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Wills--Attestation in the Presence of the Testator

Steve White
University of Kentucky

apparent that a new method of testing the sanity of persons accused of crime is needed. What that method or test should be is a question this writer does not propose to answer. As has been said, "They (the psychiatrists and psychologists) inform us that an exact definition, exact enough for law, that is, for use in trial is impossible. The present definition is unscientific but science is not yet ready to frame a new one."[28]

JAMES D. ALLEN

WILLS—ATTESTATION IN THE PRESENCE OF THE TESTATOR

I

OBJECT AND RESULT OF THE STATUTORY REQUIREMENT

"Attestation and subscription in the presence of the testator is a common requirement of both the Statute of Frauds[1] and of the Statute of Wills[2] and, accordingly, of most American statutes."[3] Superficially, it has been said that "the design of the legislature in making this requisition evidently was that the testator might have *ocular* evidence of the identity of the instrument subscribed by the witnesses."[4] Such a narrow view of the purpose of the statute has been reflected in the cases, as will be presently shown. Professor Page has suggested that it is unlikely that the statute, in its common form, prevents forgery, perjury, or fraud.[5] Perhaps the primary object of the statute is to make it sure that the genuine will executed by the testator is the same one that is attested and subscribed, and that some other writing is not substituted in place of it.[6] A strict interpretation of the statute has, in many instances, resulted in the failure of wills which undoubtedly expressed the testator's desires.[7] The statement of the

[28] Report of the Committee of the American Bar Association on Psychiatric Jurisprudence for the year 1928-1829, 5.

[1] 29 Car. 11, c. 3, sec. V (1677).

[2] Wm. IV & I Vict. c. 26 (1837).

[3] Percy Bordwell, *The Statute Law of Wills*, (1928) 14 Ia. L. Rev. 1, 15.

[4] 1 Jarman on Wills 107 (7th. ed., 1930).

[5] 1 Page on Wills, Sec. 334 (2nd ed., 1926).

[6] Calkins v. Calkins, 216 Ill. 458, 75 N. E. 182 (1905), noted (1905) 4 Mich. L. Rev. 246; Dubach v. Jolly, 279 Ill. 530, 117 N. E. 77 (1917).

[7] Gordon v. Gilmer, 141 Ga. 347, 80 S. E. 1007 (1914) (will invalid because testator's vision obstructed by curtain or footboard of his bed); Drury v. Connell, 177 Ill. 43, 52 N. E. 368 (1898) (testator must be able to see witnesses sign, though they are in same room); Snyder v. Steele, 287 Ill. 159, 122 N. E. 520 (1919) (it was error to instruct that it was enough for testatrix to be able to see witnesses and enough of act to know that they were signing); Walker v. Walker, 174 N. E. 541 (Ill. 1931) (testatrix thirty-five feet away could see witnesses through window—will held improperly executed), noted (1931) 16 Ia. L. Rev. 560; Burney v. Allen, 125 N. C. 314, 34 S. E. 500 (1899) (testator must be in position to see paper as well as witnesses), noted (1900) 13 Harv. L. Rev. 530; In re Jones' Estate, 101 Wash. 128, 172 Pac. 206 (1918) (subscription by witnesses must be within scope of testator's vision

court in *Bradford* v. *Vinton*[8] seems to point the way toward more desirable results: "Presence is not a technical or scientific word."

II

THE SIGHT TEST

A—Scope and Limitations

In accordance with Jarman's statement of the purpose of the Statute of Wills,[9] several cases have held, or it has been flatly stated in the opinions, that the testator must see or be able to see the witnesses in the act of subscribing the will.[10] *In re Beggans' Will*[11] is particularly noticeable in its determination to follow a narrow construction of the statute. There the will was subscribed in a room adjoining that in which decedent lay, but the subscribing witnesses might possibly have been seen by decedent by changing her position. *Held*, in the absence of proof that decedent actually placed herself in position to see the witnesses sign, the will fails. A variation of this type of case is presented in *Brittingham* v. *Brittingham*,[12] where it was held that if testator could have seen the subscription by merely turning his head, the statute is satisfied, regardless of whether or not testator availed himself of the opportunity. Thus, a decided relaxation of the more stringent view is seen in a recent case, *In re Lane's Estate*.[13] There the witnesses took the will into a hospital corridor some thirty feet from

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from his actual position); see also Alvin E. Evans, *Incidents of Testamentary Execution*, (1928) 16 Ky. L. J. 199, 200 n. 2.

[8] 59 Mich. 139, 148, 26 N. W. 401, 405 (1886).

[9] Supra n. 4.

[10] Hill v. Barge, 12 Ala. 687 (1848) (if testator, by moving his head, could have seen witnesses subscribe, statute is satisfied); Green v. Davis, 228 Ala. 162, 153 So. 240 (1934) (testator could see witnesses but not will, held improper execution); Reed v. Roberts, 26 Ga. 294 (1858) (subscription of witnesses must be within scope of testator's vision without his changing position or removing any obstruction); Witt v. Gardiner, 158 Ill. 176, 41 N. E. 781 (1895) (it was error to charge that if it was within physical power of testatrix to have seen the subscription, then it was done in her presence, though she did not actually see it); Orndorf v. Hummer, 51 Ky. (12 B. Mon.) 619 (1851) (witnesses subscribed four or five feet back of lounge on which testator lay); Neil v. Neil, 1 Leigh 6 (Va. 1829) (testator's back turned to witnesses in same room); In re Wilm's Estate, 182 Wis. 242, 195 N. W. 255 (1923) (an act cannot be said to be done in presence of another when it is outside his range of vision and beyond his sense of hearing); see also 30 Am. & Eng. Encyc. Law (2nd ed.) 598; 1 Jarman on Willis 120; Winston, *Attestation in the Presence of the Testator*, (1915) 2 Va. L. Rev. 403.

[11] 68 N. J. Eq. 572, 59 Atl. 874 (1905), noted (1905) 3 Mich. L. Rev. 591.

[12] 147 Md. 153, 127 Atl. 737 (1925); *accord* Ellis v. Flannigan, 253 Ill. 397, 97 N. E. 696 (1912); In re Offill's Estate, 274 Pac. 623 (Cal. App. 1929) (testator need not actually view witnesses signing will, but circumstances must allow such view).

[13] 265 Mich. 539, 251 N. W. 590 (1933), (1935) 33 Mich. L. Rev. 465.

testator's bed, where it was impossible for him to see them, and subscribed their names, and the will was held to be properly executed, the court placing emphasis on tstator's sense of hearing, consciousness of the witnesses' proximity, recognition of what was occurring, and the absence of any suggestion of fraud, undue influence, or incompetency. This seems to be a sound result, a conclusion of sound reasoning and policy, and is a natural outgrowth of earlier Michigan decisions.[14] Similiarly, in *Kitchell* v. *Bridgman*[15] the witnesses subscribed the will on a table in a hospital corridor about nine feet from testator's bed, the table being so located that it was impossible for testator to see witnesses or will; it was, in fact, a single transaction. The court, giving consideration to testator's hearing, knowledge and understanding of the circumstances, and proximity, upheld the will.[16]

A marked tendency is thus seen in some cases to regard the subscription as taking place in testator's presence if the position of the witnesses and that of testator, and their proximity to him, are such that but for some physical infirmity which did not otherwise affect him, he could see or hear what they were doing, and if he knew and was conscious of and understood what took place. It would seem that the decisions reached in these cases afford to testamentary execution all the protection provided by the more narrow rule, and at the same time escape the probability of defeating the intentions of testators by the too technical construction of a statute designed for their benefit.[17] In addition, the much vexed problems (a) whether testator must have been able to see without any material change in position,[18] (b) what constitutes a material change,[19] and (c) the effect of physical impossibility to move,[20] decrease in importance as the principle here submitted to be sound is applied.

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[14] Aiken v. Weckerly, 19 Mich. 482, 504 (1870); Bradford v. Vinton, 59 Mich. 139, 26 N. W. 401, 405, 60 Am. Rep. 276 (1886); Cook v. Winchester, 81 Mich. 581, 46 N. W. 106, 109 (1890), 8 L. R. A. 822; In re Moxon's Estate, 234 Mich. 170, 175, 207 N. W. 924 (1926).

[15] 126 Kan. 145, 267 Pac. 26 (1928).

[16] See also Bullock v. Morehouse, 19 F. (2d) 705, 708 (C. A. D. C., 1927), where it is said: "The object of the provision of the statute requiring the witnesses to sign in the presence of the testator is to prevent imposition. . . . It is the result as a whole that controls, and not the mere matter of juxtaposition."

[17] Cf. Shouler, *In Presence of a Testator*, (1892) 26 Am. L. Rev. 857.

[18] The English cases seem to allow no change in position. 10 Can. B. Rev. 56 (1932); Norton v. Bazett, Deane 259, 164 Eng. Rep. 569 (1856).

[19] Brittingham v. Brittingham, 147 Md. 153, 127 Atl. 737 (1925) (mere turning of head not material); Jones v. Tuck, 48 N. C. 202 (1855) (raising oneself in bed held material).

[20] See L. R. A. 1916C, 961; Healey v. Bartlett, 73 N. H. 110, 59 Atl. 617 (1904) (if testator could have seen except for the infirmity, it is in his presence); *contra* Re Wozciechowiecz, (1931) 4 D. L R.. 585.

B—As Effected by Cases Involving Blind Testators.

The Roman law admitted of but a limited testamentary capacity in the blind;[21] but the later developments of the civil law were away from the earlier restrictions, and in *State* v. *Martin*[22] it was held, in a thorough review of civilian authorities, that the will of a blind man was valid. At common law it is uniformly held that blindness does not destroy testamentary capacity.[23] *In re Allred's Will*[24] involved a situation where witnesses to the will of a blind man signed it in the room and about four feet from him. *Held*, since testator was fully conscious of what was going on by means of his other senses, this constituted a sufficient signing in his presence. It must be said that *Welch* v. *Kirby*[25] offers some contrast to the *Allred* case. Here the attestation of the will in question took place in a room connected with that in which the blind testatrix was by an archway, testatrix and witnesses being about ten feet apart. The court upheld the will, saying that "the rule for a blind testator is the same as that which would be applied to him if he had sight."[26] One could do no better than quote Professor Joseph Warren's criticism of this case:[27]

> "The dissenting judge, however, has the better of the argument in requiring a narrower rule for the blind. There is no hardship in insisting that consciousness through other senses of the witnesses' act should be required of a testator who cannot see. Indeed the protection of the statute can be secured to him in no other way; for the test within view of a person of full capacity can give him no aid; and yet his hearing and touch are unusually developed. An exception to a rule, sensible in the normal situation, should be made in the case of a person thus disabled even though a closer proximity of the witnesses is thereby required."

III

CONCLUSION

The cases which place such stress upon testators' ocular evidence of the subscription, in a zealous and laudable attempt to guard against fraud, imposition, and the like, probably defeat the purpose of the statute through a construction of it not warranted in most circumstances. It would seem that more of the common sense and realism to be found in the decisions involving blind testators should be allowed to

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[21] Cf. Weir v. Fitzgerald, 2 Bradf. 42 (N. Y. 1851).

[22] 2 La. Ann. 667 (1847).

[23] Davis v. Rogers, 1 Houst. 44 (Del. 1855); Elliott v. Elliott, 3 Neb. (unofficial) 832, 92 N. W. 1006 (1902); In re McCabe, 75 Misc. 35, 134 N. Y. S. 682 (1911); Wilson v. Mitchell, 101 Pa. St. 495 (1882).

[24] 170 N. C. 153, 86 S. E. 1047 (1915); (1916) 14 Mich. L. Rev. 356; (1916) U. Pa. L. Rev. 535; (1916) 3 Va. L. Rev. 406.

[25] 255 Fed. 451 (C. C. A. 8th., 1918), Wade, J., dissenting (cert. denied 249 U. S. 612); (1919) 17 Mich. L. Rev. 712.

[26] 255 Fed. 451, 455 (C. C. A. 8th., 1918).

[27] "The Progress of the Law—Wills and Administration", (1920) 33 Harv. L. Rev. 556, 566.

flow into other factual situations, for it is believed that it was here that the courts hit upon the true interpretation of he statute.

STEVE WHITE

LIFE INSURANCE—CHANGE OF BENEFICIARY IN A POLICY IN WHICH RIGHT TO MAKE SUCH A CHANGE HAS BEEN RESERVED TO THE INSURED—KENTUCKY RULE

The standard provision in modern insurance policies is that the insured may, by written notice to the insurer at its home office, change the beneficiary under the policy, such change to become effective when it is endorsed on the policy by the insurer. Some divergence of opinion exists as to the necessity for strict compliance with this provision. In a few jurisdictions the procedure set out in the policy must be strictly followed in order to make an effective change. The usual basis for such a holding is that a condition respecting endorsement requires more than a ministerial act on the part of the insurer, and the rights of the original beneficiary cannot be cut off without a compliance with such provision.[1] However, by the great weight of authority, a change of beneficiary can be accomplished without a strict or complete compliance with the conditions of the policy regarding the endorsement of the insurer. These jurisdictions reason that the endorsement of the change of beneficiary by the insurer is a purely ministerial act which the insurer cannot refuse to perform, and that therefore a failure of the insurer to perform such act will not defeat the change of beneficiary if the insured has done everything reasonably within his power to effect a change.[2]

The cases place Kentucky unequivocably with the majority of jurisdictions upon this question.[3] *Manning* v. *Ancient Order of United*

[1]Sheppard v. Crowley, 61 Fla. 735, 55 So. 841 (1911); Freund v. Freund, 218 Ill. 189, 75 N. E. 925 (1905); Prudential Ins. Co. v. Deyerburg, 101 N. J. Eq. 90, 137 Atl. 785 (1927); Douglas v. Metropolitan Life Ins. Co., 11 Ohio N. P. N. S. 531, 21 Ohio Dec. N. P. 516 (1911); Kress v. Kress, 75 Pa. Super. Ct. 404 (1921).

[2]Reid v. Durboraw, 272 Fed. 99 (C. C. A. 4th, 1921); Johnston v. Kearns, 107 Cal. App. 557, 290 Pac. 640 (1930); Reliance L. Ins. Co. v. Bennington, 142 Md. 390, 121 Atl. 369 (1923); Kochanck v. Prudential Ins. Co, 262 Mass. 174, 159 N. E. 520 (1928); Quist v. Western and Southern L. Ins. Co., 219 Mich. 406, 189 N. W. 49 (1922); Re Lynch, 135 Misc. 406, 237 N. Y. Supp. 663 (1929); Teague v. Pilot L. Ins. Co., 200 N. C. 450, 157 S. E. 421 (1931).

[3]Manning v. Ancient Order of United Workmen, 86 Ky. 136, 5 S. W. 385 (1887); Lockett v. Lockett, 26 Ky. Law Rep. 300, 80 S. W. 1152 (1904); Howe v. Fidelity Trust Co. Trustee, 28 Ky. Law Rep. 485, 89 S. W. 521 (1905); Vaughan's Admr. v. Daugherty, 152 Ky. 732, 154 S. W. 9 (1913); Landrum v. Landrum's Admx., 186 Ky. 775, 218 S. W. 274 (1920); Twyman v. Twyman, 201 Ky. 102, 255 S. W. 1031 (1923); Hoskins v. Hoskins, 231 Ky. 5, 20 S. W. (2d) 1029 (1929); Farley et al. v. First National Bank, 250 Ky. 150, 61 S. W. (2d) 1059 (1933); Inter-