WILLS - ATTESTATION - ORDER OF SIGNING IN EXECUTION OF WILLS

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WILLS — ATTESTATION — ORDER OF SIGNING IN EXECUTION OF WILLS— Testator procured A and B to witness his will. Both signed in the blank spaces provided for that purpose, but the testator had not yet signed. Four days later testator again brought the will to A and B, stating that he wished to sign it in their presence. Both witnesses recognized the paper as the one to which they had previously affixed their signatures, and recognized their signatures thereon. Testator signed in their presence, and nothing further was done. Held, the will was validly executed. Bloechle v. Davis, 132 Ohio St. 415, 8 N. E. (2d) 247 (1937).

The English cases have uniformly held that a will is not validly executed unless the testator signs before the attesting witnesses, even if the entire transaction is one continuous procedure.1 This view has been adopted by many American courts.2 The position taken is that the witnesses’ subscriptions are a part of the witnessing process, and that there can be no witnessing of that which has not yet occurred.3 One reason given is that at the time of the witnesses’ subscriptions the paper is not a will, but merely an unexecuted instrument, since it is unsigned by the testator.4 The majority view in this country, however, seems to be that the mere fact that the attesting witnesses subscribe after the testator does not invalidate the will, if only a few moments intervene, and both are part of the same transaction.5 This was the view which had been

2 Duffie v. Corridon, 40 Ga. 122 (1869); Lacey v. Dobbs, 63 N. J. Eq. 325, 50 A. 497 (1901); Jackson v. Jackson, 39 N. Y. 153 (1868); Barnes v. Chase, 208 Mass. 490, 94 N. E. 694 (1911); Sisters of Charity v. Kelly, 67 N. Y. 409 (1876); Brooks v. Woodson, 87 Ga. 379, 13 S. E. 712 (1890); Reed v. Watson, 27 Ind. 443 (1867); Marshall v. Mason, 176 Mass. 216, 57 N. E. 340 (1900); Simmons v. Leonard, 91 Tenn. 183, 18 S. W. 280 (1892); In re Halton’s Estate, 111 N. J. Eq. 143, 161 A. 809 (1932); Chase v. Kittredge, 11 Allen (93 Mass.) 49 (1865).
3 “To witness a future event is equally impossible, whether it occur the next moment or the next week.” Brooks v. Watson, 87 Ga. 379 at 381, 13 S. E. 712 (1890).
4 Gardner, Wills 211 (1916); Reed v. Watson, 27 Ind. 443 (1867); Simmons v. Leonard, 91 Tenn. 183, 18 S. W. 280 (1892). The obvious answer to this argument is that the paper is not a will at any time before the last witness signs, so that even in the normal case the witness signs an unexecuted instrument.
5 In re Silva’s Estate, 169 Cal. 116, 145 P. 1015 (1915); Gibson v. Nelson, 181 Ill. 122, 54 N. E. 901 (1899); In re Horn’s Estate, 161 Mich. 20, 125 N. W. 696 (1910); Gordon v. Parker, 139 Miss. 334, 104 So. 77 (1925); O’Brian v. Gallagher, 25 Conn. 229 (1856); Robertson v. Robertson, 232 Ky. 572, 24 S. W. (2d) 282 (1930); Miller v. McNeill, 35 Pa. 217 (1860); Kaufman v. Caughman, 49 S. C. 159, 27 S. E. 16 (1896); Will of Griffith, 165 Wis. 601, 163 N. W. 138 (1917); Shapte’s Estate, 35 Colo. 578, 85 P. 688 (1906); Swift v. Wiley, 40 Ky. (1 B. Mon.) 114 (1840); Sellers v. Hayden, 154 Md. 117, 140 A. 56 (1927);
adopted in Ohio. Some courts give the reason that the period of time intervening is so short that the law will not take cognizance of it. Others adopt the view that attestation and subscription are two different and distinct acts, and the latter may precede the former. It is upon this theory that the court in the principal case based its conclusion. If it be admitted that attestation is a mental process, distinct from subscription, and the purpose of the latter is merely to identify the instrument, there would seem to be no logical difficulty in following the court in the principal case. Since the statute prescribes no particular order, it might well be argued that none should be required, for so to require would be to add another requirement, by judicial legislation, to the already strict formalities required by the statute. However, if the view be taken that the subscription is some evidence of attestation, as well as for the purpose of identifying the instrument, it would seem that attestation must precede subscription, or, at least, that the two acts must be simultaneous in the contemplation of the law. In view of the rule that proof of an attesting witnesses' signature raises some sort of presumption of due execution, it is submitted that

Cutler v. Cutler, 130 N. C. 1, 40 S. E. 689 (1902); Rosser v. Franklin, 6 Grat. (47 Va.) 1 (1849); 57 A. L. R. 833 (1928); 39 A. L. R. 933 (1925); 22 Col. L. Rev. 486 (1922).

6 Slemmons v. Toland, 5 Ohio App. 201 (1916).
7 Gorden v. Parker, 139 Miss. 334, 104 So. 77 (1925); Kaufman v. Caughman, 49 S. C. 159, 27 S. E. 16 (1896); Will of Griffith, 165 Wis. 601, 163 N. W. 138 (1917). "The execution and attestation of the will were contemporaneous, or rather simultaneous acts, and we will not regard the question, who held the pen first—the testator or his witnesses." Miller v. McNeill, 35 Pa. 217 at 223 (1860).
8 Swift v. Wiley, 40 Ky. (1 B. Mon.) 144 (1840); Sellers v. Hayden, 154 Md. 117, 140 A. 56 (1927); 1 SchoUER, WILLS, 6th ed., § 515 (1923). See also Evans, "Incidents of Testamentary Execution," 16 Ky. L. J. 199 at 217 (1928).
9 132 Ohio St. 415 at 419.
10 This is the argument advanced by the court in the principal case. 132 Ohio St. 415 at 418-419.
11 While it is clear that a witness's signatures is equally valid as a means of identification whether affixed before or after the testator's signature, a signature which may or may not have been affixed before the testator's acts would seem to be valueless as evidence of the existence of the statutory requirements for the due execution of the will. This argument would, of course, apply whether the interval between the subscription of the witnesses and that of the testator were long or short, unless it were so short that both might be viewed as having taken place simultaneously.
12 Duffie v. Corridan, 40 Ga. 122 (1869). "This subscription is the evidence of their previous attestation, and to preserve the proof of that attestation in case of their death or absence when after the testator's death the will shall be presented for probate... If the witnesses might subscribe before they had attested his signature, and even before he had signed, of what weight could their subscription be as evidence, after their death, that the will had been duly signed and attested?" Chase v. Kitteredge, 11 Allen (93 Mass.) 49 at 63, 64 (1869). There is some dispute as to whether the lack of an attestation clause operates to destroy this presumption. 3 WIGMORE, EVIDENCE, 2d ed., 246, § 1511 (1923). Ohio apparently follows the rule that the mere signature, without the attestation clause, raises a presumption of due execution. "Where the execution of an instrument purports to have been attested by a witness, its
subscription has this two-fold purpose. If this be true, the principal case would seem to be incorrectly decided, for the witnesses' signatures, when affixed before the signature of the testator, could serve only one purpose—that of identification. There is, however, another theory on which the principal case might be supported—that the subscribing witnesses acknowledged their prior subscription at the time of the testator's signature. The courts are in conflict as to whether or not an actual acknowledgment by a witness of a previous signature is to be given the effect of a resubscription. In view of the implied prohibition of the statute, as well as the fact that the wills statute is a statute of frauds and to hold acknowledgment equivalent to resubscription would be to permit to be done by parol what the legislature has prescribed must be done in writing, the better view would seem to be that such an acknowledgment is ineffective. Also, it would seem to be questionable whether a mere failure to disaffirm, as in the principal case, should act as an acknowledgment. However, it appears clear that there was little chance for fraud in the principal case. The conclusion, therefore, was probably correct on a basis of fairness to testator and devisees, although it is difficult to support it on strict legal theory.

James W. Mehaffy

execution is proved by showing the genuineness of the signature of the witness, although there be no attestation clause." Carpenter v. Denoon, 29 Ohio St. 379 at 391 (1876).

It is not perfectly clear that the court in the principal case is following this theory at all. The court says: "Failure to expressly disaffirm their signatures at the time of the testator's subscription in their presence will render their prior subscription as effective as if the manual act of resubscription had been performed." 132 Ohio St. 415 at 421.

In re Karrer's Will, 63 Misc. 174, 118 N. Y. S. 427 (1909); Sturdivant v. Birchett, 10 Grat. (51 Va.) 67 (1853); Wright v. Wright, 5 Ind. 389 (1854); Playne v. Scriven, 1 Rob. Eccl. 772, 163 Eng. Rep. 1209 (1849); In re Foley's Will, 76 Misc. 168, 136 N. Y. S. 933 (1912); Hindmarsh v. Charlton, 8 H. L. Cas. 160, 11 Eng. Rep. 388 (1861), all seem to hold that there can be no valid acknowledgment of a subscribing witness's signature. Contra: Duffie v. Corridon, 40 Ga. 122 (1869); Town of Pawtucket v. Ballou, 15 R. I. 58, 23 A. 43 (1885); Chase v. Kitteredge, 11 Allen (93 Mass.) 49 (1869); Calkins v. Calkins, 216 Ill. 458, 75 N. E. 182 (1905). See also In re Downie's Will, 42 Wis. 66 (1877).

"The legislature has expressly given the privilege of signing or acknowledging his signature to the testator, but it has withheld a like permission in the case of the witnesses." Rowley, "The Order of Signing in the Execution of Wills," 11 UNIV. CIN. L. REV. 390 at 397 (1937), in which the principal case is discussed. See also Moore v. King, 2 Curt. 243, 163 Eng. Rep. 716 (1842); Atkinson, Will, § 129 (1937); Page, Wills, 2d ed., § 341 (1926).