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THE EXECUTION OF WILLS*

A. J. WHITE HUTTON**

A testamentary disposition is ineffective unless there is explicit compliance with the specifications of the Wills Act respecting execution, viz., the signing by the testator of the written instrument, thus signifying his assent to its terms. An example of unfortunate oversight in failing to comply with the law is thus described by Maxey, J.:¹

"In decedent's safe deposit box was found a testamentary paper dated December 22, 1930, but was unsigned at the end thereof. He had written his name in every blank space provided for in the body of the paper, including the testimonium clause and the attestation clause. Had the paper been signed at its end, it would have been a complete will."

Under the Wills Act of 1705² this omission to sign "at the end thereof" would not have been fatal for the law was not then so strict, as is thus outlined by Mitchell, J.:³

"The condition of the law before the passage of the Wills Act of 1833⁴ is well known. By the English statute of frauds all wills as to land were required to be in writing, signed by the testator. Under this act it was held that the signature of the testator in any part of the instrument was sufficient. 1 Redf. on Wills, c. 6, sec. 18, pl. 9, and cases there cited. The same construction was given to the law in Pennsylvania, and under the Act of 1705, 1 Sm. L. 33, which required wills of land to be in writing, and proved by two or more credible witnesses, etc., it was even held that a writing in the hand of another, not signed by the testator at all, might be a good will: Rohrer v. Stehman, 1 W. 463. In this state of the law the Act of 1833 was passed."

In the report of the Commissioners in 1832 it was remarked that the law, as it then was, permitted real and personal property to pass by a will without signature, seal⁵ or attesting witness, and although the will was not in the handwriting of the testator.⁶

In response to the demand for reform the General Assembly passed the

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¹Friese's Estate, 336 Pa. 241, 9 A. (2d) 401 (1939).

²1 Sm. L. 33.

³Knox's Estate, 131 Pa. 220, 18 A. 1021, 17 Am. St. Rep. 798, 6 L.R.A. 353 (1890).

⁴Act of April 8, 1833, P.L. 249.

⁵Hight v. Wilson, 1 Dall. 94 (1784); Grubbs v. McDonald, 91 Pa. 236 (1879).

⁶Rohrer v. Stehman, 1 Watts 463 (1833).

Wills Act of April 8, 1833⁷ which provided, *inter alia*, as follows:

"Section 6. That every will shall be in writing, and unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof, or by some person in his presence, and by his express direction, and in all cases shall be proved by the oaths or affirmations of two or more competent witnesses, otherwise such will shall be of no effect."

As explained by Mitchell, J.,⁸ the phraseology of this section was founded on the English statute of frauds of 29 Cs. II, which is followed closely, but with this important addition that the will shall be signed "at the end thereof." The learned justice further explained:

"The purposes of the Act of 1833 were accuracy in the transmission of the testator's wishes, the authentication of the instrument transmitting them, the identification of the testator, and certainty as to his completed testamentary purpose. The first was attained by requiring writing instead of mere memory of witnesses, the second and third by the signature of testator, and the last by placing the signature at the end of the instrument. The first two requirements were derived from the English statute; the third was new (since followed by the Act of 1 Vict. C. 26), and was the result of experience of the dangers of having mere memoranda or incomplete directions taken for the expression of final intention: Baker's App., 107 Pa. 381; Vernon v. Kirk, 30 Pa. 223."

From the above explanations it would appear that the codifiers of 1832 had made a fairly good job of reform and had planted the measure in explicit and exact language, but the legislature failed to define terms as has been learned since in legislation. Hence the courts began to construe and interpret with results that have confounded the law even unto the present day. Two fundamental interpretations will now be considered.

SIGNED

The Act of 1833 specified that the will was to be "signed" or else. What did the legislature mean by declaring that a will had to be signed? One answer was given by the courts thirteen years after the passage of the act by holding in two cases⁹ that the affixing of a mark was not a signing. It is to be noted that the statute did not specify that the testator was required to affix his name but that the will should be "signed."

*Asay v. Hoover*¹⁰ and *Grabill v. Barr*¹¹ were the cases interpreting Section 6 of the Act of 1833 as not permitting a will to be signed by mark, thus impelling the legislature two years later to enact to the contrary in the Act of January 27, 1848.¹² A careful reading of these cases, together with *Cavett's*

⁷P.L. 249.

⁸Knox's Estate, 131 Pa. 220, 18 A. 1021, 17 Am. St. Rep. 798, 6 L.R.A. 353 (1890).

⁹*Asay v. Hoover*, 5 Pa. 21 (1846); *Grabill v. Barr*, 5 Pa. 441 (1846).

¹⁰5 Pa. 21 (1846).

¹¹5 Pa. 441 (1846).

¹²P.L. 16.

Appeal,¹³ shows that the facts of none of them justify the interpretation. Furthermore, there is nothing in the Section or the long history of signing as reflected in the English law to support such an interpretation. Nevertheless, referring to the interpretation, Bell, J. was constrained to announce:¹⁴

"It may be proper to say, in order that the question may be considered as definitively settled, that we all concur in the opinion now expressed."

Likewise after declaring that Section 6 did not permit a signing by mark as construed by the Court, Coulter, J., declared:¹⁵

"The legislative and judicial mind have met on this subject, and if deviations from the statute on account of apparent hardship in particular cases (which in fact constitutes ignorant or careless individuals, the lawmakers in the community) are disallowed, and if the sum of proof required by the Act of Assembly is enforced by the judiciary, the clause in the act which prescribes the form of execution and attestation, will in process of time become as familiar as household words to the community, and the last hours of life will in some degree be softened by the certainty which will rest on the disposition of property by will."

In these same opinions the Court arrived at the conclusion that a signing by amanuensis could not take place unless the testator was in extremity. Thus the net result of judicial construction and interpretation came to this: that a testator unable to write his name could not make his mark and could only have his name signed by another if he were in extremity. To restate the matter according to Bell, J.,¹⁶ Section 6 provided, (1), that the signing by testator must be by name and not by mark, (2), that the testator must himself attach his name unless prevented by the extremity of his last sickness from so doing, (3), if prevented by the extremity of his last sickness, he could, if able, have his name placed to the will by another, provided this were done in the presence of the testator by his express direction, (4), if testator was prevented by the extremity of his last sickness from either signing himself or by another, then the requirement of signing is excused. Some years following the passage of the curative Act of 1848,¹⁷ Strong, J., observed:¹⁸

"It was only by judicial construction that our Statute of Wills, passed April 8th, 1833, was made to require at the end of the will, the testator's signature *by his name*. Our act was taken from the British statute, 29 Charles II, Sec. 2, under which it had repeatedly been decided that a signature by mark was sufficient. When, therefore, the legislature adopted words, having a recognized judicial signification, it might fairly have been presumed that they intended by the words that sense in which they were understood

¹³W. & S. 21 (1844).

¹⁴Asay v. Hoover, 5 Pa. 21 (1846).

¹⁵Grabill v. Barr, 5 Pa. 441 (1846).

¹⁶Asay v. Hoover, 5 Pa. 21 (1846).

¹⁷Act of January 27, 1848, P.L. 16.

¹⁸Vernon v. Kirk, 30 Pa. 218 (1858).

at the time of adoption. It is probable that they looked less to the mode of signature, than to its place, which they required to be at the end of the will. This appears still more probable, when it is observed that if the design was to require a signature by the name of the testator, then the power of making a will was denied to all who could not write, for if a mark was not a signature within the meaning of the statute, then those unable to write could not sign, and signing by another was permitted only when inability to sign was caused by the extremity of the last sickness. This seems to have been overlooked when *Barr v. Grabill*, *Asay v. Hoover*, and other kindred cases were decided."¹⁹

The Act of January 27, 1848²⁰ provided as follows:

"That every last will and testament heretofore made, or hereafter to be made, excepting such as may have been finally adjudicated prior to the passage of this act, to which the testator's name is subscribed, by his direction and authority, or to which the testator hath made his mark or cross, shall be deemed and taken to be valid in all respects. Provided, The other requisites, under existing laws, are complied with."

It will be observed that under the provisions of this Act, and in addition to Section 6, a will was validly executed in two ways: (a) when the testator's name is subscribed by his direction and authority, and (b) to which the testator has made his mark or cross. Furthermore, nothing was specified concerning inability to sign one's name through lack of education or by reason of physical disability and the testator's name did not have to be subscribed in the presence of the testator.²¹ Thus stood the law when the Commission of 1915 presented its draft of the law of wills to the General Assembly of 1917.

LAW OF 1917

The Wills Act of June 7, 1917²² provides, *inter alia*, as follows:

"Section 2. Every will shall be in writing, and, unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof, or by some person in his presence and by his express direction; and, in all cases, shall be proved by the oaths or affirmations of two or more competent witnesses; otherwise, such will shall be of no effect; Provided, That the presence of dispositive or testamentary words or directions, or the appointment of an executor, or the like, after the signature to a will, whether written before or after the execution thereof, shall not invalidate that which precedes the signature.

"Section 3. If the testator be unable to sign his name, for any reason other than the extremity of his last sickness, a will to which his name is subscribed in his presence, by his direction and authority, and to which he makes his mark or cross, unless unable so to do,—in which case the mark or cross shall not be required,—shall

¹⁹ROOD ON WILLS (2nd Ed. 1926) Sec. 241.

²⁰P.L. 16.

²¹*Vosburg's Will*, 9 Pa. C.C. 243 (1890); *cf.* *Greenough v. Greenough*, 11 Pa. 489, 51 Am. Dec. 567 (1849); *Barr v. Grabill*, 13 Pa. 396 (1850); *Flannery's Will*, 24 Pa. 502 (1855).

²²P.L. 403, 20 P.S. 191, 192.

be as valid as through he had signed his name thereto; Provided, That such will shall be proved by the oaths or affirmations of two or more competent witnesses."

Sadler, J., explained the above quoted sections:²³

"The Wills Act (June 7, 1917, P.L. 403) provides for the disposition of property by those over twenty-one, who are of sound mind (Section I). It also directs that the document shall be in writing, and, unless prevented by the extremity of his last sickness, shall be signed by (the maker) at the end thereof, or by some person in his presence, and by his express direction.' In the absence of proof of these facts the provisions of section 2 are not applicable (*Hughes' Estate*,²⁴ *Wilson's Est.*²⁵) to the instant case, and they were not shown to be present. To support the writing, the authority must be found, if at all, in section 3, which regulates the execution of such an instrument by a mark 'if the testator is unable to sign his name, for any reason other than the extremity of his last sickness,' and provides that in such case it shall be 'subscribed in his presence, by his direction and authority, and to which he makes his mark or cross, unless incapacitated from doing so."

STATUTES COMPARED

Section 2 of the Act of 1917 is identical with Section 6 of the Act of 1833 with the addition in Section 2 of the proviso.

Section 3 has the following specifications: (1) the testator must be unable to sign his name for some reason other than the extremity of his last sickness; (2) the name of testator must be subscribed in his presence and by his direction and authority; (3) the mark may be made but is not necessary if the testator is unable to make it.

The Act of 1848 did not require physical disability or inability through lack of education. Any one could take advantage of its provisions which were (1) that the testator's name could be subscribed by his direction and authority; it did not have to be subscribed in his presence. And (2) the name could be eliminated completely if the testator made his mark. To restate the matter the present law of Section 3 is applicable where the testator is under a disability, either physical or by lack of education, to sign his name. But in the use of this section the name positively must be subscribed by someone in the presence of the testator and by his direction and authority. On the other hand the mark is not necessarily required, and in no instance can this method be used if the testator is in the extremity of his last sickness.

Furthermore, the distinction between Section 2 and Section 3 is that Section 2 provides for the will to be "signed," whereas Section 3 requires as a condition precedent the name to be subscribed.

²³*Carmello's Estate*, 289 Pa. 554, 137 A. 734 (1927).

²⁴286 Pa. 466, 133 A. 645 (1926).

²⁵88 Pa. Super. 556 (1926).

The method of proof of wills has not been affected by the statutory changes and remains the same as under the Wills Act of 1833.

METHODS OF EXECUTION

Under Section 2, two methods of executing a will are prescribed, viz., (1) *signing* by the testator, (2) another *signing* for the testator. A third situation is where the *signing* by either method is excused when the testator is "prevented by the extremity of his last sickness." Under Section 3 there is but one method prescribed, viz., *subscribing the testator's name* by some one "in his presence and by his direction and authority," to which subscription testator may make his mark but this will be excused if he is "unable so to do." Under Section 2 the *signing* for the testator must be "by some person in his presence and by his *express* direction," but nothing is required or suggested to be done by testator. Under Section 3, however, the third person is required to subscribe *testator's name* but the direction so to do *need not be express*.

Waite, P. J., thus classifies the methods:²⁶

"Under the above-quoted sections, four methods for the execution of wills are provided, two under section 2, which for convenience, we designate methods I and II, and two under section 3, which we designate methods III and IV. Method I is 'signed . . . at the end thereof,' as directed in the first part of section 2. Method II is where the testator 'shall be prevented by the extremity of his last sickness' from signing, in which case the will shall be signed 'by some person in his presence and by his express direction,' as directed in the last part of said section 2. Method III is where the testator is 'unable to sign his name, for any reason other than the extremity of his last sickness,' in which case a will 'to which his name is subscribed in his presence, by his direction and authority, and to which he makes his mark or cross,' as directed in said section 3, is properly executed. Method IV is where his name is subscribed as prescribed in method III, but no cross or mark is required, the language in that part of said section 3 being 'unless unable so to do (that is, make his cross or mark as required under said method III),—in which case the mark or cross shall not be required.'"

SIGNING

This topic has already been discussed under the Act of 1833 and it was pointed out that the courts had held that the placing of a mark by testator was not a signing.²⁷ This interpretation was not only promptly repudiated by the legislature²⁸ but also by eminent judges thereafter in carefully considered opinions showing such interpretation to be contrary to history and precedent.²⁹ The question under Section 2 is how shall "signed" be interpreted in the light of the

²⁶Prescott's Estate, 20 D. & C. 232 (1934).

²⁷See note 9, *supra*.

²⁸Act of January 27, 1848, P.L. 16.

²⁹Vernon v. Kirk, 30 Pa. 218 (1858); Knox's Estate, 131 Pa. 220, 18 A. 1021, 17 Am. St. Rep. 798, 6 L.R.A. 353 (1890); Vosburg's Will, 9 Pa. C.C. 243 (1890).

past. The Report of the Commission is silent on this point.³⁰ A document is signed when the party attaches or causes to be attached thereto, some mark, symbol or signature indicating his assent by an act of a peculiarly personal character transmitted to the paper or parchment. Gibson, C. J., caught the idea when he said:³¹

"At common law, it is the marksman's touch, not the subscription of the name in connection with, which gives life to the instrument."

In Section 3 the reverse is true and the emphasis is placed on the name, not the mark, but this is not the case in Section 2. Furthermore, a signature is not of necessity a name. It may be but on the other hand it may be mere initials or a stamp, a symbol or a seal, or a mark.³²

ESTATE OF WILSON³³

Decedent, a single woman, resident of Pittsburgh, having no particular communications with her near relatives, working for her living and staying with friends when not employed, who charged her no board or rent, became critically ill and was taken to a hospital where she died several days later. The day before her death she called a nurse, expressing apprehension that her condition was not good, and requested that certain matters be written down concerning things these friends were to get at her death. The nurse wrote at the dictation of decedent the paper hereinafter described and next morning in the presence of witnesses the paper was read to decedent who nodded her assent and, although very weak but mentally alert, affixed her mark. She died about five and one-half hours after the signing of the paper, which was later admitted to probate. One of the heirs appealed to the Orphans' Court which dismissed the appeal, affirming the action of the Register. From this decree an appeal was taken to the Superior Court. The paper probated read as follows:

"MARY JANE WILSON

All Bank Books and Insurance goes to Mrs. R. Graham 6 Met Street Duquesne Heights Some time for her to erect a monument in Stone Church Cemetery in Elm Grove where my sister and brother are buried and I am to be buried in Home Wood and erect a stone for me.

Also pay hospital bills.

No one else to be notified.

Undertaker Woods,
Oakland.

³⁰Report of Commission, 1917; see annotation, Sec. 2 and Sec. 3 at pages 57-59.

³¹Long v. Zook, 13 Pa. 400 (1850). See 64 A.L.R. 209,n.; 18 Ann. Cas. 766; 114 A.L.R. 1108,n.

³²Knox's Estate, 131 Pa. 220, 18 A. 1021, 17 Am. St. Rep. 798, 6 L.R.A. 353 (1890); In re Romaniw's Will, 163 Misc. 481, 296 N.Y.S. 925 (1937) and 114 A.L.R. 1116,n. (Signature by fingerprints).

³³88 Pa. Super. 556 (1926). Cf. 90 U. of Pa. L.R. 196-199; 13 Temple L.Q. 463; 13 Pa. Bar Assoc. Q. 248.

If anything should happen before morning call Perrysville Ave. Orphanage Mr. Graham to have all my clothes.

Her
X
Mark

Witness

JAMES C. JACOBS
ANNA W. HESLOP

Dec. 27, 1924."

In affirming the decree of the lower court and dismissing the appeal, Gawthrop, J., remarked:

"As the learned court below found on sufficient evidence that the testatrix was prevented from signing her name by the extremity of her last sickness, it is manifest that the third section does not apply in this case. Therefore, the point to be decided is whether the crossmark placed on the will by the testatrix was a signature, that is, whether the paper was signed by her, as required by the second section of the act."

Reviewing the leading cases on the matter of signing, the learned judge concluded:

"In all of the cases in our Supreme Court since *Knox's Estate*, supra, in which the question was, what is a sufficient signature under the Wills Acts of 1833 and 1917, the decision turned on the question, whether the word affixed was intended as a signature. While it is, of course, true that the making of a mark differs from the signing of the word 'Father' in *Kimmel's Estate*, in that the testator in that case was in the habit of signing his letters by the word 'Father,' there can be no doubt that the testatrix intended the mark made by her at the end of the writing as a complete signature thereto. Therefore, we are of opinion that the mark made by this testatrix constituted a signing by her within the meaning of the second section of the Wills Act. We adopt the following from the opinion of the court below: 'A mark so affixed may be said to be stronger evidence of the intendment of the signing and execution than where the testator subscribes himself by 'Father' or by some other relation, or by the informality of initials or a diminutive, because a mark or cross is used only in case of a signature to a writing of legal value.'"

In *Prescott's Estate*,³⁴ supra, the following pertinent observation is made concerning *Estate of Wilson*:

"The court found as a fact that Mary Jane Wilson was unable to sign in the extremity of her last sickness (page 559). But she signed by a mark (X) only. Her name was not written on the will at all. It therefore was properly executed only under the first part of section 2 (method I). It did not conform to the second part of that section (method II), because testator's name was not signed 'by some person in his presence and by his express direction.' Testator's name must be signed by another in meth-

³⁴20 D. & C. 232 (1934).

ods II, III, and IV. The difference between Method II and Methods III and IV is this: Under method II, the last part of section 2, the will must be signed 'by some person in his presence and by his express direction,' while under both methods III and IV, section 3, 'his name is subscribed in his presence, by his direction and authority,' and this direction need not be express but may be implied. The 'mark or cross' may be used if intended as a signature, in method I; is required in method III; but is neither used nor required in methods II and IV.

"In Wilson's Estate, *supra*, the court expressly said (p. 559): 'The execution did not conform to the requirements of the third section, because the name of the testatrix was not subscribed to the will.' Applying exactly the same reasoning, we say that the execution in that case did not conform to the last part of section 2 (method II), because it was not signed 'by some person in his presence and by his express direction,' as therein provided.

"We thus see in the case of the will of Mary Jane Wilson, *supra*, that although a person may be in 'the extremity of his last sickness,' he may still be able to execute a will by signing, not his name, but by a 'mark or cross' under the first part of section 2 (method I), as was the actual manner of execution in that case. From the same reasoning, it necessarily follows that although a person may be unable from 'physical weakness' or 'any reason other than the extremity of his last sickness to sign his name,' he may in like manner still be able to execute his will under the first part of section 2 (method I) by a mark or cross, or a signature 'by initials only, or otherwise informal and short of his full name . . . if the intent to execute is apparent.' The intent with which it is done is the determining criterion."

The facts of *Prescott's Estate, supra*,⁸⁵ are unique and the opinion by Judge Waite contains a carefully considered and comprehensive survey of the entire field of execution of wills under Sections 2 and 3 with deductions in thorough accord with the historical development of the topic in Pennsylvania. It is to be doubted whether there is in the reports at the present time a discussion on this confused and intricate subject more helpful in the determination of sound principles. Charles W. Prescott died November 20, 1932 leaving an alleged will executed November 17th, 1932. It was probated November 23, 1932 and letters testamentary issued. An appeal was taken by two sisters of decedent as next of kin. No issues were prayed for but permission was asked to produce before the register a certain other alleged will of decedent, dated August 17, 1928. At the hearing it developed, that decedent was a bachelor, 79 years of age, a merchant of keen business judgment with an estate of several millions of dollars, a man of strong will, not easily influenced. He was taken to the hospital November 12, 1932, critically ill but with a slight chance of recovery. On November 17, 1932 somewhat improved, but in bed and under an oxygen tent, he said to his doctor: "Take a statement," and in accordance with his direc-

⁸⁵20 D. & C. 232 (1934).

tions the following paper was drawn and signed under circumstances hereafter related. The writing, purporting to be the will and later probated, was as follows:

"Nov. 17, 32.

I desire to leave 1-3 of my estate to Hamet and St. Vincent's Hospitals. \$200,000 to the Erie Boys' Club. \$100,000 each to Mr. Vollmer and Mr. Warner. The balance of the estate to be placed in trust for my sisters while they live the principal to revert to Hamet and St. Vincents' Hospitals equally upon their deaths as an endowment.

I name Frank Wallace and the Second National Bank as my executors.

Charl
X

his
Charles Prescott
mark
Dr. Elmer Hess

Ruth H. Kraschneske."

The facts were that Dr. Hess wrote "the statement" at the direction of decedent to whom the same was read and by him approved. Decedent was then given a pencil and he used the window of the oxygen tent as a sort of desk and laboriously wrote, "Charl" and then the pencil dropped from his hand. The nurse handed the pencil to him again and Dr. Hess directed him to make the mark "X" for his last name, which he did. After this Dr. Hess wrote the

his
name "Charles Prescott" following this with his own name and Miss Kraschneske
mark

wrote her name. No one was present except the two witnesses and decedent and the entire ceremony of execution took place in his presence and that of each other. Dr. Hess, however, testified that decedent wrote the word "Charles" but the other witness said he wrote merely "Charl." The paper corroborated the latter version. Both witnesses agreed that the mark was made by decedent for his last name only. Decedent was very weak but mentally alert and the court found that there was no other word spoken to or by decedent, or either of the witnesses, or that any act was done by any of them relative to the writing or its attempted execution. Furthermore, it was determined as a fact that decedent was not in the extremity of his last sickness. The court, reviewing the various modes of execution already quoted, determined that under the facts the present situation could not be classified under any one of the four, except method one and that it was defective under this method because of the incompleteness of the two acts, viz., the word "Charl" and the facts incident to its writing showed clearly that it was incomplete as a signature. It is true that Dr. Hess considered the word as "Charles" but there was no evidence that decedent thought so. Therefore *Plate's Estate*⁸⁶ was a ruling authority. According to

⁸⁶148 Pa. 55, 23 A. 1038, 33 Am. St. Rep. 805 (1892).

the testimony of both witnesses the mark was only for the last name and was likewise incomplete. To quote the words of the learned court:

"To summarize our conclusions, this writing was not properly executed as a will, as provided in section 2 (Method I) because there is no evidence to show that either the letters "Charl" or the mark was placed thereon by the decedent with the intention of signing 'at the end thereof,' nor is it shown that either "Charl" or the cross, singly or when taken together, were either ratified, approved, acknowledged, or considered by him as a complete signature. Nor was it properly executed under section 2 (Method II) because decedent was not "in the extremity of his last sickness." Nor did he 'expressly direct' any other person to sign his name. The writing was not properly executed under section 3 (Method III) because, although unable to sign 'his name' he did not either directly or impliedly 'direct and authorize any other person to sign his name for him and he did not make the mark after the signing of his name. Nor was it properly executed under section 3 (Method IV) because, although unable to 'sign his name' he did not direct and authorize the signing of his name by another, and was in fact able to make a mark or cross, as is conclusively shown by the fact that he actually did make a mark or cross just before his name was written."

It will be noted that in comparing this case with *Estate of Wilson*³⁷ the emphasis is placed on the intention of the testator in signing under Method I and not the extremity situation.

HUNTER'S ESTATE³⁸

This was an appeal from the refusal of the register to probate and an order of the Orphans' Court dismissing the appeal. Proponent then sued out this appeal from the order of the lower court. Hunter was very ill from cancer and was brought from the hospital to proponent's home. On the morning of the day he died Hunter spoke of a will and that he wanted to make a disposition of his property to proponent and her janitor. A notary drew the will in question and gave instructions as to its execution to the proponent who had procured it. Proponent returned from the notary to her home and with the janitor propped Hunter on a pillow while he made his mark in the presence of proponent and the janitor. Proponent asked Hunter whether she should sign as a witness but his reply was, "No, you are the one who is going to receive this, you don't sign." This occurred about 9 A. M. In the afternoon about 2:30 the attending doctor came and was requested by proponent to witness the writing. Observing the mark, and the absence of Hunter's name thereon, he subscribed Hunter's name and then proponent took the will upstairs to Hunter who made his mark anew in the presence of the proponent and the janitor. The subscribing of Hunter's name took place downstairs and not in the presence

³⁷See note 33, *supra*.

³⁸328 Pa. 484, 196 A. 35 (1938).

of the decedent. Moreover, in the janitor's testimony he said his sole connection with the transaction took place in the morning. It does not appear that Hunter requested or approved or had anything to do, directly or indirectly, according to two competent witnesses, with the doctor's affixing his name. The foregoing were the findings of fact of the court and according to the report of the case there were no subscribing witnesses and it is inferred that the "two competent witnesses" mentioned were the proponent and the janitor. The Supreme Court affirmed the decree of the lower court, per curiam, "on the comprehensive opinion of Judge Bolger."

As this is the last expression of our Supreme Court on this topic, it may be analyzed in the light of the methods of execution classified by Judge Waite in *Prescott's Estate*.³⁹

It is quite apparent that the facts do not fit either Method III or Method IV of Section 3 for the name of Hunter was not subscribed in his presence and by his direction. As stated by Judge Gest in *Picconi's Estate*,⁴⁰ so in the present case:

"We are not convinced that the name of the testator was written by his direction or in such circumstances that he must have seen it so written, or that he ratified the act of the scrivener by anything he said or did."

Hunter died at 8:30 P. M. of the day the above events occurred, a matter of about eleven hours after he had first affixed his mark, and accordingly, Bolger, J., concludes that the decedent was not prevented by the extremity of his last illness from signing his will. This would eliminate Method II under section 2 as outlined by Judge Waite. There would remain but Method I of section 2 and that brings the matter to the same question as presented in *Prescott's Estate*.⁴¹

Did Hunter sign his will by affixing his mark at the end thereof about a few minutes after 9 A. M. of the day he died with the intent that this was his complete signature evidencing his assent to the will in accordance with Section 2 of the Wills Act? It is clear law that if a testator properly executes his will at 9 A. M. of a certain day, the will is then valid and can only be revoked as provided by the Wills Act,⁴² consequently any attempted re-execution at the instance of bungling friends has no legal effect, especially when testator is dying from cancer and does actually succumb within six hours thereafter. The opinion in this case is neither clear nor convincing and cannot properly be termed comprehensive. It is regrettable that the Supreme Court did not take the occasion to review the whole situation and set at rest, if possible, the perplexing questions arising under Sections 2 and 3.⁴³ The opinion in *Hunter's*

³⁹20 D. & C. 232 (1934).

⁴⁰20 D. & C. 245 (1934).

⁴¹20 D. & C. 232 (1934).

⁴²Act of June 7, 1917, P.L. 403, Sec. 20; P.S. 271-272; ROOD ON WILLS (2nd Ed. 1926) Sec. 255; Goods of Redding, 2 Rob. Ecc. 339 (1850), 14 Jur. 1052; Ripoll v. Morine, 12 Rob. (La.) 552 (1845), cited by Rood, *supra*.

⁴³See note 33, *supra*.

*Estate*⁴⁴ fails to distinguish between signing under Section 2 and affixing a name under Section 3. It also fails to clarify the involved phrase "prevented by the extremity of his last sickness" and to recognize that there are different degrees of "prevention" and that "extremity" is a relative matter. Again, that the extremity feature was only relevant in *Estate of Wilson*⁴⁵ as an important and convincing fact that the signing as performed by testatrix was indubitable evidence of the complete and final assent to the written will. Lastly, the opinion does not explain whether Sections 2 and 3 are complementary of each other or exclusive or inclusive of each other. The Commissioners, too, are vague on all of these matters.⁴⁶

Referring to the situation of the testator in *Hunter's Estate*⁴⁷ Judge Bolger observed:

"Applying the rules in the foregoing decisions, it is clear that Mr. Hunter was not prevented by the extremity of his last illness from signing his will, nor was he incapable of directing or authorizing his name to be subscribed thereto, and, while he was too weak to write his name, he was not too weak to ask somebody else to do it for him. Wherefore, his name was not subscribed as required by Section 3 'in his presence, by his direction and authority.' Further, we find that such a signing of the writing is not supported by the evidence of two competent witnesses, as required by both Sections 2 and 3."

If this case is to rest upon a finding of insufficient proof under both sections, that may explain the decision but if it is based on the proposition that under the admitted facts the affixing of the mark by Hunter on the first occasion was not a compliance with Section 2, the conclusion is not in harmony with the trend of our decisions. In *Kline's Estate*⁴⁸ where an issue was granted by the Supreme Court to try the question of forgery of the signature, which appeared by mark, there is nothing in the entire opinion of Kephart, C. J., suggesting that the will would not be valid if the mark was genuine. The testator at the time of the alleged signing was in poor health but not in any contended extremity of sickness. The learned Chief Justice declared:

"The decedent, Frank J. Kline, during his life was an educated, intelligent, and well informed man, and, although the execution of a will by mark is not rare, it is most unusual for a person of his background to sign in this manner. This circumstance does not invalidate the will, but as the ordinary means of testing the genuineness of the signature is wholly absent, it does call for the closest scrutiny by the court if questioned, especially when other circumstances cast a cloud of suspicion about it."

There are many illustrations in the reports of valid signing other than by

⁴⁴328 Pa. 484, 196 A. 35 (1938).

⁴⁵88 Pa. Super. 556 (1926). And see note 33, *supra*.

⁴⁶Report of Commission, 1917; see annotations, Sec. 2 and Sec. 3 at pages 57-59.

⁴⁷328 Pa. 484, 196 A. 35 (1938).

⁴⁸322 Pa. 374, 186 A. 364 (1936). *Quere*, whether the name was also subscribed? Annotator, 114 A.L.R. 1116, n., appears to be in doubt.

mark, all of which show the liberality of view of the Courts in effectuating the evident intention of the testator. But one case occurs where the result may be termed narrow. In *Knox's Estate*⁴⁹ it was held that a will signed "Harriet" was a good signature under the Wills Act of 1833, it appearing testatrix was accustomed to so sign and the facts indicating that the signature was intended to be complete. Conversely, in *Plate's Estate*⁵⁰ under the same act, the testator having started to write his name but only proceeding as far as the up and down stroke of the capital letter "H" and compelled to stop on account of excessive weakness, the act was incomplete, the decedent stating, "I can't do it now." He died several days later but made no further reference to the will. In reversing the lower court, which held the attempt was a mark, Mitchell, J., explained that this holding would have been correct if sustained by the evidence. However, all the facts showed that decedent had considered the act incomplete. Had he stated that this effort should be considered as his mark and two witnesses would have so declared, the execution would have been complete. The same result might have been accomplished in *Prescott's Estate*⁵¹ if the decedent had adopted "Charl" as his complete signature. In *Brennan's Estate*⁵² the will was in form of a letter and at the end the subscription, "Your miserable father." This was determined to be an incomplete signing. However, some years later, in *Kimmel's Estate*⁵³ a will was held valid, signed at the end in this wise:

"Will clost your Truly
Father."

The distinction is thus drawn by Simpson, J.:

"It is of course true, and upon this point *Plate's Est.*, supra, and *Brennan's Est.*, supra, were decided, that while 'exactly what constitutes a signing has never been reduced to a judicial formula,' if that which is written at the end of the paper is not 'a full and complete signature according to the intention and understanding of the testator,' it is not a compliance with the statute. The same cases decide, however, it will be held to be so 'if intent to execute is apparent.' In the present case as already pointed out, testator used the word 'Father' as a full and complete signature, and mailed the paper as a finished document."

It was contended that in *Brennan's Estate*⁵⁴ the subscription was not a signature but part of an unfinished paper, which decedent retained, and to which his signature was not subsequently attached. However, this attempted distinction is somewhat tenuous and is not wholly sustained by the facts for there was evidence that the writer cherished the paper and apparently considered it as a finished document. Both these cases were under the present Wills Act. In

⁴⁹131 Pa. 220, 18 A. 1021, 18 Am. St. Rep. 798, 6 L.R.A. 333.

⁵⁰148 Pa. 55, 23 A. 1038, 33 Am. St. Rep. 805 (1892).

⁵¹20 D. & C. 232 (1934). See note 26, supra.

⁵²244 Pa. 574, 91 A. 220 (1914).

⁵³278 Pa. 435, 123 A. 405 (1924).

⁵⁴244 Pa. 574, 91 A. 220 (1914).

*Vernon v. Kirk*⁵⁵ under the Act of 1833 a signing, "Ezekial Norman for Rachel Doherty, at her request," was held to be valid. Under the Act of 1848⁵⁶ in his

*Long v. Zook*⁵⁷ the will of David Long was signed as follows: "Jacob X Long
mark

(Seal)" and duly witnessed as the will of David Long. Gibson, C. J., reversed the judgment against the validity of the will and held the execution valid. Likewise under the same act in *Main v. Ryder*⁵⁸ it was held that the will was validly executed by mark although the testator did know how to write and had at times signed his name.⁵⁹

Recently there was probated before the Register of Wills of Franklin County the will of Kate Knepper, a woman ninety-odd years of age and who died several weeks after its execution, having affixed her mark in the presence of two witnesses who subscribed their names as such attesting that the mark as the signature of testatrix was affixed in their presence and that they subscribed their names in the presence of the testatrix and of each other. This is followed by the certificate of a notary public that the entire ceremony of signing by mark and the attestation of the witnesses took place in the presence of said official.⁶⁰

From this review of the authorities it is submitted that a signing by mark with the intent by the testator to so evidence his assent to the terms of the will is a sufficient compliance with Section 2 of the Wills Act of 1917 irrespective of the fact that the testator could write or was prevented from signing his name by the extremity of his last sickness. In other words, Section 2 does not preclude one from signing by mark because of his ability to sign his name, but as is emphasized in *Vosburg's Will*⁶¹ the proponents of a will signed by mark by one who according to the evidence was able at the time to sign his name and was accustomed to sign his name to other papers, would have the burden of explaining why testator selected the method of signing by mark rather than by his name.⁶²

SECTION 3 OF WILLS ACT⁶³

According to the notes of the Commission⁶⁴ this section is to supplant the Act of January 27, 1848⁶⁵ which was repealed by Section 27 of the Act of

⁵⁵30 Pa. 218 (1858).

⁵⁶Act of January 27, 1848, P.L. 16.

⁵⁷13 Pa. 400 (1850).

⁵⁸84 Pa. 217 (1877).

⁵⁹*Cf. Vernon v. Kirk*, 30 Pa. 218 (1858); *Knox's Estate*, 131 Pa. 220, 18 A. 1021, 17 Am. St. Rep. 798, 6 L.R.A. 353 (1890); *Vosburg's Will*, 9 Pa. C.C. 243 (1890); *Hersperger's Estate*, 245 Pa. 569, 91 A. 942 (1914); *Kline's Estate*, 322 Pa. 374, 186 A. 364 (1936); *In re Rosato*, 322 Pa. 229, 185 A. 197, 114 A.L.R. 1108, n.

⁶⁰*Knepper's Will*, Register of Wills Records, Franklin County, probated August 3, 1942.

⁶¹9 Pa. C.C. 243 (1890).

⁶²*Cf. Kline's Estate*, 322 Pa. 374, 186 A. 364 (1936); *In re Rosato*, 322 Pa. 229, 185 A. 197 (1936); *Hunter's Estate*, 328 Pa. 484, 196 A. 35 (1938).

⁶³P.L. 403, 20 P.S. 192.

⁶⁴Report of Commission, 1917.

⁶⁵P.L. 16.

1917.⁶⁶ Referring to the Act of 1848 it is said that its language is open to criticism as it might be understood to mean that a will, signed by the direction of the testator, although not in his presence and although he was not in the extremity of his last illness, would be good, which would be inconsistent with the preceding requirements. It is therefore deemed desirable to clarify its language and it is then explained that the new section is intended to cover cases where a person is unable to sign his name, whether from lack of education or from physical weakness. It is pointed out that the mark is not indispensable if the testator is unable to make it as in cases of one having lost both his arms or being paralysed. In view of the litigation under this section it is doubtful whether the Commission has attained its wonted aim of clarification. Furthermore, some of the implications of the language used make it vague if not incomprehensible. The criticism made of the Act of 1848 could have been met by inserting in that Act the amendment "*in his presence and by his express direction and authority.*" But this would have been the equivalent of Section 2. The key to the situation, but not stressed in the explanatory notes, is that the *name* of the testator is to be subscribed. The mark may be eliminated, as has been intimated⁶⁷ for any cause or reason sufficient to the testator as being "unable so to do." In other words the testator is the judge of his inability, although the Commission had in mind some obvious physical disability.

What is the meaning of the cryptic phrase, "For any reason other than the extremity of his last sickness?" In Section 2 the corresponding phrase reads "unless the person making the same shall be prevented by the extremity of his last sickness." It is obvious that if the person is "prevented" the will would not be signed and if he was not prevented it would have to be signed by the testator, "or by some person in his presence and by his express direction." If, under Section 3 "the testator be unable to sign his name" because of "the extremity of his last sickness" the will likewise under such an hypothesis would not be signed by the testator or by any one else.

A man dying from cancer was judicially determined not to have been in extremity when he made his mark although he died the same day and was so weak he could not write his name.⁶⁸ But a woman was declared to be in extremity at the time she made her mark and she died the same day, living about five hours less than the man in the preceding case.⁶⁹ On the other hand a testator was assisted out of his bed to a chair beside a stand where he took up a pen to sign his will. He tested the pen by writing the letter "P" on a loose piece of paper and then when about to put his pen to the will, sank back in the chair and expired without speaking or being able to speak and without signing the will in any way. Said Lewis, J.,⁷⁰

⁶⁶P.L. 403.

⁶⁷In re Rosato, 322 Pa. 229, 185 A. 197 (1936).

⁶⁸Hunter's Estate, 328 Pa. 484, 196 A. 35 (1938).

⁶⁹Estate of Wilson, 88 Pa. Super. 556 (1926).

⁷⁰Showers v. Showers, 27 Pa. 485, 67 Am. Dec. 487 (1856).

"The testator was neither able to sign it himself nor to request another to sign it for him, and that inability was caused by the extremity of his last illness. Under these circumstances, the will, if otherwise established, was then without these formalities."

Again a decedent, seriously ill, requested another to write his will. This was done and read to him. He said it was his will and was raised in bed and given a pen to sign his name. However, he declared he was too sick to sign his name but said it would do as well without it as he requested all persons present to witness that he left everything to his wife. In rejecting the will for non-signature, Woodward, J., explained:⁷¹

"It is not the case of a testator prevented by the extremity of his last sickness from signing and requesting another to sign for him. According to the evidence he could not sign, but could request and did not."

These few cases illustrate the several interpretations placed upon this phrase under different circumstances.

Under Section 3 there are many cases interpreting other portions of the language used. In one case⁷² the testator had defective eyesight. After expressing satisfaction upon hearing the will read, a pen was handed the testator but he gave it to another who wrote the testator's name. Then the testator stepped forward and touched the pen as the mark was made, which appeared in connection with the signature, after which the subscribing witnesses signed. As the testator was not prevented by the extremity of his last sickness from signing his name but on account of lack of eyesight, it was held the case was covered by the third section. It was not necessary to prove express direction of the testator to the other person to sign his name. Likewise it was stated that under Section 3 an express request that another sign testator's name was unnecessary as authority to sign may be inferred from the fact the testator saw the same written and then signified his approval by placing his mark over the signature.⁷³ However, in another case⁷⁴ an issue was awarded to determine whether the will was executed as required by law in view of the fact that the testimony did not make plain whether the name of the decedent was signed in her presence. Moschzisker, C.J., pointed out that if the evidence had been preponderatingly plain on this fact an issue would not have been ordered. It was again stressed that no express direction to sign decedent's name was necessary if the direction and authority could be implied from the attending circumstances.⁷⁵ In this case the inability was due partly to a limited knowledge of English although the testator was able to write but usually made his mark. Essentially,

⁷¹Ruoff's Appeal, 26 Pa. 219 (1856); *cf.* Stricker v. Groves, 5 Wh. 386 (1839); Dunlop v. Dunlop, 10 Watts 153 (1840).

⁷²Novicki v. O'Mara, 280 Pa. 411, 124 A. 672 (1924).

⁷³Girard Trust Co. v. Page, 282 Pa. 174, 127 A. 458 (1925).

⁷⁴Hughes' Estate, 286 Pa. 466, 133 A. 645 (1926).

⁷⁵Carmello's Estate, 289 Pa. 554, 137 A. 734 (1929).

however, it was due to illness and weakness. In one case⁷⁶ the testator complained that his hand shook and this was held sufficient and in another⁷⁷ the testatrix had impaired vision and called upon a servant to sign her name. The latter was illiterate and her hand had to be guided by the scrivener. The testatrix then made her mark. The facts being proved by two witnesses, the will was properly admitted to probate. The inability of the testator to sign his name, according to Schaffer, J., rests ultimately with him under the phrase "for any reason."⁷⁸

The execution of a will under Section 3 has developed into quite a ceremony⁷⁹ and is unfolded by the cases. In one case,⁸⁰ the two subscribing witnesses testified they saw the testatrix make her mark but did not see her name subscribed to the will nor hear her request any one to write it for her. The proponent offered to prove by the scrivener that, having read the will to the testatrix, he wrote her name thereon at her express direction, and then, in the presence of the two subscribing witnesses, she affixed her mark. It was held that the validity of the will was not established, because there were not two witnesses to prove that the name of testatrix had been subscribed in her presence and by her direction and authority.⁸¹ In this case Maxey, J., declared:

"A testator unable to sign his name . . . can register his assent to the paper purporting to be his will only by the method prescribed by the third section of the Wills Act. . . . That method is this: First, his or her name must be subscribed to the will in his or her presence and by his or her direction and authority. Second, after this is done, he or she must make his or her mark or cross at the appropriate place in the signature."

This dogma, however, has been declared a dictum⁸² and "intended as a guide to the best, but not the only method of procedure."⁸³ In this case the facts as developed from the testimony of the subscribing witnesses, were not clear as to whether the mark was placed first by the testatrix and then the name subscribed or that the order was *vice versa*. However, the rule of law was thus explained by Schaffer, J.;

"When the execution of a will is a unitary act and there is evidence of two competent witnesses of direction and authority to subscribe the testator's name, the order of action, whether the signature is first or the mark is first is immaterial."⁸⁴

⁷⁶Francis' Estate, 299 Pa. 398, 149 A. 701 (1930).

⁷⁷Roney's Estate, 309 Pa. 309, 164 A. 55 (1932).

⁷⁸In re Rosato, 322 Pa. 229, 185 A. 197, 114 A.L.R. 1108 (1936).

⁷⁹Stearne, *The Testator and His Mark* (1939), 13 Temple L.Q. 461; 90 U. of Pa. L.R. 194; 13 Pa. Bar Assoc. Q. 250.

⁸⁰Kelly's Estate, 306 Pa. 551, 160 A. 454 (1932).

⁸¹Hock v. Hock, 6 S. & R. 47 (1820); James' Estate, 329 Pa. 273, 198 A. 4 (1938); Orlady v. Orlady, 336 Pa. 369, 9 A. (2d) 539 (1939).

⁸²Cassell's Estate, 334 Pa. 381, 6 A. (2d) 60 (1939).

⁸³Picconi's Estate, 4 D. & C. 245 (1924).

⁸⁴The careful lawyer will be guided, however, by the method pointed out in *Kelly's Estate* and have an attestation clause executed by the subscribing witnesses circumspectly describing the procedure.

In a recent case⁸⁵ the testatrix had signed a will and codicil by mark to each, the name of testatrix being typewritten on the codicil, but on the will written by the scrivener. As both marks were made by the testatrix, according to the testimony, in her sick room where there was admittedly no typewriter, it was obvious that her typewritten name was not subscribed in her presence and as to the will one of the two witnesses could not state that the name of testatrix was subscribed in her presence. The two witness rule of proof could not be met. Consequently, both will and codicil were held not properly executed. Likewise a will was held to be defectively executed when testatrix had her name subscribed by another in her presence and by her direction, after which she affixed her mark.⁸⁶ However, no one was present but the one witness. Some time later the testatrix called in two witnesses and acknowledged her mark and the subscribing of her name as respectively her act and by her authority. It was held that the acknowledgment was not a compliance with Section 3 although proved by the required number of witnesses. Stern, J., pointed out that the acknowledgment would comply with Section 2 but not with the requirements of Section 3 under which the facts of the case fell. However, the Superior Court held that a will was properly executed by the direction and authority of the testator within the meaning of Section 3 where his name was written by the scrivener in his presence and he then made his mark and subsequently witnesses were called in, before whom testator, after the will was read over in their presence, acknowledged having signed it by mark.⁸⁷

PREVENTION BY EXTREMITY

For over one hundred years the law of execution of wills has been in a confused state. The Wills Act of 1833⁸⁸ was a reform measure founded on the English statute of frauds, 29 Car. II, the phraseology of which it follows closely, but with the important addition that the will shall be signed "at the end thereof."⁸⁹ Another important addition in the Act of 1833 was the provision making an unsigned will good if the signing was prevented by the extremity of the last sickness.⁹⁰ Under the English statute and those of the other states following it, an unsigned will for any cause is invalid.⁹¹ The wording of Section 6 of the Wills Act of 1833 and of Section 2 of the Wills Act of 1917 is the same,⁹² reading as follows:

"Every will shall be in writing, and, unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof, or by some person in his presence and by his express direction."

⁸⁵Orlady v. Orlady, 336 Pa. 369, 9 A. (2d) 539 (1939).

⁸⁶James' Estate, 329 Pa. 273, 198 A. 4 (1938).

⁸⁷Reitley's Estate, 92 Pa. Super. 314 (1927).

⁸⁸Act of April 8, 1833, P.L. 249.

⁸⁹Knox's Estate, 131 Pa. 220, 18 A. 1021, 17 Am. St. Rep. 798, 6 L.R.A. 353 (1890).

⁹⁰Showers v. Showers, 27 Pa. 485, 67 Am. Dec. 487 (1856).

⁹¹ROOD ON WILLS (2nd Ed. 1926), Sec. 253.

⁹²Report of Commission, 1917, page 57.

From the very beginning our judges with utter disregard of grammar and syntax construed this provision as though it read that the testator could not sign by another unless he was prevented in some way from signing himself. The doctrine had its inception in a dictum of Gibson, C. J.,⁹³ wherein he admits that this is not derivable from the language but justifies it because the Commissioners in their report had said that when the party is unable to affix his proper signature to his will, by reason of infirmity or otherwise, then it might be done by some person in his presence and by his express direction, and on general grounds of expediency to prevent forgery and fraud. All the report meant was to give some illustrations when this method might be used but the language must be completely distorted to arrive at any such construction.⁹⁴ Furthermore, such an interpretation is at variance with all decisions under the American statutes which allow a signing by amanuensis without regard to the ability or inability of the testator to sign for himself.⁹⁵ Nevertheless, Bell, J.,⁹⁶ interpreted Section 6 of the Wills Act of 1833 as providing, (1) that the signing by the testator must be by name and not by mark, (2) that the testator must himself attach his name unless prevented by the extremity of his last sickness from so doing, (3) if prevented by the extremity of his last sickness, he could have his name placed to the will by another, provided this were done in the presence of the testator by his express direction, (4), if testator is prevented by the extremity of his last sickness from either signing himself or by another, then the requirement of signing is excused. The legislature was so resentful of this narrow and unsound interpretation that two years later the Act of 1848⁹⁷ was passed providing that a will should be deemed valid if either, (1), the testator's name is subscribed by his direction and authority, or, (2) if the testator has made his mark or cross thereto. No repudiation could have been more complete and it was later held to be broad enough to cover all situations whether or not the testator was able to write.⁹⁸

But the repudiation did not directly touch the prevention by extremity interpretation of Section 6 of the Act of 1833 as propounded by Bell, J.⁹⁹ This has continued to be a troublesome factor despite the views as expressed by Strong, J.,¹⁰⁰ Mitchell, J.¹⁰¹ and Sittser, J.¹⁰² Furthermore the phrase has been interpolated into Section 3 of the Act of 1917 without any explanation by the Commissioners¹⁰³ and as placed is ambiguous, wholly irrelevant as well as in-

⁹³Cavett's Appeal, 8 W. & S. 21 (1844).

⁹⁴Comments of Editor, 23 P. & L. Dig. Dec., Col. 39826.

⁹⁵ROOD ON WILLS (2nd Ed. 1926), Sec. 263.

⁹⁶Asay v. Hoover, 5 Pa. 21 (1846).

⁹⁷Act of January 27, 1848, P.L. 16.

⁹⁸Main v. Ryder, 84 Pa. 217 (1877).

⁹⁹Asay v. Hoover, 5 Pa. 21 (1846).

¹⁰⁰Vernon v. Kirk, 30 Pa. 218 (1858).

¹⁰¹Knox's Estate, 131 Pa. 220, 18 A. 1021, 17 Am. St. Rep. 798, 6 L.R.A. 353 (1870).

¹⁰²Vosburg's Will, 9 Pa. C.C. 243 (1890).

¹⁰³Report of the Commission, 1917, pages 57-59.

comprehensible. As contained in Section 2 of the present Act in the same position as in Section 6 of the Act of 1833, the interpretation of Bell, J. has been adverted to somewhat conflictingly.¹⁰⁴ It is submitted that the phrase is meaningless except as applied in the unusual situations¹⁰⁵ where the application was denied. These unusual situations were all early cases under the Act of 1833 but there is a more recent application where the testator in the extremity of his last sickness requested another to write his will which was done.¹⁰⁶ The will was then read to the testator and approved by him in the presence of two witnesses, but before he was able to sign or direct anyone else to sign for him he suddenly became unconscious and died without regaining consciousness. These facts having been proved by the oaths of two witnesses in an affidavit presented to the register, the will was admitted to probate without signature. On the other hand there is a case where a paper was prepared as a will and read to the decedent who was in his last illness and expressly approved by him, but he was prevented from signing by sheer exhaustion brought on by his wife's hysterical conduct.¹⁰⁷ The probate of this will without signature was denied as not coming within the narrow confines of the requirement of prevention by the extremity of the last illness.

In view of the confusion that has arisen in the cases interpreting Secs. 2 and 3 of the Wills Act, it has been suggested that the legislature should clarify the matter of execution by recasting of the present sections into one.¹⁰⁸ Possibly the same results might be attained by the courts reconsidering the whole problem of a new approach to Secs. 2 and 3. The policy of permitting probate of a will unsigned, when by proper proof it is shown the testator was prevented from signing by the extremity of last illness, was one of the distinct reforms in the Act of 1833 and peculiar to our will legislation not found elsewhere.¹⁰⁹ It has been and should be confined to very narrow limits. On the other hand sound policy should permit a will maker to execute the will by affixing at the proper place any designation in form of a mark, name or symbol used to indicate his assent to the terms of the instrument. If he desires to sign by another and such is done in his presence and by his express direction and authority, he should have the privilege so to do. And in no case should the fact of ability or inability to sign his name be the criterion by judicial or legislative fiat. The will ultimately must be supported by the proper proofs of execution in whatever form the signature takes place. Here is the point to lay the emphasis. The courts are to be commended on the liberality of policy exhibited in the cases supporting testamentary dispositions against attack on grounds of lack of testamentary capacity or undue influence. Likewise liberality has been

¹⁰⁴Dubiously: *Estate of Wilson*, 88 Pa. Super. 556 (1926); confusedly: *Hunter's Estate*, 328 Pa. 484, 196 A. 35 (1938); apparently repudiated: *Prescott's Estate*, 20 D. & C. 232 (1934).

¹⁰⁵E. g., *Showers v. Showers*, 27 Pa. 485, 67 Am. Dec. 487 (1856); *Aurand v. Wilt*, 9 Pa. 54 (1845); *Ruoff's Appeal*, 26 Pa. 219 (1856).

¹⁰⁶*Smith v. Beales*, 33 Pa. Super. 570 (1907).

¹⁰⁷*Butler's Estate*, 223 Pa. 252, 72 A. 508 (1909).

¹⁰⁸90 U. of Pa. L.R. 194.

¹⁰⁹ROOD ON WILLS (2nd Ed. 1926), Sec. 253.

displayed in construing the testamentary character of a wide variety of expressions. In certain cases¹¹⁰ assuming that each decedent intended actually and truly to express assent to the will in question, doing so by signing by mark, and the facts are proved by two witnesses, should the validity of the will depend on the degree of extremity or on the fact that the decedent might have signed by name?¹¹¹

¹¹⁰As e.g., *Estate of Wilson*, 88 Pa. Super. 556 (1926) and *Hunter's Estate*, 328 Pa. 484, 196 A. 35 (1938).

¹¹¹*Cf. Brehony v. Brehony*, 289 Pa. 267, 137 A. 260 (1927); *In re Rosato*, 322 Pa. 229, 185 A. 197, 114 A.L.R. 1108,n. (1936).