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WILLS — WITNESSES — CONSTRUCTION OF "IN THE PRESENCE OF" THE TESTATOR — Testator, ill in a hospital, signed an instrument as his will in the presence of the attending physician and nurse, and requested them to sign as witnesses. For convenience they signed the instrument around a slight jog in the corridor on a table which was about 30 feet from the testator's bed and out of his sight. Thereafter he examined the signatures and expressed his approval. *Held*, that the witnesses signed in the presence of the testator as required by the Michigan statute.[1] *In re Lane's Estate*, 265 Mich. 539, 251 N. W. 590 (1933).

Although the requirement that a will must be signed by the witnesses "in the presence of" the testator is purely statutory,[2] it has been required in the famous Statute of Frauds and the Statute of 1 Victoria, and in the wills act of virtually every state. What constitutes "presence," however, has caused no little difficulty, although it seems agreed that the testator must be conscious of what is being done.[3] The majority of courts have adopted the so-called "sight test," which does not require that the testator actually see the signing,[4] but does insist that he might have seen it if he had so desired.[5] Still, if the legislatures intended such a test, why do not the statutes say "in the sight of," instead of merely "in the presence of"? Moreover, the adoption of this test involves a welter of difficulties and a morass of explanations, raising such questions as the following: whether a testator must have been able to see the paper and the actual subscription;[6] what the effect if the instrument is signed in another room;[7] whether the testator must have been able to see without any material change in position,[8] and

[1] Mich. Comp. Laws, 1929, sec. 13482, requires that a will "be in writing and signed by the testator or by some person in his presence, and by his express direction, and attested and subscribed in the presence of the testator by two (2) or more competent witnesses. . . ."

[2] 1 PAGE, WILLS, 2d ed., sec. 334 (1926).

[3] 1 PAGE, WILLS, 2d ed., sec. 335 (1926); cases collected in footnote 5, L. R. A. 1916c 951; Watson v. Pipes, 32 Miss. 451 (1856); Lane v. Lane, 114 Am. St. Rep. 207 at 225 (1906).

[4] Shires v. Glascock, 2 Salk. 688, 91 Eng. Repr. 584 (1687).

[5] Cases are collected in 1 PAGE, WILLS, 2d ed., p. 536, n. 3 (1926); in L. R. A. 1916c, p. 951, n. 5; in 6 Am. & Eng. Ann. Cases 415; Bullock v. Morehouse, (App. D. C. 1927) 19 F. (2d) 705; In re Offill's Estate, 96 Cal. App. 640, 274 Pac. 623 (1929).

[6] See 1 PAGE, WILLS, 2d ed., sec. 338 (1926); L. R. A. 1916c 959; Graham v. Graham, 32 N. C. 219 (1849); Quirk v. Pierson, 287 Ill. 176, 122 N. E. 518 (1919); Walker v. Walker, 342 Ill. 376, 174 N. E. 541 (1930).

[7] It generally makes no difference provided there is opportunity of seeing. Shires v. Glascock, 2 Salk. 688, 91 Eng. Repr. 584 (1687); Walker v. Walker, 342 Ill. 376, 174 N. E. 541 (1930); cases collected in 6 Ann. Cas. 415 and 417; and in L. R. A. 1916c 953. As for the usual presumptions applied, see Jones v. Tuck, 48 N. C. 202 (1855).

[8] It seems to be the English doctrine that no change in position is possible. 10 CAN. B. REV. 56 (1932); Norton v. Bazett, Deane 259, 164 Eng. Rep. 569 (1856). The same view is taken in Quirk v. Pierson, 287 Ill. 176, 122 N. E. 518 (1919);

what constitutes a material change;[9] the effect of physical impossibility to move.[10] And as to a blind man, to apply this test and say that his will is valid if he could have seen provided he possessed the sense of sight[11] seems the height of absurdity. Thus, although sight is probably the best test of presence, it is not the only one, and a few courts have avoided the above difficulties by adopting the so-called "conscious presence" test that the witnesses be within the understanding and available senses of the testator.[12] Especially in view of the oft-repeated purpose of the requirement, namely, to prevent the substitution of a surreptitious will,[13] this liberal test seems preferable. For there is little danger of fraud if the witnesses are within the available senses of the testator, particularly when, as in the instant case, the testator approves the instrument after the witnesses have signed; while, on the other hand, the sight test, strictly applied, is more likely to be an instrument of fraud than a means of preventing it. The principal case, however, in holding that witnesses signing 30 feet away, out of testator's sight, are within his presence, is taking the most extreme position yet recorded, and it is interesting to speculate just where the Michigan court would draw the line and say that the witnesses were no longer "within call" or in the "immediate nearness or vicinity." But the result, tending away from the injustice of rejecting otherwise validly executed wills in which there is no question of fraud, is laudable, and the only possible objection is that it is more like legislation than construction.[14]

G. W. D.

and Jones v. Tuck, 48 N. C. 202 (1855). But, *contra*, Healey v. Bartlett, 73 N. H. 110, 59 Atl. 617 (1904).

[9] Mere turning of the head is not material. Brittingham v. Brittingham, 147 Md. 153, 127 Atl. 737 (1925). As for raising oneself in bed, it was held material in Jones v. Tuck, 48 N. C. 202 (1855).

[10] See L. R. A. 1916c 961. If testator could have seen except for the infirmity, it is in his presence, Healey v. Bartlett, 73 N. H. 110, 59 Atl. 617 (1904); but *contra*, see Tribe v. Tribe, 1 Rob. Ecc. 775, 163 Eng. Repr. 1210 (1849); Re Wozciechowiecz, [1931] 4 D. L. R. 585.

[11] In the Goods of Piercy, 1 Rob. Ecc. 278, 163 Eng. Repr. 1038 (1845); Welch v. Kirby, (C. C. A. 8th, 1918) 255 Fed. 451, 9 A. L. R. 1418. But some courts adopt the more liberal test that the witness is in the presence of the blind testator provided the testator knows by his remaining senses what is being done. In re Allred's Will, 170 N. C. 153, 86 S. E. 1047, L. R. A. 1916c 946 (1915). Articles also in 3 VA. L. REV. 406 (1916); 64 UNIV. PA. L. REV. 535 (1916); 17 MICH. L. REV. 712 (1919); 1 PAGE, WILLS, 2d ed., sec. 340 (1926).

[12] Sturdivant v. Birchett, 51 Va. 67 (1853); Cook v. Winchester, 81 Mich. 581, 46 N. W. 106, 8 L. R. A. 822 (1890), overruling Aikin v. Weckerly, 19 Mich. 482 (1870); Riggs v. Riggs, 135 Mass. 238, 46 Am. Rep. 464 (1883); Kitchell v. Bridgeman, 126 Kan. 145, 267 Pac. 26 (1928); Cunningham v. Cunningham, 80 Minn. 180, 83 N. W. 58, 51 L. R. A. 642, 81 Am. St. Rep. 256 (1900). But in a later case the Minnesota court seemed again to stress possibility of seeing. In re Larson's Estate, 141 Minn. 373, 170 N. W. 348 (1919).

[13] 1 PAGE, WILLS, 2d ed., sec. 334 (1926); 6 Ann. Cas. 414; cases collected in L. R. A. 1916c 951, n. 1; Shires v. Glascock, 2 Salk. 688, 91 Eng. Repr. 584 (1687); Bullock v. Morehouse, (App. D. C. 1927) 19 F. (2d) 705; Walker v. Walker, 342 Ill. 376, 174 N. E. 541 (1930).

[14] 1 PAGE, WILLS, 2d ed., sec. 339 (1926).