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WILLS-STATUTE REQUIRING WILLS TO BE SIGNED AT THE END THEREOF-FACTS CONSTITUTING COMPLIANCE

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WILLS—STATUTE REQUIRING WILLS TO BE SIGNED AT THE END THEREOF—FACTS CONSTITUTING COMPLIANCE—Testator had properly executed his will in all respects except that following his and witnesses' signatures there appeared a clause appointing executors.[1] New York statute law[2] provided that to be valid a will must be signed at the end by the testator. Surrogate Court had denied probate. On appeal, *held,* affirmed. The statute was not complied with, for the end of a will is not found until the last word of all the provisions is reached. *In re Winter's Will,* 98 N.Y.S. (2d) 312 (1950).

Under the common law[3] the problems arising when testator has failed to sign his will are (1) whether testator's signature in the body of the will was intended by him to be his subscribing signature;[4] (2) whether the instrument was intended by testator to be a preliminary draft or a final and complete will.[5] Seemingly, the New York statute in the principal case was designed to eliminate these problems,[6] although the reason generally given by New York courts is that it was designed to avoid fraudulent additions to wills.[7] Upon a literal reading, the statute seems to be unnecessarily harsh. Judicial decision in the guise of "interpretation" might have been expected to modify its severity.

[1] If this clause had been added after the due execution of the instrument, it would not affect the validity of what preceded the signature, for it would be in the nature of an ineffective codicil. In re Serveira's Will, 205 App. Div. 686, 200 N.Y.S. 464 (1923); Smith v. Ellis, 15 Ohio App. 38 (1921); Ward v. Putman, 119 Ky. 889, 85 S.W. 179 (1905); 1 PAGE, WILLS, 3d ed., §294 (1941).

[2] N.Y. Decedent Estate Law (McKinney, 1949) §21.

[3] Statute of Frauds, 29 Car. II, c. 3 (1677). This is the origin of the requirement that a will be in writing and that testator and witnesses sign it.

[4] Cf. Stone v. Holden, 221 Mich. 430, 191 N.W. 238 (1922), with Bamberger v. Barbour, 335 Ill. 458, 167 N. E. 122 (1929).

[5] Baker's Appeal, 107 Pa. 381 (1884), indicates that the legislature intended to remove such an evil.

[6] Adopting this view, see Tonnele v. Hall, 4 N.Y. 140 (1850).

[7] In re Gibson's Will, 128 App. Div. 769, 113 N.Y.S. 266 (1908); In re Conway, 124 N.Y. 455, 26 N.E. 1028 (1891).

But in the leading definitive case[8] it was held on facts substantially the same as the principal case that the whole will was invalid. The reasons for the decision as given by the court are (1) the literal requirements of the statute are not met;[9] (2) provision for an executor is a material part of the will and testator would presumably prefer to have the whole will invalidated than to have it stand with a material provision omitted.[10] The cases have since tended in two directions. One line suggests that technical rules of execution should not stand in the way of substantial justice.[11] These cases usually involve an immaterial provision following testator's signature. The reason given for not demanding that the statute's requirements be fulfilled is either that testator would prefer to have the part preceding his signature stand alone than have the whole will fall,[12] or that these provisions should be treated as not a part of the will because they add nothing to the effect of it.[13] The other line of decisions demands that the strict statutory requisites be fulfilled.[14] Concerning the authority in respect to provision-for-executor cases, a glance at other jurisdictions indicates that although a respectable number have this requirement[15]—that testator sign at the end of his will—few have any decisions on the subject. Kentucky[16] and California[17] have held that the provision for executor following testator's signature will not invalidate the whole instrument, while Pennsylvania[18] has agreed with New York. Ohio courts, which have not decided on the precise question, have stated that immaterial provisions following testator's signature will not invalidate the entire will.[19] It is submitted that on pure logic

[8] Sisters of Charity of St. Vincent de Paul v. Kelly, 67 N.Y. 409 (1876).

[9] Id. at 415, "To say that where the name is, there is the end of the will, is not to observe the statute. That requires that where the end of the will is, there shall be the name."

[10] Id. at 416, "It is evident that deceased considered the instrument to be one paper. We have no reason to say that he wished one part of it to be carried into effect if the whole was not."

[11] In re Gibson's Will, supra note 7; In re Serveira's Will, supra note 1; In re Field, 204 N.Y. 448, 97 N.E. 881 (1912).

[12] In re Gibson's Will, supra note 7.

[13] In re Serveira's Will, supra note 1.

[14] As illustrative: the principal case; Sisters of Charity of St. Vincent de Paul v. Kelly, supra note 8; In re Andrew's Will, 43 App. Div. 394, 162 N.Y. 1 (1899).

[15] Ark. Stat. Ann. (1947) §60–403; Cal. Prob. Code (Deering, 1949) §50; Fla. Stat. Ann. (1944) §731.07; Idaho Code (1948) §14.303; Kan. Gen. Stat. Ann. (1935) §22.202; Ky. Rev. Stat. (1948) §§394.040, 446.060; Mont. Rev. Code Ann. (1947) §91–107; N.Y. Decedent Estate Law (McKinney, 1949) §21; N.D. Rev. Code (1943) §56–0302; Ohio Gen. Code (Page, 1938) §10504–3; Okla. Stat. (1941) tit. 84, §55; Pa. Decedent's and Trust Estates (Purdon, 1950) tit. 20, §191; S.D. Code (1939) §56.0210; Utah Code Ann. (1943) §101-1-5.

[16] Ward v. Putman, supra note 1.

[17] McCullough's Estate, Myrick Probate Court Reports 76 (1875).

[18] In re Wineland's Appeal, 118 Pa. 37, 12 A. 301 (1888). The result was changed by statute in 1917 which provided that only the provision following testator's signature is invalid. Pa. Decedent's and Trust Estates (Purdon, 1950) tit. 20, §191.

[19] Baker v. Baker, 51 Ohio St. 217, 37 N.E. 125 (1894); In re MacNealy's Will, 29 Ohio Op. 48, 14 Ohio Supp. 28 (1944). The other four jurisdictions enumerated agree that this is the general rule, but differ over application.

any exception to the statutory requirement is unjustified. The statute is clear and unambiguous. It requires that the testator's signature appear at the end of the will. Any writing following his signature that was intended by him to be a part of his will would constitute an invalidation of the entire will. A finding of immateriality or that testator would prefer to void that part than have the whole will fail appears to be of no significance as far as the statute is concerned.[20] The results in the cases, then, can only be explained as an evasion of the statutory requirements whenever avoidance of the entire will would be unconscionable, as when substantial justice is defeated by technical rules. That such an exception is justified seems indisputable, considering the possible evils to be cured by the statute in relation to the unfortunate result of having many wills refused probate solely on technical grounds. Especially is this so when the technicality is an immaterial provision that adds nothing to the effect of the will. It is surprising that the court in the present case refused to adopt this equitable exception. Although a provision for executor is material in that it adds something to the will, it does not dispose of property. In the usual case it has no more bearing on testator's testamentary plan of distribution than does an immaterial provision and it is submitted that for such provision to invalidate the entire will is just as unconscionable.

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[20] In re O'Neil's Will, 91 N.Y. 516 (1883); 21 CORN. L. Q. 351 (1936).