Michigan Law Review

Volume 42 | Issue 5

1944

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Allen C. Holmes
University of Michigan Law School

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Recommended Citation
Allen C. Holmes, *WILLS-INTERPRETATION OF WILLS STATUTE REQUIRING WITNESS TO SIGN "IN THE PRESENCE OF" THE TESTATOR*, 42 MICH. L. REV. 940 (1944).
Available at: https://repository.law.umich.edu/mlr/vol42/iss5/15

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WILLS—INTERPRETATION OF WILLS STATUTE REQUIRING WITNESS TO SIGN "IN THE PRESENCE OF" THE TESTATOR—Decedent died leaving a purported will dated October 30, 1930, by the terms of which all her property, real and personal, was devised to her daughter, the appellant herein. The decedent's husband was made executor. The document was perfectly regular upon its face. It was witnessed by two persons and the attestation clause recited "that we [the subscribing witnesses] were present and saw Susie Raby Alexander [the deceased] sign the above instrument." When the will was offered for probate one

of the witnesses was dead. The one who did testify stated that the will had been signed by the decedent when he first saw it, but that the decedent had acknowledged to him that she had signed it and that it was her will. *Held*, the will was not entitled to probate and the decedent's property passes by intestacy. *In re Alexander's Estate, Engberg v. Alexander*, (Utah 1943) 139 P. (2d) 432.

Utah and New Mexico are unique in demanding that the testator must sign in the presence of the witnesses and may not acknowledge his previously executed signature in their presence.[1] Perhaps Louisiana would also require this precise formality except of the dispositions of secret wills.[2] The Statute of Frauds [3] made no provision as to whether testator could merely acknowledge in the presence of witnesses or not, and the English Wills Act [4] merely required that the signatures should be made *or* acknowledged by the testator in the presence of the witnesses.[5] The earliest example of the requirement of subscription in the presence of the witnesses is an early New Jersey statute (passed in 1714).[6] In construing this statute (after it had been on the statute books for 116 years) the court consistently held that, although the acknowledgment by the testator that he signed may be proof of signing, yet such acknowledgment was not an actual signing in the presence and consequently not sufficient.[7] Both the Utah [8] and the New Mexico courts have adopted this position. It would seem, however, that there are certain arguments which could be advanced for a contrary conclusion. It is difficult to imagine a situation in which this requirement would give any greater protection to the testator than would his acknowledgment, for the witnesses need not see the contents of the will. The testator must publish it and witnesses must sign and attest it, yet it could be so folded as to produce the same situation as though the testator had withdrawn from the room, signed it, returned and acknowledged it. Further, the solemnity accompanying the testator's acknowledgment is just as great as when he affixes his signature. If the witnesses intended to perjure themselves in order to probate a fraudulent will, this pro-

[1] Utah Code Ann. (1943) tit. 101, c. 1, § 5 provides as follows:

"1. It must be subscribed at the end thereof by the testator himself;

2. The subscription must be made in the presence of the attesting witnesses;

3. The testator must at the time of subscribing the same declare to the attesting witnesses that the instrument is his will; and,

4. There must be two attesting witnesses, each of whom must sign his name as a witness at the end of the will, at the testator's request, in his presence, and the presence of the other."

N. M. Stat. Ann. (1941) c. 32, § 106. See In re Riedlinger's Will, 37 N. M. 18, 16 P. (2d) 549 (1932), where the court held that a subsequent statute requiring attestation of a will in the testator's presence by two or more credible witnesses is not so comprehensive as to impliedly repeal prior existing statutory provisions not repugnant thereto.

[2] Bordwell, "Statute Law of Wills," 14 IOWA L. REV. 1 at 13-14 (1928).

[3] 29 Car. 2, 1676, c. 3, § 5.

[4] 7 Wm. 4 and 1 Vic., 1837, c. 26, § 9.

[5] 1 PAGE, WILLS, 3rd ed., § 349 (1941).

[6] Den ex dem Compton v. Mitton, 12 N.J.L. 70 (1830); Combs v. Jolly, 3 N. J. Eq. 625 (1835); Den ex Dem Mickle v. Matlack, 17 N.J.L. 86 (1839).

[7] 115 A.L.R. 689 at 698 (1938).

[8] In re Wolcott's Estate, 54 Utah 165, 180 P. 169, 4 A.L.R. 727 at 731 (1919).

vision gives no aid to the testator. The statute merely makes it easier for a witness who desires to prevent probate of a certain will, for some reason, to cast doubt upon its validity. A different but similar and much more significant defense against fraud is the requirement of the Utah statute providing for two witnesses, each of whom is to sign "at the end of the will, at the testator's request, in his presence, and in the presence of the other." [9] Yet the words "in the presence of," have, in many states, received a much more liberal interpretation than they have here. In *Sturdivant v. Birchett* the court recognized that the acts of the parties, though not within the literal words of the statute, "will furnish as perfect and complete a security against the frauds and imposition sought to be guarded against by the statute, as the actual or manual operation or writing their names under the very eyes of the testator." [10] Many cases have held that so long as the testator *could have* witnessed the signing by shifting his position, the requirement has been satisfied. If the witnesses or some one acting with them were determined to substitute another will, here is a situation where it could be done very easily. In spite of the dangers inherent in this broad interpretation, the courts continue to permit this substantial modification of the express language of the wills statutes.[11] Finally, Chief Justice Hornblower has made a very ingenious historical argument in his analysis of the New Jersey Wills Act of 1714.[12] The preamble recited that the act was passed to validate wills which had been made in compliance with an act of the legislature of the Province of East Jersey in 1682 which enacted "that all Wills in Writing, ATTESTED, by two credible witnesses, shall be of the same force to convey lands, as other conveyances." [13] Pursuant to this policy, the New Jersey statute stated "Be it . . . enacted . . . that all last Wills etc. signed by the testator *in the presence of two subscribing witnesses* shall be valid." [14] Clearly the phrase "in the presence of" meant nothing more than "attested before," else the 1714 act would not have acted as validating legislation. Therefore, when the second section stated that all wills must henceforth be subscribed by the testator in the presence of three credible witnesses, it could mean only that attesting was sufficient compliance with the statute, for nothing was indicated as a reason for a more definite and limited meaning in the later section. Perhaps the precise argument cannot be made in regard to the Utah statute,[15] but it does suggest a method of approach

[9] Utah Code Ann. (1943) tit. 101, c. 1, § 5 (4) quoted supra, note 1.

[10] 51 Va. 67 at 72 (1883). In this case the witnesses were out of the room of the testator when they signed their names and he could not possibly see them from where he was. They returned in two or three minutes. One stated, "Here is your will witnessed." The statute in effect at that time in Virginia required the witnesses to sign "in presence of" the testator.

[11] P. H. Winston, "Attestation in the Presence of the Testator," 2 VA. L. REV. 403 at 409 (1915).

[12] Den ex dem Mickle v. Matlack, cited supra, note 6, Chief Justice Horblower wrote the dissenting opinion in this case.

[13] Id. at 94.

[14] Ibid.

[15] Subdivisions 2 and 3 of Utah Code Ann. (1943) tit. 101, c. 1, § 5 were passed in 1886 when Utah was still a territory. Utah Laws, 1886, c. 17, p. 34. No explanation for the change is suggested in the cases.

which would give a liberally inclined court (this was a three to two decision) a legal pathway whereby it could give effect to the intent of the testator without shocking all the canons of statutory interpretation too greatly. The law of Utah, however, and of New Mexico as well, seems too well settled to expect any future court to adopt any view other than the one enunciated in the principal case.

Allen C. Holmes