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WILLS—EXECUTION—*Lacey et al.* v. *Dobbs.*—50 Atlantic Reporter, 497. (Court of Errors and Appeals of New Jersey. November 15, 1901.)—Perhaps no branch of the law from the layman's point of view should in natural justice be more free from doubt than that directing the formalities necessary to the validity of a will, for although the right to divert property by will out of the channel fixed by law to prevent its becoming common again at the death of the owner may have had its origin in a mere privilege of legislative enactment, yet to-day, by reason of long usage, this privilege has come to be looked upon by the public as a natural right. However this may be, it must be confessed that at the present time few branches of the law are more fruitful of litigation. Beginning with the statute of frauds (29 Car. II.) and continuing under later statutes down to the present time, frequent cases have arisen concerning the office or purpose of witnesses under each particular statute. Such was the present case. The act of New Jersey upon which

the validity of all wills depends (3 Gen. St., p. 3760) provides that "all wills and testaments . . . shall be in writing, and shall be signed by the testator, which signature shall be made by the testator or the making thereof acknowledged by him, and such writing declared to be his last will, in the presence of two witnesses present at the same time, who shall subscribe their names thereto as witnesses, in the presence of the testator." The question presented was whether under this statute it is essential to the validity of the will that everything required to be done by the testator should precede in point of time the subscription of the witnesses, it having been proved that the signature of the deceased to the paper writing produced, had been made *after* the subscription of the putative testamentary witnesses, although on the same occasion and while they were still present. The majority of the court after renouncing a dictum in *Mundy* v. *Mundy,* 15 N. J. Eq. 290 (1858), to the effect that the order of signing is not material to the validity of a will, came to the conclusion that it is the entire testamentary act, including the testator's signature or acknowledgment of signature which the witnesses are to attest by their subscription, and consequently that the former must precede the latter in point of time.

As there was a strong dissent in the present case, it can be imagined that the question is not one entirely free from doubt, or one upon which the statutes of other jurisdictions have received a unanimous interpretation. Before considering the law as it stands under the statutes of the various states, it may perhaps be well to consider the decisions having any bearing upon this subject which have arisen under the two great English statutes, viz: the Statute of Frauds (29 Car. II., c. 3, § 5) and the modern Wills Act (1 Vict., c. 26), because these acts have served as models for the act concerning wills of nearly every state of the Union. It follows that while the interpretation placed upon them by the English courts is not binding upon the courts of this country, yet (as said in the present case) "such interpretation is highly persuasive."

The statute of frauds (29 Car. II., c. 3, § 5), which was the first act to require witnesses to wills disposing of realty, provided that such devises "Shall be in writing and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed, in the presence of the said devisor, by three or four credible witnesses, or else they shall be utterly void and of no effect." It was not until this act had been superseded by the Victorian statute that the question presented in the present case ever arose in England. For this reason any attempt to define the interpretation which the courts would have placed upon the words "attest and subscribe" must be in its very nature purely

conjectural; and it is for this reason that the decisions of states whose statutes are modeled after the one in question differ; those arising under statutes actually or professedly modeled after the more explicit statute of Victoria being unanimous.

The first case arising under the statute of frauds which throws any light upon this question is that of *Peate* v. *Ougly*, Comyns, 197 (1710). The question presented was whether a codicil to the will there produced was well executed. The will itself was written prior to the Stat. 29 Car. II. (1668-69). Subsequent to this statute the codicil in question was added, extending to the foot of the paper, and when produced, had the name of the devisor and his seal attached. At the top of the will was written, "signed, sealed and published as my last will and testament, in the presence of, the same being written here for want of room below." Then followed the names of the witnesses. The only surviving witness testified that when he and the other witnesses signed, the paper was so folded that they could not see the writing; neither did the deceased tell them it was his will; "but he believes this to be the paper, because his name is there and the names of the other witnesses, and he never witnessed any other deed or paper for the earl. And though the earl did not set his name and seal to the will in their presence, yet he had often seen the earl write, and believes the whole will and codicil to be in his handwriting."

On behalf of the contestants it was argued that "the execution of the will (codicil) is not good within the statute 29 Car. II., for it is not sufficient that the witnesses write their names in the presence of the testator without anything more, but they must attest everything, viz: the signing of the testator, or at least the publication of his will; but here the testator neither signed the will in their presence, nor declared it to be his last will before them."

In support of the will it was argued, that "the execution is sufficient within the statute, for there is no necessity that the witnesses see the testator write his name, and if he writes these words, *signed, sealed* and *published* as his will, and prays the witnesses to subscribe their names to that, it will be a sufficient publication of his will though the witnesses do not hear him declare it to be his will."

Trevor, C. J., "inclined that here was sufficient evidence to find the codicil well executed, and the jury found it accordingly."

It will be noticed that the only question left to the jury was whether the codicil was "well executed;" in other words, whether the testator's signature and seal had been affixed to the paper at the time the witnesses signed, and the verdict can be justified only upon the ground that the jury found such to have been the case. Even the argument in support of the will implies such a necessity; the two arguments differing only as to whether

there had been a sufficient publication or expression of intent on the part of the testator that the paper *as a completed whole* should take effect as a will. However, this may be, the fact that in this case the witnesses were unable to attest the due execution of the will and were of service merely for purposes of identifying the paper produced, has given rise to the doctrine which prevails in several of the states (notably Kentucky and Virginia) that the purpose of witnesses' subscriptions under statutes similar to the statute of frauds is merely that of identification, and hence it is immaterial whether their signatures precede or follow that of the testator.

Another case bearing indirectly upon this subject is *Wyndham* v. *Chetwynd,* 1 Burrows, 414 (1757). The question there raised was whether a will of land attested by three interested witnesses was duly attested by three credible witnesses within Stat. 29 Car. II., c. 3. Lord Mansfield at p. 21 of the report uses this language: "Suppose the subscribing witnesses honest, how little need they know? They do not know the contents; they need not be together; they need not see the testator sign (if he acknowledges his hand it is sufficient); they need not know it to be a will (if he delivers it as a deed it is sufficient)." This language seems to imply a signing by the testator before the witnesses, but it also seems to imply that the purpose of the witnesses is to identify the paper, not to attest its execution.

A third and last case is *Roberts* v. *Phillips,* 4 El. & Bl. 450, which was decided as late as 1855. The will (which was executed in 1828 and was therefore governed by the statute of frauds) was written on three sides of a folded sheet of paper. On the last was the signature of the testator and an attesting clause subscribed by two witnesses. On the second page appeared the name of a fourth person. The jury found that he signed as an attesting witness at the same time as the others. The court held that the will was duly attested. Lord Campbell, C. J., said, "The mere requisition that the will shall be *subscribed* by the witnesses, we think, is complied with, by the witnesses who saw it executed by the testator immediately signing their names on any part of it at his request with the intention of attesting it." This last judicial construction of the statute of frauds clearly assumes a signing by the testator before the witnesses. The case, however, having arisen after the passage of the Statute 1 Vict. and after the rendition of several decisions thereunder to the effect that the signature of the testator must precede those of the witnesses, the language above quoted should not be given too much weight, for although Lord Campbell in his opinion complains of the hardships caused by the new act, yet it is not at all unlikely that in using the language above, he was strongly influenced by the then established law as laid down in these decisions.

The general result of the cases under the statute of frauds appears to be that while they all assume that the signature of the testator has preceded the subscription of the witnesses, yet they also assume that the only purpose of the witnesses is to attest the writing itself for purposes of identification when it is produced for probate, and not to attest the due execution including signing by the testator. And it is to be observed that by the wording of the statute itself, it is the declared written will and not the testator's signature which is to be attested. Had the present question arisen in England under this statute the result, in view of the loose construction placed upon it, is exceedingly doubtful.

To remove these doubts existing under the statute of frauds and to bring testaments of personalty, which up to this time had been left to the ecclesiastical courts unaffected by legislation, into uniformity with devises of land, "An act for the amendment of the laws with respect to wills" was passed by Parliament in 1837 (1 Vict., c. 26). Section 9 of this act provides that "no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; that is to say, it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

A case identical to the one here in discussion arose under this act in 1841 (*In the goods of Olding,* 2 Curt. Ecc. 865) *ex parte* upon motion for probate of a will which had been signed by the testator after the witnesses had subscribed their names. Motion for probate was denied, no opinion being delivered. The same question was presented the next year (1842) in *Goods of Byrd,* 3 Curt. Ecc. 117. This case differed from the prior one only in the fact that after the signing by the deceased, the witnesses had placed seals opposite their names. Sir Herbert Jenner Fust said that he saw no real distinction between this case and *In re Olding.* "My opinion is," he said, "that the witnesses should subscribe the will after the testator has signed it." Motion for probate was rejected.

In *Moore* v. *King,* 3 Curt. Ecc. 243 (1842), the same judge in holding invalid a will in which one witness had signed after the testator, but upon a subsequent day had acknowledged his signature in the presence of a second witness who then signed, said, "I am inclined to think that the act is not complied with, unless *both witnesses* shall attest and subscribe *after* the testator's signature shall have been made and acknowledged to them when *both* are actually present at the same time." And in

Cooper v. *Bockett,* 3 Curt. Ecc. 648 (1843), although the evidence was held sufficient to establish the fact that the testator had signed before the witnesses, yet the court expressly said that the requirements of the act would not be complied with if the court were to hold "that a testator might sign, after the witnesses had subscribed, either at the same time, or two hours, or two weeks afterwards." The state of facts presented in *Peate* v. *Ougly* arose under this statute in *Ilatt* v. *Genge,* 3 Curt. Ecc. 160 (1842), and also in *Hudson* v. *Parker,* 1 Rob. Ecc. 14 (1844), and in both cases the will was held invalid. These cases, together with *Charlton* v. *Hindmarsh,* 1 Swab. & T. 433, and the same case affirmed in 8 H. L. C. 160, have settled once for all that under this statute it is the making or acknowledging of the testator's signature which the witnesses are to attest by subscription, and consequently such signature must of necessity precede those of the witnesses.

The American cases involving a decision of this question, which have arisen under statutes similar to the statute of frauds, viz: those statutes not in terms requiring a testator's signature, but only his declared written will, to be attested, divide themselves into two groups:

1. Those holding that there can be attestation before signature of testator.

2. Those holding that there cannot.

It is submitted that in all cases falling under (1) the subscriptions by the witnesses and signature by the testator formed substantially one transaction, no American case having apparently gone so far as to hold a will valid where the subscriptions by the witnesses and subsequent signing by the testator were separate and disconnected acts.

Probably the first American decision on this subject is that presented in *Swift* v. *Wiley,* 1 B. Mon. (Ky.) 114 (1840). The then existing Kentucky statute under which it was decided (Stat. 1797, Stat. Laws 1537-38) provided that last wills and testaments devising real estate shall "be signed by the testator or testatrix, or by some other person in his or her presence, and by his or her direction, and moreover, if not wholly written by himself or herself, be attested by two or more competent witnesses, subscribing their names in his or her presence." The controverted paper in this case was written by a third person, but was read to the testator, who thereupon approved its contents. Two witnesses then present subscribed their names as witnesses. Some hours later the testator subscribed his name in the presence of the two witnesses, "who still remaining with him, again acknowledged their respective signatures as subscribing witnesses." The physician who was present at this time also signed as a third witness. The will was held valid, the court resting its decision upon the distinction which they drew

between "attestation" and "subscription." They said, "to attest a will is to know that it was published as such, and to certify the facts required to constitute an actual and legal publication: but to subscribe a paper published as a will, is only to write on the same paper the names of the witnesses, for the sole purpose of identification. There may be a perfect attestation in fact without subscription. But to insure identity and prevent the fraudulent substitution of any other document than that which has been published and attested, the statute providently requires the *attesting* witnesses to *subscribe* their names in the presence of the testator: but it does not prescribe the order of the attestation and the subscription; and the attestation being intended to prove that a will had been published, but the subscription being required only to identify the document which had been attested as a will, whether the one or the other of these acts shall have been first in time, cannot be essential to the objects of the statute or the effect of the publication; nor can it be material whether the names of the attesting witnesses or that of the testator shall have been first subscribed, if, as in this case, those witnesses had been present when the testator either wrote his name or acknowledged it as his signature, and, being called on for that purpose, actually witnessed or attested that fact." The language above quoted is evidently based upon a misconception of the meaning of the word "attest," which, according to the best authorities, means to subscribe as a witness. Nevertheless this same case (*Swift* v. *Wiley*) was approved in the later case of *Upchurch* v. *Upchurch,* 16 B. Mon. 102 (1855), as laying down the proper distinction between subscription and attestation; and hence where the signatures of the witnesses were made by another, these were held sufficient under the statute, since the witnesses recognized the paper as the one which they "attested"—in the mental sense. Judge Gray, in the Massachusetts case of *Chase* v. *Kittredge,* 11 Allen, 49 (1865), draws the same distinction between "subscription" and "attestation," but reaches a different result on the ground that the witnesses are to subscribe "in proof of" their attestation. In the light of later decisions *Swift* v. *Wiley* can be best justified on the following grounds, which were apparently added as a mere make-weight: "Were it material," says Robertson, C. J., "we might, with obvious truth and propriety, consider the subscription of the names of the three attesting witnesses and of that of the testator, as one continuous series of acts, essentially indivisible as to time, the two first witnesses having remained with the testator until they had, in fact, attested his subscription and that of the third witness, and all being present attesting, altogether, the final act of publication, and of attestation and subscription as to each and all." Here we see the first appearance of the "same transaction" doctrine upon which all the

later cases justify the subscribing by the witnesses before the testator. The next Kentucky case, *Sechrest* v. *Edwards*, 4 Metc. (Ky.) 163 (1862) (as also *Upchurch* v. *Upchurch ubi supra*), arose under the Revised Statutes, Sec. 5, chap. 106, which provided in part that if the will be not "wholly written by the testator, the subscription shall be made, or the will acknowledged, by him, in the presence of at least two credible witnesses, who shall subscribe the will with their names in the presence of the testator." It will be noticed that the word "attest" does not appear. The court, however, held this provision to be a substantial re-enactment of the act of 1797, and said that under it (as held in *Swift* v. *Wiley* under the prior statute) it is not material whether the names of the attesting witnesses, or that of the testator, shall have been first subscribed, *if the witnesses be present* when the testator writes his name, or acknowledges his signature, and being called on for that purpose actually *witnessed or attested* that fact.

It is a significant fact that the court in basing this decision upon *Swift* v. *Wiley*, held that case to have been decided rather upon the circumstance that the witnesses still remained present when the testator signed or acknowledged his signature, than upon the distinction between "attestation" and "subscription." In giving the result of the prior decision, it will be noticed that they use these words as synonymous. This was probably a necessary result brought about by the omission of the word "attest" from the later statute. The case seems to show a drifting away by the Kentucky courts from the distinction between these words as laid down in *Swift* v. *Wiley* and an adoption of the "same transaction" theory.

Nine years after the decision of *Swift* v. *Wiley* (1849) a case very much the same arose in Virginia under a similar statute. *Rosser* v. *Franklin*, 6 Grat. 1. Briefly stated the facts were these: The will in question and also the signature of the testatrix were written by one of the witnesses. At the time the witnesses signed, she acknowledged it to be her will. Subsequently to their signing she affixed her mark. The court held the will to be valid, saying that "It is not necessary that the subscribing witnesses to a will should see the testator sign, or that he should acknowledge to them the subscription of his name to be his signature, or even that the instrument is his will. It is enough that he should acknowledge in their presence that the act was his, with a knowledge of the contents of the instrument, and the design that it should be the testamentary disposition of his property." The affixing of the mark, the court said, was apparently an afterthought, and in this aspect "it was a work of supererogation." But continuing, the court used this language: "And, moreover, the fact whether in the order of time the testatrix made her mark before or after the subscription

of the witnesses is, under the circumstances, in no wise material, insomuch as the *whole transaction* must be regarded as one continuous uninterrupted act, conducted and completed within a few minutes, while all concerned in it continued present, and during the unbroken supervising attesting attention of the subscribing witnesses." As an authority involving this "same transaction" doctrine the case is stronger than *Swift* v. *Wiley,* for while the Kentucky case was practically decided upon another ground, yet in the present case, upon the contingency that the making of the work was not a mere afterthought, this doctrine must constitute the entire basis of the decision. And in *Sturdivant* v. *Birchett,* 10 Grat. 67 (1853) the same court carried this doctrine so far as to hold that where the witnesses had signed in another room but had immediately thereafter acknowledged their signatures to the testator, this was a substantial subscribing of their names in the presence of the testator. The next case involving this doctrine to arise in chronological order was *O'Brien* v. *Galagher,* 25 Conn. 229 (1856). The Connecticut statute closely follows the wording of the statute of frauds, there being, however, the additional requirement that the witnesses shall subscribe in the presence of each other. Under it the court held the will valid where the witnesses signed before the testator, the latter, however, immediately thereafter affixing his signature. In the course of their opinion the court said, "The general and regular course undoubtedly is for the testator, in the first place, to sign and execute the will on his part, and then to call upon the witnesses to attest the execution by subscribing their names. But where as in the present case witnesses are called to attest the execution of a will, and being informed what the instrument is, subscribe their names thereto as witnesses, and the testator on his part and in their presence duly executes the instrument as his will, and all is done *at one and the same time,* and for the purpose of perfecting the instrument as a will, we cannot say that it is not legally executed merely because the names of the witnesses were subscribed before that of the testator."

This case was followed four years later in Pennsylvania by *Miller* v. *McNeill,* 35 Pa. 217 (1860). The facts were these: The testator and the subscribing witnesses to his will were assembled around the same table at the same time. All signed a will in the presence of each other, but the subscribing witnesses wrote their names before the testator wrote his. The Pennsylvania statute (P. L. 1832-33, p. 249, § 6) provides that "every will shall be in writing, and unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof, or by some person in his presence, and by his express direction, and in all cases shall be proved by the oaths or affirmations of two or more competent

witnesses; and otherwise shall be of no effect." Under this statute the will was held valid. Woodward, J., in the course of a short opinion said, "Our statute contemplates, undoubtedly, a signature by the testator, and then a signing by witnesses in attestation of that signature, when witnesses subscribe at all; but where a transaction consists of several parts, all of which occur at the same moment, and in the same presence, are we required to undo it because they did not occur in the orderly succession which the law contemplates? . . . 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." Although the strength of this decision is somewhat weakened by the fact that under this act subscribing witnesses are not necessary (*Carson's Appeal,* 59 Pa. 493, 1868; *Frew* v. *Clarke,* 80 Pa. 170, 1875), nevertheless, it stands as the law in Pennsylvania in cases where the witnesses do actually subscribe.

The latest case, and the one in which this view has received its most comprehensive treatment, is *Kaufman* v. *Caughman,* 49 S. C. 159 (1896). Section 1988, Revised Statutes of that state, provides that "all wills and testaments of real and personal property shall be in writing, and signed by the party executing the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed, in the presence of the said testator and of each other, by three or more credible witnesses, or else they shall be utterly void and of none effect." In the present case the testator signed after the witnesses in point of time, but upon the same occasion. The court held the will valid, saying that under this statute (as differing from the statute 1 Vict.) it is not merely the signature of the testator which the witnesses attest, "but they attest the *will,* which is not merely the paper containing a declaration of the testator's mind or will, but includes all the statutory requirements essential to constitute the writing a will." Continuing the court said, "If it be asked, as Sir Herbert Jenner Tust asked in 2 Curt. 865, 'Is the paper a will before it is signed by the testator?' or if it be asked, can witnesses attest before it is made? the answer is, the testator's signature does not make the will, and that there is no will until testator and witnesses have all signed. In acts *substantially contemporaneous,* it cannot be said that there is any substantial priority." The case of *Chase* v. *Kittredge,* 11 Allen, 49, was distinguished on the ground that in that case the witnesses signed before the testator and *in his absence,* and hence their signing and that of the testator were not substantially contemporaneous acts.

From these authorities it will be seen that even those states which allow a signing by the witnesses before the testator, do so only upon the assumption that the two have been substantially

contemporaneous acts so as to make them both parts of the same transaction. It may be mentioned that while the exact case here in question has never arisen in Maryland, yet this doctrine appears to be recognized in that state. *Moale* v. *Cutting,* 59 Md. 510 (1882).

2. Examining next those cases arising under statutes similar to the statute of frauds in which the courts have refused to hold valid a will in which the signing by the witnesses has preceded the signing by the testator, the earliest case in point of time is *Ragland* v. *Huntingdon,* 1 Ired. (N. C.) 561 (1841). The North Carolina statute (Rev. St., c. 122, § 1) provided that a will or testament in order to be sufficient to convey an estate in lands must be subscribed in the presence of the testator by two witnesses at least. In this case the will was written the night before by one of the witnesses who subscribed his name as such. The next day the testator signed his name in the presence of the one who wrote the will, and another who immediately thereafter signed. In a short opinion, the court held the will invalid because it was not subscribed by *two* witnesses *in the presence of the testator.* This case was followed in North Carolina a few years later by *In re Cox's Will,* 1 Jones, 321 (1854), with facts substantially identical. Relying upon the prior case, the court held that "the witness must, *in fact,* subscribe his name in the presence of the testator. The *act* is necessary. No words will answer the purpose." The court in giving this latter decision was apparently influenced to a great extent by the English decisions under the statute of Victoria, which it pronounced similar to that of North Carolina. This seems to have been an erroneous view. These two decisions while authority for the fact that statutes requiring subscription *in the presence of the testator* are to be strictly construed, are no authority for the case in which there has been a subscription in fact in the presence of the testator, but preceding his in point of time.

A case in which the witnesses signed in the presence of the testator, but one of them several months prior to the signing by the testator, and who was absent when the testator and the second witness signed, arose in Indiana in 1867 in the case of *Reed* v. *Watson,* 27 Ind. 443, under a statute pronounced by the court to be similar to the fifth section of Statute 29 Car. II., 2 G. & H. 555. Upon these facts the will was held invalid. In the opinion, the same distinction was made between attestation and subscription as in the Kentucky cases, the court saying, "To attest is one thing, to subscribe is another." The statute was construed to mean that the witnesses to the will are to "attest, that is witness, its publication or execution by the testator." The decision was based entirely upon the fact that the first witness being absent when the testator signed, had not "attested"

in the sense here laid down, the execution of the will, viz: the signing by the testator. The court said, "The authorities, we think, all concur, that, to constitute a valid *attestation* of a will, the testator must either sign in the presence of the subscribing witnesses, or acknowledge his signature to them. Here, as we have seen, the testator did not sign the will in the presence of Marsh, one of the subscribing witnesses, and it does not appear that Marsh ever saw the will after it was signed by Reed (the testator) or knew that it was so signed." This language and the fact that *Swift* v. *Wiley* and *O'Brien* v. *Gallagher* were cited with approval rather shows that the decision would have been otherwise had the first witness been present when the testator and the second witness signed.

In 1869 a case arose in Georgia (*Duffie* v. *Corridon,* 40 Ga. 122) in which the witnesses signed in the presence of the testatrix, but through oversight she neglected then to sign. The next day the testatrix signed in the presence of two of the former witnesses and of a third, who then subscribed his name; the two original witnesses acknowledging their signatures. The court adopted practically the same view as that expressed by Justice Gray four years previously in *Chase* v. *Kittredge,* 11 Allen (Mass.) 49, and held that it is the signature of the testator that is to be attested, and that as subscription is in evidence of attestation, it must necessarily precede. It will be observed that while the reasoning in this case is broad enough to cover one in which the previous signing by the witnesses and the subsequent signing by the testator are so closely connected in point of time as to be each part of one and the same transaction, still upon its facts it is no authority for such case. This case, however, did arise in Georgia in 1891, *Brooks* v. *Woodson,* 87 Ga. 372. In their opinion the court held the principle laid down in the prior case in their state correct, and hence the fact that the acts were all parts of the same transaction immaterial. "To witness a future event," said the court, "is equally impossible, whether it occur the next moment or the next week."

In the Massachusetts case above referred to in which this doctrine was first laid down, *Chase* v. *Kittredge,* 11 Allen, 49, the signature of one of the witnesses was made prior to that of the testator and *in his absence,* being subsequently acknowledged when the testator and the other witnesses signed. The case might therefore have been decided solely upon the ground that there had not been a sufficient compliance with the statute requiring that the will shall be "attested and subscribed in the presence of the testator."

Judge Gray went further, however, and after making the same distinction between attestation and subscription as was first made in the Kentucky cases, held that it is the completed will which is to be attested, and that the subscription being in

evidence of the previous attestation, it must necessarily follow the signing of the testator. In the course of his opinion he said, "The 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. It is as difficult to see how they can subscribe in proof of their attestation before they have attested, as it is to see how they can attest before the signature of the testator has made it his written will." Although this case was not one in which the facts constituted one transaction as nearly as could be in the order of events, such case did arise in Massachusetts as late as 1900—*Marshall* v. *Mason,* 176 Mass. 216. In this case the witnesses signed first in the presence of the testatrix, she signing immediately afterwards in their presence. Holmes, C. J., without going into the question held the reasoning of Justice Gray in the previous case broad enough to cover this state of facts, and the will consequently invalid.

The preceding cases are apparently the only ones in which this question has been directly presented under statutes similar to 29 Car. II. In *Fowler* v. *Stagner,* 55 Tex. 393 (1881), although the exact point was not in issue, the case being similar to *Roberts* v. *Phillips* (*supra*), the court used this language, "It was not material, we think, in what part of the instrument they signed their names as witnesses, if that were done after the subscription and acknowledgment of it by the testator, and with the purpose of attesting it as subscribing witnesses." This would apparently show that should the case arise in Texas, the court would require a signing by the testator before that of the witnesses.

As a general result of the cases arising under statutes similar to the fifth section of the statute of frauds, three propositions may be laid down:

1. The statute requiring a subscribing "in the presence of the testator," such subscribing must be *in fact* in his presence.

2. Where the will is subscribed by the witnesses in the presence of the testator, but is not signed by him until a subsequent time, whether the witnesses be then present or not, the will is invalid.

3. Where the prior subscribing by the witnesses and the subsequent signing by the testator are so closely connected in point of time as to constitute but parts of the same transaction, the authorities differ according to the meaning given "attestation" and the purposes ascribed to "subscription," the latter holding that even in such case the signature of the testator must precede the subscribing by the witnesses.

Few cases of this nature have been presented to the courts under statutes similar to § 9 of 1 Vict., c. 26, viz: those statutes in terms requiring the signature of the testator, not merely his

declared written will, to be attested. This is probably because the statutes concerning wills of the majority of the states follow the older English statute. A statute falling under this head, though passed seven years prior to the Victorian statute, is that of New York, which provides as follows: "Every last will and testament of real or personal property, or both, shall be executed and attested in the following manner: (1) It shall be subscribed by the testator at the end of the will. (2) Such subscription shall be made by the testator, in the presence of each of the attesting witnesses, or shall be acknowledged, by him, to have been so made to each of the attesting witnesses. (3) The testator at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument, so subscribed, to be his last will and testament; and (4) there shall be at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will at the request of the testator." 2 Rev. St., p. 63, § 40. In Ruddon v. McDonald, 1 Bradf. 352 (1850), it was held that this statute prescribes *all* the formalities necessary to the valid execution of a will. The question still remained as to the order in which they should be performed. The first case requiring a decision of this question was *Vaughan* v. *Burford*, 3 Bradf. 78 (1854), in which the will had been signed by the witnesses before the testator but upon the same occasion. Surrogate Bradfield held the will to have been properly executed under the statute, and admitted it to probate, justifying his decision in the following words: "The particular order of the several requisites to the valid execution of a testament is not at all material provided they are done at the same time, that is, as part of the same transaction." This decision stood as the true interpretation of the statute until 1868, when a case involving similar facts was presented to the Court of Appeals. (*Jackson* v. *Jackson*, 39 N. Y. 153.) That tribunal, reversing the decree of the Supreme Court, which had affirmed the Surrogate, held such will invalid under this statute, between which and the statute of 1 Victoria there was said to be no material difference. In the course of his opinion, Woodruff, J., pointed out that as the witnesses are to attest the signing by the testator, if they sign before, "for some period, longer or shorter, as the case may be, those signatures attest no execution; they certify what is not true;" and that if while the will is in this condition, the testator should sign in their absence, the presumption of due execution upon the death or absence of the witnesses would be destroyed. Continuing, he negatived any idea that under such statute the one transaction doctrine could have any place, because the statute in terms requires the attestation of a past transaction, and any relaxation of this rule would be open to danger and abuse. This case was followed in *Sisters of*

Charity v. *Kelly,* 67 N. Y. 409 (1876), so that the law in this respect under the New York statute seems to be perfectly well settled.

The only other case involving this question which has arisen under a statute similar to that of 1 Victoria appears to be the one here in discussion. Considering the interpretation placed upon their statute by the English courts and also those of New York, and the arguments advanced in support of the same, the decision of the majority of the court in the present case seems to be justified both upon principle and authority.

Besides those states having statutes the wording of which follows closely that of either of the English acts, there are some whose statutes are in terms unique. In these states a decision of a case involving facts of this nature must depend entirely upon a judicial determination of the meaning of the particular act in question unaided by previous authority. Such a statute is that of Illinois, which received its first interpretation in *Hobart* v. *Hobart,* 154 Ill. 610, where it was held that it is the *will* which is to be attested, and not the signing by the testator. This case was followed by *Gibson* v. *Nelson,* 181 Ill. 122, which held that the order of signing is immaterial, although there was a dictum in the case to the effect that the decision would have been otherwise had not all occurred upon the same occasion.

The general result of the cases appears to be that whether the statute in question follows 29 Car. II. or 1 Vict., by the weight of recent authority the signing by the testator must in point of time precede that of the witnesses. In some states an exception is made to this rule and the will held valid where the prior signing by the witnesses and the subsequent signing by the testator all occurred upon the same occasion so as to be merely parts of one transaction, but this exception seems to have no place under statutes following that of 1 Victoria, but to be confined to those in terms similar to 29 Car. II. Under statutes in terms following neither of the English acts, the courts in deciding this question must determine whether it is merely the will, or the signing by the testator, which is to be attested by the witnesses. If the former, then the one transaction doctrine may or may not be applied; if the latter, then the signing by the testator must precede that of the witnesses irrespective of this fact.

D. H. Y.