TREATISE ON SIGNATURES ON WILLS

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The Wills Act (1) provides by S. 4, "that no will shall be valid unless it is 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 subscribe the will in the presence of the testator, and in the presence of each other; but any will, although not signed at the foot or end thereof, shall be valid if it be apparent from the will and position of the signature, or from the evidence of the witnesses thereto, that the same was intended by the testator to be his last will; but no form of attestation shall be necessary."

One may see from the above section that one necessary condition for the validity of a will is that it should be signed. This signing does not exclude the act being done in pencil. This article considers what amounts to "a signing." It has been decided that a mark is sufficient; but such "mark" must leave a trace; it is not sufficient to point to or touch the paper with a dry pen. (2) A writing read to the testator, who makes an oral declaration before witness that he accepts it as an expression of his last wishes, but is unable to sign it owing to the injuries received, cannot be treated as a will made according to the form derived from the law of England nor be proved as such. (3) There must be a mark of some kind which must be acknowledged by the testator as his mark, and such mark will suffice even if the testator is able to write. (4) (It is of significance that the testator's name need not appear anywhere on the will). (5) If a mark is sufficient, it follows that the testator's initials would also suffice. (If the signature is a wrong or assumed name, or that against the mark was written a wrong name, it may still be a valid will). In the case where a will purporting in the commencement and testimonium clause to be that of Susannah Clarke, was executed by a mark, against which was written the name Susannah Barrel, and was handed by Susannah Clarke, as her will to one of here executors, shortly before her death. (Barrel had been the maiden name of Susannah Clarke). It was held that as there was sufficient evidence that the mark was that of Susannah Clarke, the execution of the will by her was not vitiated by another name having

(1)—Chapt. 173, R.S.N.B., 1927.
(2)—Kevil v. Lynch, Ir. R. 8 Eq. 244.
(3)—Ex p. Sampson, 18 Que. P.R. 368.
(4)—Taylor v. Dening, 3 Nev. & P. 228.
(5)—In b. Bryce, 2 Curt. 325.

been written against her mark. (6) It also has been decided that where the testator's hand was guided in making the mark, this satisfies the statute, (7) even if the witness is not told that it is a will. (8) Where a testatrix has executed a will by making her mark and the evidence fails to show that she was in full possession of her faculties, it will not be admitted. (9)

"Sealing alone will not as a general rule satisfy the statutory requirement that a will must be signed by the testator. But it is conceived that a distinctive seal, if shown to have been impressed by the testator with the design of authenticating the instrument would be good as a signature by mark." (10) In Re Wilson Estate, 19 D.L.R. 698, it was held the impress of the testator's natorial seal upon the will was a sufficient signature upon which to grant proof in common form.

The testator's name signed to the will by another person at the testator's direction, done in his presence and in the presence of two witnesses who so attested the instrument, was held to be a will executed in accordance with the requirements of the Wills Act. (11) That "other person" may, it seems, be one of the witnesses, as in Smith v. Harris. (12). It has been decided that he may sign his own name instead of the testator. (13) And on the ground that whatever would be good as a signature, if made by the testator, must be equally good if made by his direction, an impression of his name stamped by his direction was held good, as a mark would also have been. (14) One might also hold that the testator's name typewritten on the will by his direction would also be valid.

It is quite sufficient that a will contained in several sheets of paper, have one signature; (15) and the sheets need not be in order nor fastened together as long as the Court is satisfied that when the will was signed and attested the other sheets were in the room, and that the testator treated the whole as his will. (16) However there must be a dispositive part of the

(6)—In b. Clarke, 27 L.J.P. 18.

(7)—Wilson v. Beddard, 12 Sim. 28.

(8)—In Goods of Moo.e, 1901.

(9)—Thuot v. Berger, 77 Que. S.C. 211; Leger v. Poirier, 1944, 3 D.L.R. 1; Peden v. Abraham, 1912, 3 W.W.R. 265.

(10)—Jarman on Wills, 7th Ed. Vol. 1, Page 96.

(11)—Banks v. Goodfellow, L.R., 50 Q B. 549 and Re Gibson, N.S.C.A. 1939, 1 D.L.R. 591.

(12)—1 Rob., 262.

(13)—In b. Clark. 2 Curt. 329.

(14)—Jenkins v. Gaisford. 3 S.W. & Tr. 93.

(15)—Lewis v. Lewis, 1908. P. 1.

(16) Gregory v. Her Majesty's Proctor, 4 N. of C. 620.

will contained on the sheet which bears the signature and attestation. The signature may indeed be on a separate piece of paper containing nothing but the signature and attestation, but such piece of paper must be "attached" to the will itself, and proved to have been so attached before execution. (17) The degree of attachment required is a discretionary matter for the Court.

With regard to the preceding paragraph it might be well to refer to several conflicting cases. In the Goods of Mann, 1942, P. 146 was a case where a testatrix wrote out her will on a sheet of paper. One of the attesting witness was present during the whole of the time while the testatrix was so engaged and the other attesting witness was present during the writing of the latter part of the paper. After completing the paper the testatrix wrote on an envelope the words: "the last will and testament of Jane Catherine Mann." She then pointed out to the two witnesses that the documents which she had written were her will, and requested the two witnesses to sign their names as witnesses thereto. Thereupon the two witnesses, in the presence of the testator and in the presence of one another, subscribed the paper. After the witnesses had signed the document, the testatrix placed it in an envelope but she did not sign it. The paper and envelope were deposited with the bankers of the testatrix for some six months, at the end of which time she took the will to her home. Soon afterwards she was admitted to hospital and took her will with her. There she had the document in its envelope placed in a further envelope and sealed the covering envelope with sealing wax. This whole thing was handed to her executrix. It was held that probate would be decreed of the two documents, the signature on the envelope being accepted as the signature of the will, since (a) the circumstances were so well ascertained as to preclude all possibility of fraud, (b) the envelope had a far closer relationship to the document which it enclosed than a second or wholly discontinued piece of paper would have had, (c) both the envelope and the paper were holograph documents written on the same occasion and, (d) both documents were written in the presence of the attesting witnesses, (e) the history of the documents clearly showed the genuine nature of the transaction.

However, in the Estate of Bean (1944) 2 A.E.R. 348, where the circumstances were that the testator used a printed form of will but did not sign this in the space provided for, but rather wrote his name on the back of it, and also filled in spaces on the envelope on which were printed, "The last will

(17)—In b West, 32 L.J. 182.

and testament of ..... of ..... To ..... Executor. Date." The attesting witnesses then signed their names and added their addresses in the space provided in the document for the purpose. It was held that the document and envelope could not be admitted to probate and the name "George Bean" written on the envelope was not the signature to the will.

In Re De Gruchy, 56 B.C.R. 271, the testator signed a printed form of will on the back under the words "Will of ....." and then had two witnesses sign their names in the usual place under the testimonium. The decision of the Court was that the will was executed in compliance with S.7 of the Wills Act, R.S.B.C. 1936.

This treatise is by no means complete regarding the problems of the testator's signature. Our treatise leads us now into an inquiry as to why should such problems arise. If the testator knows S.4 of the New Brunswick Wills Act there should be no difficulty, providing he follows it to the letter. One of the difficulties is that most people feel that making a will denotes a weakness, and persist in leaving such a duty until near death. Another is the idea that the printed Will forms sold commercially are better than solicitor's advice. The obvious conclusion to eradicate the disputes over signatures, would be to make your Will while you are in full possession of your faculties, and under the advice of a solicitor who should supervise such signatures.

DEBATING COMMITTEE

In an active term of debating the Law School Debating Society scored two wins and two losses. On January 21, the Dalhousie team, composed of Neil McKelvey and Don Cross, defeated the negative arguments of the Law School team of Gordon Fairweather and James Lunney, on the resolution: "Resolved, that Members of Parliament should be allowed to vote freely and not according to party caucus."

In the Co-ed Radio Debate, Beatrice Sharp and Elizabeth Hoyt of the Law School successfully contended that "Comics are no laughing matter," against a team from the University of New Brunswick.

At Fredericton on February 25, John Gray and Margaret Warner of the Law School defeated the "Hillmen" Bob Horner and Tom Gibbs, who were affirming "Labour unions should be and remain non-political."

On the same night and on the same resolution an Acadian team scored a win over the Law School team of Gordon Harrigan and Vernon Copp in a debate held at Acadia.