart v. Everhart*, supra note 14 (a); *Plate’s Estate*, 148 Pa. St. 55, 23 A. 1083 (1892).

<sup>70</sup> *Knox’s Appeal*, 131 Pa. 220, 17 A. S. R. 798 (1890).

<sup>71</sup> *Pilcher v. Pilcher*, 117 Va. 356, 84 S. E. 667 (1915).

<sup>72</sup> *Reed v. Hendrix*, 180 Ky. 57 (1918). Cf. *Goods of Redding*, 2 Rob. Eccl. 339 (1850).

<sup>73</sup> *In re Walker’s Estate*, 110 Cal. 387, 42 P. 815 (1895).

<sup>74</sup> 132 N. Y. Sup. 481 (1911).

can expect of him in procuring attesters and it is an illiberal construction which makes such a will fail. If an intentional assumption of such name were established it seems clear enough that the will would stand.

#### 5. ACKNOWLEDGMENT AND ADOPTION OF NAME WRITTEN AT AN EARLIER TIME.

Suppose an attester subscribes before the testator signs the will; or an attester subscribes out of the presence of the testator; or the testator signs and makes a later addition and the attesters then subscribe, is it possible that in any or all of these cases a later acknowledgment and adoption of the signature or subscription so made may cure the defect?

New York<sup>75</sup> and Indiana<sup>76</sup> have held that such may be the result. In Massachusetts<sup>77</sup> when the testator had written his name in the exordium probably not intending it at the moment it was penned, as a signature, it was held that after the entire will was drafted he could adopt the whole as his act and thus make his name, so placed, a signature. But how much is due to this reasoning and how much is due to *Lemayne v. Stanley* as a precedent, it is difficult to say.

It has been well said that the purpose of requiring the attester to subscribe is not to detect insanity and prevent fraud, though these are incidental benefits, but to identify the instrument.<sup>78</sup> There is, however, another very important purpose, and that is that there may be evidence by the subscription that the subscriber attested<sup>79</sup>. It is believed that the attesting and the subscribing must be by the same persons; that a will would be invalid if attested only by A, B, and C and subscribed only by D, E, and F<sup>80</sup>. Hence the act of subscribing is the only admissible evidence that the instrument was attested by anyone if we assume a statute that requires both attesting and subscribing. In Pennsylvania, a will in the past, need not have been subscribed by the attesters<sup>81</sup>.

<sup>75</sup> *In re Karrer's Will*, supra note 12.

<sup>76</sup> *Wright v. Wright*, 5 Ind. 389 (1854).

<sup>77</sup> *Meads v. Earle*, supra note 14 (a).

<sup>78</sup> *Swift v. Wiley*, 1 B. Monroe (Ky.) 114 (1840); *Canada's Appeal*, 47 Conn. 450 (1880); *Nunn v. Ehlert*, 218 Mass. 471 (1914); 106 N. E. 163.

<sup>79</sup> *Duffit v. Corridon*, supra, note 12.

<sup>80</sup> *In re Sloan's Estate*, 184 Ill. 579, 56 N. E. 952 (1900).

<sup>81</sup> *Hight v. Wilson*, 1 Dallas 94 (Pa. 1784).

If this be true, then certainly there can be no adoption of a former subscription made prior to the signature of the testator because the subscription was made before the act attested was performed, and the evidence of the attestation consists now of oral words<sup>82</sup>. If the subscription which is adopted was written beyond the presence of the testator this constitutes another reason why the will must fail<sup>83</sup>. If the testator signs and later makes an addition to his will, this addition remains unsigned and an oral adoption of the signature still leaves it an unsigned addition<sup>84</sup>. To retrace the name with a dry pen has no greater efficacy<sup>85</sup>. But as already shown, the fact that the witnesses acknowledge their subscription at the instant they are made is a circumstance bearing upon the question whether or not the subscribing was in the presence of the testator.

#### OTHER PROBLEMS OF EXECUTION.

(a) (What is Attested?) Many other incidental questions arise, as for example, what is the difference between attestation and subscription, and what do the subscribers attest? Assuming that attestation is a mental act, the evidence of the performance of which consists of the subscribing, the question arises, toward what is this mental act directed? The Statute of Frauds required: "Devises shall be . . . signed, . . . attested and subscribed." The Wills Act provided "No will shall be valid unless . . . it shall be signed . . . and such signature shall be made or acknowledged . . . in the presence of two or more witnesses \_\_\_\_\_ and such witness shall attest and shall subscribe the will." What is meant by attesting a devise or a will? This is a curiously difficult question to answer and has led some courts to assert that it does not differ from subscription and that the two terms are used together for the sake of fullness of expression<sup>86</sup>. Kentucky was one of the first jurisdictions to make the distinction clear<sup>87</sup>.

<sup>82</sup> *Marshall v. Mason*, 176 Mass. 216, 57 N. E. 340 (1900).

<sup>83</sup> *Lamb v. Girtman*, 33 Ga. 289 (1862); *Duffit v. Corridon*, supra, n. 12; *Ragland v. Huntington*, 23 N. C. (10 Ired L.) 561 (1841); *Cox's Will*, supra, n. 12; *In re Downie's Will*, supra, n. 2; *Mendell v. Dunbar*, 169 Mass. 74, 47 N. E. 402 (1897).

<sup>84</sup> *Charles et al. v. Huber et al.*, 78 Pa. St. 448 (1875).

<sup>85</sup> *Playne v. Scriven*, 1 Rob. Ecc. 772 (1849); *In re Foley's Will*, supra, n. 58.

<sup>86</sup> *Lane v. Lane*, supra, n. 12; *Drury v. Connell*, supra, n. 2; *Skinner v. American Bible Soc.*, 92 Wis. 209, 65 N. W. 1037 (1896).

<sup>87</sup> *Swift v. Wiley*, supra, n. 12.

It has been said that to attest means to bear witness to those facts with respect to which he must testify at the time of probate<sup>88</sup>. What are those facts? It is sufficient in jurisdictions which do not require a publication of the will, for the attester to see the testator sign or hear him acknowledge his signature already made<sup>89</sup>, whether the Statute follows the Wills Act or the Statute of Frauds. It seems rather clear, however, under the Wills Act, that the attester must see the signing or hear the acknowledgment<sup>90</sup>. It is also held that under the Wills Act if the signature is acknowledged only, it must at the time be visible whether the attester actually sees it or not; that a publication of the will to the attesters if they do not see the signing or cannot see the signature is insufficient even though the signature is in fact already made<sup>91</sup>. The attestation has principal reference to the signature even though the Statute merely requires the will to be attested<sup>92</sup>.

It is clear that under the Statute of Frauds it was not necessary to be able to see the signature if there was a publication of the will to the attesters<sup>93</sup>. It is believed therefore, that under those statutes which resemble the Statute of Frauds a will should be held valid even though the testator did not sign nor acknowledge the signature to the attesters specifically, if in fact the signature was there and he published the will to them as his

<sup>88</sup> *Nunn v. Ehlert*, supra, n. 78.

<sup>89</sup> *Wright v. Wright*, 7 Bing. 458 (C. P. 1831); *Griffith v. Griffith*, 44 Ky. 511 (1845); *In re Ludwig's Will*, 79 Minn. 101, 81 N. W. 758 (1900); *Ellis v. Smith*, 1 Ves. Jr. 11 (Ch. 1754) seems to have been the first case which held that the attestation of the testator's acknowledgment of his signature fulfilled the statutory requirements.

<sup>90</sup> *Ludwig's Will*, supra, n. 89; *Haynes v. Haynes*, 33 Ohio St. 598, 31 A. R. 579 (1878); *Simmons v. Leonard*, 91 Tenn. 183, 18 S. W. 280 (1892).

<sup>91</sup> *Goods of Gunstan*, 7 P. D. 102 (1882); *Daintree v. Fasulo*, 13 P. D. 67 (1888); *Hudson v. Parker*, 1 Rob. Ecc. 14 (1844); *Blake v. Blake*, 7 P. D. 102 (1882); *Goods of Thompson*, 4 N. of C. 643 (1846); *In re Mackay's Will*, 110 N. Y. 611, 18 N. E. 433 (1888); *Lewis v. Lewis*, 11 N. Y. 221 (1854); *Mitchell v. Mitchell*, 16 Hun. 97; affirmed 77 N. Y. 596 (1879); *Richard v. Orth*, 40 Oreg. 571, 66 Pac. 925 (1901). *Beckett v. Howe*, 2 P. & D. 1 (1869) contra.

<sup>92</sup> *Brooks v. Woodson*, 87 Ga. 379, 13 S. E. 712 (1891); *Simmons v. Leonard*, supra, n. 90.

<sup>93</sup> *Lacey v. Dobbs*, 63 N. J. Eq. 325 (1901); *White v. Trustees British Museum*, 6 Bing. 310 (C. P. 1829); *Gould v. Chicago Theological Seminary*, 189 Ill. 282, 59 N. E. 536 (1901); *Daugherty's Estate*, 168 Mich. 281, 134 N. W. 24 (1912).

act<sup>94</sup>. It is possible therefore, under the earlier statute to attest the signing, the acknowledgment or the publication and the attestation of any one of them is sufficient. It was held in *Inglesant v. Inglesant*<sup>95</sup> that if the testator could hear a third person make the request and did nothing, this was sufficient acknowledgment of his signature<sup>96</sup>.

(b) (Third Person Requests Attesters to Subscribe.) A request by the testator to the attesters to sign is commonly held a sufficient acknowledgment<sup>97</sup>. Kentucky holds that such request by a third person without more in which the testator does not join is ineffective as an acknowledgment<sup>98</sup>. There must be some sort of act for which the testator is responsible which shows he means the attesters to understand that the instrument is his acknowledgment of the signature.

(e) (Another Writes the Name of an Attester.) It is well established that another may sign the testator's name to his will and the Wills Act makes specific provision therefor. May another person, whether he be an attester or not, sign the name of an attester? There is no specific provision with reference thereto in the Statute, and for that reason it is sometimes held that this possibility is excluded since that provision is expressly made with respect to the testator<sup>99</sup>. *Expressio unius exclusio alterius est*. But this is a *non-sequitur*. There is no sufficient reason why the subscribing of a will should differ from the signing of other instruments. *Qui facit per alium facit*

<sup>94</sup> *Goods of Gunstan*, supra, n. 91; *In re Ludwig's Will*, supra, n. 89; *Tobin v. Haack*, 79 Minn. 101, 87 N. W. 758 (1900); *Nunn v. Ehler*, supra, n. 88 contra.

<sup>95</sup> L. R. 3 P. & D. (1872-75). Cf. *Daintree v. Fasulo*, supra, n. 91; *Haynes v. Haynes*, supra, n. 90.

<sup>96</sup> *Manners v. Manners*, 72 N. J. Eq. 854; 66 Atl. 533 (1907) contra.

<sup>97</sup> *White v. Trustees British Museum*, supra, n. 93; *Daintree v. Fasulo*, supra, n. 91; *Ela v. Edwards*, 16 Gray 91 (Mass. 1860); *Tilden v. Tilden*, 13 Gray 110 (Mass. 1859); *Hogan v. Grosvenor*, 10 Met. 54 (Mass. 1845); *Hall v. Hall*, 17 Pick. 373 (Mass. 1835); *In re Landy's Will*, 161 N. Y. 429, 55 N. E. 914 (1900) (a question for the jury). *Roberts v. Welch*, 46 Vt. 164 (1873) contra.

<sup>98</sup> *Griffith v. Griffith*, supra, n. 89; *Moore v. Sanders*, 202 Ky. 286 (1924).

<sup>99</sup> *Simmons v. Leonard*, supra, n. 90; *Bush v. McFarland*, 94 Tenn. 538, 29 S. W. 899 (1895); *Riley v. Riley*, 36 Ala. 496 (1860); (at least if the attester is able to sign his own name; *Horton v. Johnson*, 18 Ga. 396 (1855); *Bush v. McFarland*, 94 Tenn. 538, 29 S. W. 899 (1895).

*per se*.<sup>100</sup> It may well be, however, that an attester cannot, as the testator may, substitute an acknowledgement of his signature for a subscribing in the presence of his co-attesters.<sup>101</sup>

We conclude that to make "within his sight" the sole test of "in the presence of the testator" is to make an addition to the statute which is unnecessary and undesirable; first, because it either excludes blind persons from making wills or makes a special class of them; second, because it is entirely possible to be within sight but so far away that in no reasonable sense can the test be applied; third, because there are other senses than the sense of sight, and the use of those other senses when there is a reasonable contiguity, may well give rise to a situation where the attesters are in the presence of the testator though he cannot see them.

The testator should always sign before the witnesses subscribe. If the order is the reverse, a situation arises similar to that where an interlineation is made after the complete execution of the rest of the will. Such interlineation made later is never sustained because it was not signed and subscribed. One purpose of subscription is to identify the witnesses as attesters and if they attest after they subscribe, the will is no better than if one set of persons attested and an entirely different set subscribed.

There is no sufficient reason for putting a narrow construction upon the requirement that a will must be signed "at the end thereof." The will is not paper only, nor ink only distributed over the surface of the paper in a given way. If the will is signed where the last writing closes (not an interlineation) it should be good. If it is signed at the bottom of the page and the writing is above it again the will should be good when either internal or parol evidence shows that it was all written before it was signed and subscribed. When there are incorporations to be made and by the natural order of perusal one would read them at the place where it is indicated they belong, the will

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<sup>100</sup> *Turner v. Cook*, 36 Ind. 129, 136 (1871); *Schnee v. Schnee*, 61 Kan. 643, 60 P. 738 (1900); *Upchurch v. Upchurch*, 16 B. Monroe, 102 (Ky. 1855); *Lord v. Lord*, 58 N. H. 7, 42 A. R. 565 (1876); *In re Strong's Will*, 16 N. Y. Sup. 104 (1891); *Mock v. Kaufman*, 32 N. Y. Sup. 310 (1903); *Riley v. Riley*, 36 Ala. 496 (1860); *Jesse v. Parker*, 6 Gratt. 57 (Va. 1849).

<sup>101</sup> *Den v. Mitton*, 7 Holst. 70 (N. J. L. 1830).

should be regarded as signed at the end if they are not later additions.

It also seems that any name or mark used by an attester should be sufficient to comply with the statutory requirement when a fictitious name is voluntarily assumed or another name than his own is inadvertently written. A descriptive term should suffice, as also the use of a nickname or initials, if he intends to so identify himself. "Your miserable father" seems entirely adequate inasmuch as the description leaves no doubt as to who so identified himself. There is no provision for the adoption of one's name formerly written, either by the testator or the attesters. Such a practice complies neither with the spirit nor the letter of the statute.

Under statutes resembling the Wills Act it is clear that the witness must attest either the signing or the acknowledgment and if the latter, then the signature must be visible. That is, a mere publication of the will is insufficient. There is no sufficient reason, however, why, under statutes following the Statute of Frauds, one may not attest the signing, an acknowledgment of the signature, or a publication of the will.

It should be entirely possible for another person to sign the name for an attester at the latter's request. But if in no proper sense the former is the agent of the latter in that regard and the latter takes no part in the transaction, the will is not properly subscribed. While it would be undesirable practice for the chief beneficiary under the will to subscribe for the attester, yet that alone apart from fraud should not make invalid the subscription.

ALVIN E. EVANS

University of Kentucky,  
College of Law.