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WILLS-PUBLICATION OF WILL AND ACKNOWLEDGMENT OF SIGNATURE

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WILLS—PUBLICATION OF WILL AND ACKNOWLEDGMENT OF SIGNATURE—Testatrix telephoned two friends, asking them to come to her home and witness her will. When they arrived, the document was lying on a table in testatrix' presence, and she declared, "Here is the pen, sign it." Both witnesses were positive testatrix did not sign in their presence. The evidence, while not conclusive, also tended to show that neither witness saw the signature, testatrix having signed on page seven while the document was opened to the attestation clause on page eight. The superior court admitted the will to probate over appellant's objection that testatrix had failed to meet the statutory requirements for execution. On appeal, *held,* affirmed. *In re Gray's Estate,* (Cal. 1948) 201 P. (2d) 392.[1]

[1] The most complete statement of facts will be found in Re Gray's Estate, 75 Cal. App. (2d) 386, 171 P. (2d) 113 (1946), an earlier contest by other heirs.

The California probate code is modeled on the English Statute of Wills,[2] requiring that the testator must, in the presence of two witnesses, subscribe or acknowledge a prior signature, and must declare that the instrument is his will.[3] California courts have long held that the requirement of publication may be satisfied by testator's conduct and actions, an oral declaration being unnecessary.[4] The court in the principal case had little difficulty in finding sufficient publication,[5] but a more serious dispute involved acknowledgment of testatrix' signature. The overwhelming weight of authority is that the witnesses must see, or have an opportunity to see, the testator's signature, and that where a document is so placed or folded that this is impossible, there is no acknowledgment.[6] Under this view, publication is not a substitute for signature acknowledgment.[7] Reasons assigned for the rule are that there can logically be no acknowledgment where the signature is invisible,[8] that witnesses cannot identify the document as a will when they do not know whether it is signed,[9] and that witnesses must see the signature so that they can later identify it.[10] A very few courts have held that acknowledgment of the will is a sufficient acknowledgment of the signature, generally on the theory that the majority rule allows "designing witnesses" or witnesses with defective memories to defeat the testator's intent.[11] The court in the principal case seems to adopt this minority position, relying on the opinion in *Re Estate of Abbey*.[12] However, the pertinent portions of the latter opinion are dicta; in that case, the signature of the testator was on the same page as those of the witnesses, and an attorney called this to the witnesses' attention. The court recognizes the factual distinction between the *Abbey* case and the principal case.[13] Nevertheless, it holds that the attestation clause of the will here involved, which recites that the will was signed and subscribed, is as effective as the actual exhibition in the *Abbey* case, and that the testimony of the subscribing witnesses does not overcome the presumption of due

[2] 7 Wm. 4 & 1 Vict., c. 26 (1837).

[3] Cal. Probate Code (Deering, 1944) § 50, subd. 2 and 3.

[4] In re Estate of Silva, 169 Cal. 116, 145 P. 1015 (1915); In re Estate of Culberg, 169 Cal. 365, 146 P. 888 (1915). This is in line with the great weight of authority. See ATKINSON, WILLS 280 (1937); 1 PAGE, WILLS, 3d ed., § 378 (1941).

[5] Principal case at 396. See also Robbins v. Robbins, 50 N.J.Eq. 742, 26 A. 673 (1893), where making an appointment with witnesses, prior to execution, was held publication.

[6] Cases collected in 127 A.L.R. 384 (1940). See also 34 HALSBURY'S LAWS OF ENGLAND, 2d ed., 60 (1940).

[7] ATKINSON, WILLS 276 (1937); 1 PAGE, WILLS, 3d ed., § 381 (1941).

[8] Nunn v. Ehlert, 218 Mass. 471, 106 N.E. 163 (1914).

[9] In re Hitchler, 25 Misc. 365, 55 N.Y.S. 642 (1898).

[10] In re Mackay, 110 N.Y. 611, 18 N.E. 433 (1888). The facts of this case are strikingly similar to the principal case.

[11] In re Bragg, 106 Mont. 132, 76 P. (2d) 57 (1938), is probably the leading case. See also Brilie v. Wilkie, 373 Ill. 409, 26 N.E. (2d) 475 (1940); Eggleston v. Eggleston, 16 Ohio C.C. (n.s.) 455 (1907). A few early New York cases which took this position have long been overruled. See 127 A.L.R. 384, 389 (1940).

[12] 183 Cal. 524, 191 P. 893 (1920).

[13] By reference to the holding in Re Gray's Estate, 75 Cal. App. (2d) 386 at 391, 171 P. (2d) 113 (1946).

execution. In the principal case, as in many decisions, one cannot be certain whether the court is resting its decision on the valid acknowledgment of the signature or merely on the fact that the signatures of witnesses, if genuine, raise a presumption of due execution which has not been overcome.[14] While the presumption of validity is acceptable, it is difficult to see how a person can acknowledge a signature to be his, where no signature can be seen.[15] The present court, in holding that the attestation clause or publication of the will is a substitute for acknowledgment of signature by exhibition, seems to ignore completely one of the mandatory provisions of the statute and to substitute its judgment for that of the legislature.

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[14] 2 PAGE, WILLS, 3d ed., §§ 755-756 (1941).
[15] See Nunn v. Ehlert, note 8, supra.