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The Execution of Wills

A.J. White Hutton

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The Wills Act of 1917, like that of 1833, stipulates that the will shall be signed "at the end thereof." These words have been interpreted by the courts in a series of interesting cases. In an early case \(11^2\) Gibson, C. J., explained that it was not essential that the different parts of a will be physically connected but it was sufficient if they are connected by their internal sense or by a coherence and adaptation of parts. Accordingly it was held \(11^3\) that a will signed at the end of the obviously inherent sense, though not at the end in point of space, complies with the requirement as "signed at the end thereof." Here the will was written on the first and third pages of a sheet of paper and signed at the end of the third page. Another application \(11^4\) is where the testatrix after writing the first page, passed the second and wrote on the third, returning then to the second where the will was finished about the middle of the page. The name of the testatrix then followed with the names of the witnesses. This was a signing at the end as required by the statute. Likewise \(11^5\) a codicil was held to be signed at the end when the page contained paragraphs from one to eight downward and near the bottom of the page appeared the name and seal of the testatrix and the usual attestation clause. Along the entire left margin of the page four more paragraphs were added numbered from nine to twelve inclusive. An issue was refused and on appeal the decree was affirmed. Said Michell, C. J.:

"In the present case the connected sense of the text is entirely clear, though it does not follow the usual order of arrangement. But it does not deviate from it more than many letters written in the style of the present day when the writing jumps from the first
to the third page and then back to the second. The full substance
of the testatrix's intent and its expression are there, and the signa-
ture is at what she intended and regarded as the end of her will.
When that is manifest the continuity of sense and not the mere po-
position on the page must determine the statutory 'end thereof' as the
place for the signature.'

The courts have been liberal in not requiring the testator's signature to be
in immediate juxtaposition to the end of the dispositive matter of the will. In
one case\textsuperscript{116} the granting parts were all on one page and at the top of the
reverse side was written the usual attestation clause, followed by the
words, "Witness my hand and seal," and the decedent's name. It was held
that the interposition of a blank space between the dispository portion of the
will and the testator's signature was not material and hence the decree admitting
the will to probate was affirmed. Quoting from Hawkins, J., of the lower
court, it was said:

"Who shall undertake judicially to say that the subscription
shall be one-eighth of an inch, one-half of an inch, two inches,
or ten inches from the last line of the instrument? The distance
from the last line has not been fixed by statute. The place named
by the statute is the end."

In another case\textsuperscript{117} the will was declared validly signed when the name ap-
peared at the bottom of the second page otherwise blank.

However, the signature must be placed at the end of the will and this must be on a page of the instrument so that there is a necessary connection with the
dispositive portion by internal sense or by a coherence and adaptation of parts.
Consequently, there was no valid execution when the names of the
testator and witnesses were placed on the folded back of the will, there being thus no connection whatsoever between the parts of the instrument and
the signature.\textsuperscript{118} Likewise the will was held not properly signed where
testatrix signed her name in the attestation clause of a printed form of will.\textsuperscript{119}
In another case also\textsuperscript{120} a will proper in form but not signed at the end thereof
was held a nullity although decedent had inserted his name at various other
blank spaces on the document.

In another case\textsuperscript{121} an envelope left by decedent contained four loose
and detached papers, having the appearance of being cut from a will
previously made; one was in form an introduction to a will, another was
numbered eight and contained testamentary directions, a third was an attestation

\textsuperscript{116} 204 Pa. 479, 54 A. 313 (1903).
\textsuperscript{117} 96 Pa. Super. 26 (1929).
\textsuperscript{119} 81 A. 212 (1911).
\textsuperscript{120} 606, 13 A. (2d) 125 (1940).
\textsuperscript{121} 336 Pa. 241, 9 A. (2d) 401 (1939). \textit{And see} Stinson's Estate, 232 Pa. 230,
\textsuperscript{122} 81 A. 212 (1911).
\textsuperscript{123} 202, 108 A. 614 (1919).
clause in usual form and the fourth had the testator’s name written thereon with names of two other persons. One of these persons admitted that the signature was his but the other could not be found. It was held there was no evidence showing a complete will as the parts were loose, disconnected and unrelated and there was nothing to comply with the requirement of being signed at the end. A later case shows a somewhat similar situation and with the same result.\(^{122}\) In still another case\(^{123}\) codicils were placed in an envelope but not signed. However, the envelope was endorsed with the decedent’s name. It was held the codicils were not signed at the end. Under very similar facts,\(^{124}\) the papers were denied probate. Under a curious set of facts\(^{125}\) decedent had a will prepared by a lawyer which was returned for certain corrections. These could all be made on the third and last page which had likewise the testimonium clause and space for names of testator and witnesses. The lawyer rewrote the third page and in returning the will to decedent enclosed with it the old third page for comparison. Decedent, evidently not noticing the difference, signed, instead of the new one, the old third page which although enclosed was actually detached from the will. It was held, per Stern, J., that the will was not executed.\(^{126}\)

If the testator desires to revoke his will by another writing, the latter must be signed at the end as required of a will. So an unsigned statement written on the margin of a will in such a manner as not to touch any part of the words thereof stating “this will to be destroyed,” and giving the date, was held to be invalid as a revocation.\(^{127}\)

In a recent case,\(^{128}\) there was a typewritten will offered for probate having pencil lines crossing out the provision designating an executrix, and a paper which was in testatrix’s handwriting and executed by her designating an executor was pinned to the typewritten will. Likewise at the place where the residuary estate was mentioned, this disposition was crossed out by pencil lines and a paper in the testatrix’s handwriting but not executed and which provided for a disposition of the residuary estate was also pinned to the will. It was held that the original will plus the provision added designating an executor were properly probated because the added paper concerning the executor was signed, but in the case of the other paper providing for residuary disposition, such could not be probated because it was not signed at the end thereof. This latter paper was known as “Exhibit B” and concerning it Stern, J., observed:


\(^{123}\)Maxwell’s Estate, 18 D. & C. 111 (1933).

\(^{124}\)Koenig’s Estate, 22 D. & C. 275 (1935).

\(^{125}\)Bryen’s Estate, 328 Pa. 122, 195 A. 17 (1937).

\(^{126}\)See Alter’s Appeal, 67 Pa. 341, 5 Am. Rep. 453 (1871); Hagarty’s Appeal, 75 Pa. 503 (1874).

\(^{127}\)William’s Estate, 34 D. & C. 411 (1938).

\(^{128}\)Baker’s Estate, 331 Pa. 33, 200 A. 65 (1938).
"To permit the probate of such a paper as "Exhibit B" would be to legalize a practice by which testators, instead of formally executing codicils in the manner prescribed by the statute, could pin unsigned scraps of paper to their wills, and later remove and replace them at pleasure as their testamentary plans changed from time to time. It would also enable evilly-disposed persons to pin to the will of a testator fragmentary slips which he may have discarded or prepared only tentatively, or to remove similar pieces which he had pinned thereto. Thus the way would be opened to unbounded possibilities of fraud."

In another recent case there were two sheets of paper offered as codicils not firmly fastened together but typewritten except for the date "9th" inserted by a pen in a blank space which had been left for the purpose. It was conceded that testator signed the paper in the presence of the subscribing witnesses and the sufficiency of the proof of execution was admitted. The first sheet was described as follows:

"A codicile to my last will dated February 11, 1937." Then followed certain changes in the will. The second sheet was described as follows:

"Continuation of codicile of my last will dated February 11, 1937." Then followed certain other changes in the will. The Court came to the conclusion that the papers were connected in their internal sense as to constitute a single instrument and therefore entitled to probate being signed at the end thereof which was on the bottom of the second sheet.

PROVISO

Section 2 of the Wills Act of 1917 differs from corresponding Section 6 of the Wills Act of 1833 in that the former has the following clause:

"Provided, that the presence of dispositive or testamentary words or directions, or the appointment of an executor, or the like, after the signature to a will, whether written before or after the execution thereof shall not invalidate that which precedes the signature."

The following explanation is given of the above in the Report of the Commission:

"The Commissioners, however, recommend in the proviso to this section a change induced by the decision in Wineland's Appeal, 118 Pa. 37. The legislative requirement that a will shall be signed at the end thereof, the natural and proper place for the signature, was a judicious improvement upon the law as it previously existed; but the Commissioners are of opinion that the presence of testamentary provisions after the signature, even if written before the signature is affixed, should not invalidate what the testator by his signature has authenticated."

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131 Wineland's Appeal, 118 Pa. 37, 12 A. 301, 4 Am. St. Rep. 571 (1888).
In Wineland's Appeal, the signature of the testator appeared between the last disposing clause and a subsequent clause appointing an executor. There was no evidence on the face of the document or aliunde to indicate whether the clause appointing the executor was an addition or whether it was there at the time the signature was placed. Consequently, the will was denied probate because of lack of evidence to show it was signed at the end thereof.

On the other hand, where a testatrix signed and executed her will at the end thereof and on a subsequent day added an additional clause appointing an executor but did not sign such clause, it was held that the added clause was to be regarded as inoperative either to appoint an executor or to affect the will as originally signed and hence the testatrix was deemed to have signed her will at the end thereof. In view of the proviso these questions no longer arise, for irrespective of time, whatever precedes the signature is entitled to probate if it is of testamentary character.

ASSISTANCE IN SIGNING

In an early case the testator gave instructions concerning his will, being very ill at the time. When the scrivener returned with the written will, the testator was found speechless and senseless. Nevertheless, he was held up in bed and a pen placed in his hand while another directed the hand in the making of a mark. The will was not read to the testator for it would have been useless as he could not understand anything at the time. However, later the testator revived and requested the will read to him, which being done he approved and also ratified the execution of the will. In reversing the judgment of the lower court in favor of the will, Gibson, C. J., declared that the attempted execution was clearly invalid and no subsequent ratification would give it validity. Likewise in Stricker v. Groves where the decedent by reason of an infirmity of the hands was unable to write but directed others to sign for him and they refused to do so from misapprehension of the law, the holding was that the refusal, however unreasonable and accompanied by futile exertions upon the part of the testator, did not constitute compliance with the law. However in the matter of assistance rendered testator the courts have been more liberal. In an early case it was stated:

"If one having testamentary capacity is unable from palsy or other cause to steady his hand so as to make to his will the signature required by law, another person may hold his hand and aid

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132 Idem.
134 Hays v. Harden, 6 Pa. 409 (1847); Heise v. Heise, 31 Pa. 246 (1858); Baker's Appeal, 107 Pa. 381 (1884); Taylor's Estate, 230 Pa. 346 (1911).
136 Dunlop v. Dunlop, 10 Watts 153 (1840).
137 Wharton 386 (1839).
him in so doing; and it is not necessary to prove any express request from the testator for such assistance. The act is his own with the assistance of another, and not the act of another under authority from him."

In a somewhat later case, a testator was paralyzed and said he was unable to write but he would put his mark to his will; accordingly, he was raised in bed, a pen was put into his hand which was held by another, whilst he made his mark. This was a valid execution of the will and the act was that of the testator with the assistance of another and not the act of another under authority of the testator.

In a more recent case, it was held to be proper for a bystander to steady the testator's hand while the latter was writing his name to the will. In this case, the testator was a man of ninety-one years of age and shown by the testimony of his family physician and others to have been normal and rational at the time of the execution of the will although physically infirm.

In another recent case, testatrix had been blind for some years and had been confined through illness to her home a few days before the will was executed. When about to place her signature on the document she called in her brother, William, the principal beneficiary, to assist. He placed his left arm about her wrist, raised her in bed and with his right hand placed over her hand wrote her name. Thereafter the subscribing witnesses attested the will as just indicated.

In affirming the judgment of the court below entered n. o. v. for the plaintiff on an issue d. v. n., Kephart, J., said:

"Whether a testator can write at all makes no difference in determining the validity of a will, nor does it matter whether he is so stricken that he cannot write, or can write only with difficulty. Where testator's mental conception is entirely clear and he desires to sign the will, but his physical powers unassisted will not permit it, and such assistance is called in, the incident of assistance becomes immaterial so long as there is a conscious wish of the testator that his hand should make the signature. His participation in the slightest degree or acquiescence in or adoption of the signature is sufficient: McClure v. Redman, 263 Pa. 405, 411, 412; Fritz v. Turner, 46 N. J. Eq. 515, 22 Atl. 125; Kearney's Will, 74 N. Y. S. 1045. Therefore, it makes no difference whether this will was signed by Mary Brehony herself with the aid of her brother, or by William Brehony at her request, as long as the signature was adopted and legal proof is present: Hughes's Est., 286 Pa. 466, 469, et seq."

On the other hand in another recent case the facts were very similar but

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139 Cozen's Will, 61 Pa. 196 (1869).
140 Hopkin's Estate, 277 Pa. 157, 120 A. 807 (1923).
the essential difference between the two cases was on the matter of the proofs. In the former, Kephart, J., explained:

"Therefore, when the two subscribing witnesses in this case testified they were present and saw Mary Brehony affix her name at the end of the will on the date on which it purports to have been executed, and heard her declare that it was her will, and that she knew what it was, asking them to sign it, a prima facie case was made out; the execution of the will was so far established as to cast on the contestants the burden of showing that it was not executed: Lawrence's Est., 286 Pa. 58, 64; Logan's Est., 195 Pa. 282, 283."

Unfortunately for the proponent in the latter case there was but one witness and in view of the fact that the name of the testatrix as subscribed was not her natural signature owing to the fact that she had to be so assisted, the court characterized the act of execution as the joint effort of the testatrix and another, and as to just how much each contributed to the formation of the letters of the signature, would be a matter of pure speculation. Therefore it was held that the rule of Hays v. Harden would not be applicable allowing circumstantial proof to supply the statutory requirement where at the execution of the will but a single witness was present.

**Publication**

By publication is meant the declaration by the testator that the paper in question is his will. The usual opening of a formally drawn will is:

"I, John Doe, do hereby make, publish and declare this my last will and testament."

At one time in England, the courts interpreted the statute as requiring such publication in the presence of the witnesses. It was finally determined that publication was not required. Some of our states so require, others do not. In Pennsylvania it was early decided that the testator did not have to declare to the witnesses that the instrument was his will and the witnesses did not have to know the contents. Furthermore, the witnesses are not required to know that the testator knew the contents of the will. As will be discussed hereafter our statute does not require subscribing witnesses but it does specify that

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See note 141, *supra.*

See note 142, *supra.*

146 Pa. 409 (1847).

See ROOD ON WILLS. (2nd ed., 1926) sec. 276, et seq. It is pointed out that twelve states require publication, notably New York and New Jersey. Massachusetts and Pennsylvania along with others do not.

147Grinder v. Farnum, 10 Pa. 98 (1848); Comb's Appeal, 105 Pa. 155 (1884); Kisecker's Estate, 190 Pa. 476, 42 A. 886 (1899); Lillibridge's Estate, 221 Pa. 5, 69 A. 1121, 128 Am. St. Rep. 723 (1908).

148Linton's Appeal, 104 Pa. 228 (1883).
two witnesses are necessary to prove the execution of a will and the ruling is that each witness must separately depose to all facts necessary to complete the chain of evidence, so that if only one witness were required the will would be fully proved by the testimony of either. Although the requirement of publication may be dispensed with when the will is obviously testamentary in character and all that is necessary is to prove the signature by two witnesses, yet if the instrument is equivocal in character, it is necessary by the required proof to show some publication on the part of the decedent indicating that it was his intent that the document as offered was to be considered a will. In one case, the paper offered as a will was in the form of a letter to the decedent's attorney giving him instructions as to the preparation of a will. It was held necessary to show by the required proof that the decedent declared the paper to be his will. Another illustration is where the attempt was to have probated as codicils seven judgment notes that had been executed by the decedent. There was no doubt about the signatures to the notes but it was held that the problem was to prove the notes were codicils to a will. This could not be done. Consequently, publication, as it appears, may be a very essential element in the proving of a will. In the usual ceremony of execution of a will no careful lawyer should fail to bring out a publication of the will by the testator stating to the witnesses that it is his will, as well as the observance of having at least two subscribing witnesses.

Proofs of Wills

Both the Acts of 1833 and 1917 declare in identical terms:

"Every will shall be in writing . . . signed at the end thereof, and proved by the oaths or affirmations of two or more competent witnesses."

It is noteworthy that the statute prescribes proofs as to the will and not merely as to the signature. However, if the paper propounded is obviously testamentary in character, the rule of res ipsa loquitur applies and proof of the signature is sufficient. If the signature has been subscribed by the testator himself and in the presence of the witnesses, the testimony of such constitutes the best evidence. However, the signature, if characteristic as the name written by testator or some peculiar symbol or sign customarily adopted by testator so affixed or subscribed by him, may have been placed on the will by him and yet there were no witnesses present when it was done. The statute does not require subscribing witnesses; therefore, in the absence of such, witnesses must be called who are familiar with the testator's signature and are able to express an opinion as

149 Hock v. Hock, 6 S. & R. 47 (1830); Derr v. Greenawalt, 76 Pa. 239 (1874); Comb's Appeal, 103 Pa. 155 (1884).
150 Scott's Estate, 147 Pa. 89, 23 A. 212 (1892).
to its genuineness. The statute does not specify that there shall be subscribing witnesses, although invariably wills drawn by professional hands provide an attestation clause to be subscribed by the witnesses. This is in conformance with the practice under English statutes, and those of most American States, but our statute is peculiar by reason of the absence of any requirement concerning subscribing witnesses.

Witnesses to a will, exclusive of subscribing witnesses, are of two kinds: (1) persons who were actually present and saw the testator execute his will under one or the other modes as prescribed by law and already discussed, (2) persons who were not present at the time of the execution of the will, but who are qualified to express an opinion as to the genuineness of the signature attached to the will and which is alleged to be that of the testator.

In the first class, the witnesses testify as to their sense perceptions, viz., what they observed, perceived and discerned; whereas, in the second class, the witnesses testify as to their opinions rather than to the facts concerning the handwriting or signature affixed to the document stating whether it is genuine or spurious, the opinion being based on familiarity with the handwriting of the decedent. If testamentary capacity is at issue, both classes may testify, but again in the first class the witnesses are testifying as to their sense perceptions, whereas in the second, the testimony is based solely on opinion.

**Two Witness Rule**

The statute declares that the proof must be "by the oaths or affirmations of two or more competent witnesses." At common law there is no specification as to the number of witnesses necessary to prove a fact. Therefore, one witness, if believed, may suffice. The two witness requirement is an adoption from civil law sources. In a recent case Linn, J., refers to "the rule recently applied in several cases and stated long ago by Gibson, J.," as follows:

"Proof of execution must be made by two witnesses, each of whom must separately depose to all facts necessary to complete the chain of evidence, so that no link in it may depend on the credibility of but one."

In other words, assuming there were five points to be proved in order to make a complete set of proofs, each witness must testify as to the five points to complete the set. It would not suffice if one witness testified to three points...
and the other to two points, making a total of five points. Stewart, J., explained: 158

"It is an established rule that each of the two witnesses required for the proof of a will must depose to all facts necessary to complete the chain of evidence in order that no link in it may depend on the credibility of one; so that if one witness was only required the will would be proved by the testimony of either. When the evidence of both is circumstantial each must make proof complete in itself, so that if the Act of Assembly were out of the question, the case would be well made out by the evidence of either: Hock v. Hock, 6 S. & R. 47; Derr v. Greenawalt, 76 Pa. 239."

In this case there was but one witness of class one, also subscribing, and the attempt to supply the other was by offering testimony of an expert in handwriting, thus a witness from class two. But the signature of testatrix was not susceptible of this kind of proof, for on the facts it was the product of the combined efforts in writing of testatrix and the other witness who had assisted her. It was not a customary or characteristic signature. The proofs were not sufficient. In a like case 159 the facts as to actual execution were quite similar to McClure v. Redman 160 but there were two subscribing witnesses to testify to the essential facts as to the signing by the testatrix. The proofs were sufficient. In an early case 161 Gibson, J., elaborating on the rule as laid down, explained:

"When the evidence is positive there can be no difficulty, for the witnesses then attest the simple fact of execution itself; but when the evidence of one or both is circumstantial, each must make proof complete in itself, so that if the Act of Assembly were out of the question, the case would be well made out by the evidence of either. Circumstantial proof cannot, therefore, be made by two or more witnesses alternating with each other, as to the different parts of the aggregate of circumstances which are to make up the necessary sum of proof: the evidence of each, not going to the whole."

In a late case 162 Frazer, J., observed that when the paper was testamentary in form and met the legal requirements necessary to constitute a valid will, save the signatures of subscribing witnesses, this lack could be supplied by circumstantial proof of witnesses, both expert and nonexpert, giving opinions as to the authenticity of testator's signature, their competency to testify first being established. In an earlier case 163 there was one subscribing witness to a will

160 263 Pa. 405 (1919).
162 Ligo v. Dodson, 301 Pa. 124, 151 A. 694 (1930).
163 Carson's Appeal, 59 Pa. 493 (1868).
signed by mark competent to testify as to the facts. The other witness had been asked to subscribe but could not do so, not knowing how to write. He testified however that he saw testator execute a will which he believed was the one offered for probate, although he had no way to identify it. He said the mark also looked like the one he saw testator make and that he saw the subscribing witness sign. Further, he never heard of any other will as made by testator. There was no contradictory evidence or proof that the testator had made another will. It was held the will was properly proved.  

Not only must the execution of a will be proved by the two witnesses, but as already pointed out, there may be circumstances requiring proof of other parts of the will as illustrated in the peculiar facts of Derr v. Greenawalt, where the will was duly proved to have been executed in the presence of two witnesses but with a blank left for the insertion of the name of the residuary legatee. The proofs on this point were by one witness who testified that the name was inserted in the presence of the testator and by his direction. However, the person who actually inserted the name could only testify that he wrote it but had no recollection whether he did so by the direction of the testator or in his presence. This deficiency in proof was held not to be supplied by evidence of the subsequent declarations of the testator that the person named was his residuary legatee, and the further fact that the will continued a long time afterward in the possession of the testator. Sharswood, J., applied the rule of Hock v. Hock and made this comment:

"The rule is a simple, intelligible one, but the difficulty in this, as it has been in other cases, is in its application. It is not easy for the mind to divest itself of the influence which facts sworn to by one witness have in corroborating the evidence of another, especially of supplying what is a mere vacuum—a failure or uncertainty of memory in another. This difficulty is well illustrated by the evidence in this case. The evidence of Mrs. Huber was direct and positive that her son, George Rise, wrote the name in the blank in the presence of the testator and by his express direction. Striking out the entire testimony of Mrs. Huber, is there sufficient evidence from other witnesses in the cause which would justify the submission of that fact to the jury? George Rise was unable to testify that he had inserted the name by the direction of the testator or in his presence."

Simrell’s Estate affords another example of the proving of the will, rather than the execution, where the two witness rule was applied. After the will was executed and subscribed the daughter of testatrix made some erasures on the will at the direction of her mother. There was no republication or re-execution.

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164 Note opinion Sharswood, J., in Carson’s Appeal, 59 Pa. 493 (1868) deploring the paring away of the statute by the admission of circumstantial evidence.
165 1657 Pa. 239 (1874).
166 1666 S. & R. 47 (1830).
and the subscribing witnesses testified that the will had no erasures when they attested, and no witness aside from the daughter was produced by proponents. It was held that the will in its original form was the only valid disposition. A similar situation and result are found in Charles v. Huber. In a later case the execution was proved by three witnesses but the question was whether the paper was actually a will, being in the form of a letter of instruction. The proof that it was intended by decedent to be a will was supplied by the scrivener who was present at the signing and who testified to the declarations of decedent, also by the son who, although not present at the execution of the paper and not having seen the same at the time of the declarations, nevertheless being in and about at the time, his testimony was held admissible along with that of the scrivener as to the publication of the paper by the decedent as a will. In another case when it was sought to probate a lost will by parol proof of its once existence, the court was emphatic in the position that the fact of execution must be proved by the testimony of two witnesses. Likewise in a recent case where the attempt was also to establish a lost will, it was stated that the proofs must be strict and complete and circumstances may not supply lack of second witness' testimony as to execution and contents, to which there is but one competent witness. Said Schaffer, J.:

"Wills differ from all other documents. By statute and judicial decision they are put in a class by themselves in order as far as possible to safeguard their integrity. One of the reasons for this is that the person most concerned about a will cannot come forward to defend it . . . Section 2 of the Wills Act (20 PS 191) provides that 'every will shall be in writing . . . signed . . . at the end thereof; . . . and, in all cases, shall be proved by the oaths or affirmations of two or more competent witnesses; otherwise, such will shall be of no effect.' A will is proved, therefore, not by circumstances, but by the direct testimony either of two witnesses who saw the testator sign it or by two witnesses who are familiar with his signature and identify it."

Continuing, the learned justice quotes with approval from an earlier case the following:

"Proof of a lost will is made out only by proof of execution and of contents by two witnesses 'each of whom must separately depose to all the facts necessary to complete the chain of evidence, so that no link in it may depend on the credibility of but one.' Hock v. Hock, 6 Serg. & R. 47."

16878 Pa. 448 (1875).
169Scott's Estate, 147 Pa. 89, 23 A. 212 (1892).
171Michell v. Low, 213 Pa. 526, 63 A. 246 (1906).
It is believed by the writer that these recent statements of the Supreme Court are sound in construction and policy and present a possible barrier to any further encroachment upon the statute by way of circumstantial proofs, the fear of which was expressed clearly by Sharswood, J., in *Carson's Appeal.*

Non constat, keeping in mind that the Wills Act of 1917 requires the will itself to be proved by the requisite number of witnesses and that proving of the signature or the execution in some form or other is only a means of proving the will, a situation might arise where there were no witnesses available who could prove the fact of execution as being present at the time, no witnesses familiar with the handwriting of decedent and no admitted handwriting for comparison by experts. Yet the paper may have been found at such a place and under such circumstances as to point almost conclusively that such was the product of the decedent and written by him. Would the testimony of two witnesses who found the paper be sufficient proof, relating the facts and circumstances of the finding?

**SUBSCRIBING WITNESSES**

The importance of subscribing witnesses is apparent in the early cases despite the fact that the statute did not require them. In one case Paxson, J., observed:

"The signature of a subscribing witness to an ordinary instrument of writing implies nothing more than the instrument was signed by the person whose act or deed it purports to be. It is not so in the case of a subscribing witness to a will. His attestation is an assertion not only that the will was signed by the testator, but of the further fact that the testator was of sound mind when he executed it. It is said by Mr. Greenleaf, in his work on Evidence, Vol. 2, page 691, that 'the attesting witnesses are regarded in the law as persons placed round the testator, in order that no fraud may be practiced upon him in the execution of the will, and to judge of his capacity.'"  

Subscribing witnesses are deemed the "court's witnesses" as stated in *Whitaker's Estate* and as pointed out by Barnes, J., in *Plott's Estate.*

"Their attendance at the trial should be required by the court, if necessary, upon the request of proponent or contestant. When

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17459 Pa. 493 (1868).

175Hays v. Harden, 6 Pa. 409 (1847); Gibson, C. J. explaining history of proving wills under Act of 1705.

176Hays v. Harden, 6 Pa. 409 (1847); Smith v. Hays, 9 Pa. 151 (1848).


180335 Pa. 81, 5 A. (2d) 901 (1939).
called to testify they may be freely examined and cross-examined by both parties, without either one being bound by any adverse testimony given by such witnesses, as would be in the case of a witness called as if upon cross-examination. The justification for their presence at the trial of an issue to determine the validity of a will may be found in the fact that they are competent to prove not merely the execution of the will, but that the testator was of sound mind at the time it was signed, and they are subject to examination at length upon these essential questions in cases of this character."  

In an early case, one of the subscribing witnesses was dead and his signature was proved which was held equivalent to his oath to the signature of the testator. However, it was competent for contestant to show declarations of this deceased subscribing witness that the testator was *non compos* at the time the will was executed. Further, that when a subscribing witness expresses his belief that testator was *non compos* at the time the will was executed, the party calling him may contradict his evidence by reading his testimony given at a former trial that testator was of sound mind and also by proof of his declarations to this effect at other times.

As already stated the subscribing witness is an attesting witness but according to our decisions an attesting witness must subscribe. Although frequently wills are subscribed by the witnesses as such but without a formal attestation clause, it is desirable to have them sign such a clause. It sets forth that the testator has signed in the presence of the witnesses and the latter, at the request of the testator, have signed in the presence of the testator and of each other and that they attest these facts together with the fact that testator declared in their presence that the document was his last will and testament.

The type of subscribing witnesses will sometimes have a very profound influence upon the court and jury in cases of will contests and there are numerous instances where it has been said that the will having been drafted and witnessed by a reputable member of the legal profession, this fact and the testimony of the lawyer will have great weight in the determination of the is-


183Subscribing witnesses repudiating testimony, subsequent statements to be received with caution or eliminated. Wrestler v. Custer, 46 Pa. 502 (1864); Rice's Estate, 173 Pa. 296, 34 A. 833 (1896); Wertheimer's Estate, 286 Pa. 135, 133 A. 144 (1926); Plott's Estate, 335 Pa. 89, 6 A. (2d) 267 (1939), where two of three subscribing witnesses testified they had affixed their names to the will several days after death of testatrix and at request of proponent, admitting under cross-examination that they had sworn falsely before the Register of Wills; Porter's Estate, 341 Pa. 476, 19 A. (2d) 731 (1941).

184In Swift v. Wiley, 1 B. Mon. (Ky.) 114 (1840) it is said an attesting witness is one who knows the will is published as such whereas a subscribing witness is one who merely subscribed for purposes of identification. See also, ROOD ON WILLS (2nd ed. 1926) p. 214.

185See note 178, supra.
sues involved. Although Section 3 of the Wills Act does not require by specific terms subscribing witnesses the methods of execution prescribed as well as the signing by mark or by another under the provisions of Section 2 of the Wills Act almost of necessity call for the subscription by witnesses. In the early cases it was declared that the mark must be proved by the witnesses who saw it affixed; and in Carson’s Appeal the mark was proved by a witness who could not write, yet this situation is highly unsatisfactory. Nevertheless, it would appear that when the identity of the will has been established, attesting witnesses will suffice in the stead of subscribing ones. Under both sections the witnesses should be subscribing ones, and the scrivener should see to it that all provisions are meticulously observed and that the attestation clauses subscribed contain the necessary averments that follow the terms of the respective sections.

Under both sections the witnesses should be subscribing ones, and the scrivener should see to it that all provisions are meticulously observed and that the attestation clauses subscribed contain the necessary averments that follow the terms of the respective sections. If these precautions be observed, it would lessen litigation in the same proportion as observing the traffic laws cuts down motor vehicle accidents.

CHARITIES PROVISION

Section 6 of the Wills Act of 1917 as amended now provides:

“No estate, real or personal, shall be bequeathed or devised to any body politic, or to any person in trust for religious or charitable uses, except the same be done by will at least thirty days before the decease of the testator, which period shall be so computed as to exclude the first and include the last day thereof; and all dispositions of property contrary hereto shall be void and go to the residuary legatee or devisee, heirs or next of kin, according to law.”

The amendments eliminated the provisions requiring wills containing charitable gifts to be attested by two credible and disinterested witnesses and the definition of the latter. The effect of this legislation is to render obsolete a vast number of cases on the topics of attestation, credibility and disinterest of witnesses. No longer are attesting and subscribing witnesses so required. The will containing a gift to a charity is on the same plane as any other will, save one exception, viz., it must be executed “at least thirty days before the decease of the testator.”

Thompson v. Kyner, 65 Pa. 368 (1870); Kane’s Estate, 206 Pa. 204, 55 A. 917 (1903); Kustus v. Hager, 269 Pa. 103, 112 A. 45 (1920); Phillips’ Estate, 299 Pa. 415, 149 A. 719 (1930); Keen’s Estate, 299 Pa. 430, 149 A. 737 (1930); Aggas v. Munnel, 302 Pa. 78, 152 A. 840 (1930).  


Engles v. Brinington, 4 Yeates 345 (1807); Shinkle v. Crock, 17 Pa. 159 (1852).

Dunn’s Estate, 3 D.R. 248 (1894); Carson’s Appeal, 59 Pa. 493 (1868); Novicki v. O’Mara, 280 Pa. 411, 124 A. 672 (1924); 13 Temple L.Q. 465.

Drew’s Estate, 32 D. & C. 297 (1938); Bobbitt’s Estate, 30 D. & C. 659 (1937); James’ Estate, 329 Pa. 273, 198 A. 4 (1938); Hunter’s Estate, 328 Pa. 484, 196 A. 35 (1938); Szamih’s Estate, 335 Pa. 89, 6 A. (2d) 267 (1939); Cassel’s Estate, 334 Pa. 381, 6 A. (2d) 60 (1939).

The fundamental statute on this topic was the Act of April 26, 1855, and the necessity for such legislation was explained by Read, J., as follows:

"Devises to charitable uses became so frequent in England, particularly by languishing or dying persons, that the statute of George II, Ch. 36, was passed, enacting, that after the 24th June, 1736, no lands, or money to be laid out in lands, or any interest in lands, shall be given or conveyed for the benefit of any charitable use whatever, unless by deed executed in the manner prescribed twelve calendar months before the death of the donor or grantor, and enrolled in the Court of Chancery within six calendar months from its execution."

The Act of 1855 covered both gifts inter vivos as well as gifts by will. Therefore it was held that a promise in writing to pay an amount of money toward the erection of a church, without consideration, was void, the promisor having died within one calendar month after the date of the promise. In Irvine's Estate Mestrezat, J., compares the terms of the Wills Act of 1833 with those of the Charities Act of 1855 but as already stated this comparison is rendered obsolete by the amendatory legislation eliminating the requirement of attestation by two credible and at the time disinterested witnesses.

In a recent case, the will of testatrix containing a charitable bequest was executed prior to the passage of the amendatory act but was not attested by the required witnesses. Testatrix died after the passage of the amendatory legislation leaving the will so unattested. It was held the gift to the charity was valid, the statute providing that its terms should apply to wills of all persons, dying on or after its effective date. The legislature could enlarge the power of disposition by testatrix of property owned by her at death and could eliminate the formality of attesting witnesses although the will was executed before the passage of the statute, no rights having vested before the death of testatrix.

**Religious or Charitable Uses**

In order to bring the gift within the inhibition of the statute it must have been made "for religious or charitable uses." A religious purpose is a charit-
able purpose but the language of the statute makes this decision unnecessary by using both terms.\textsuperscript{200}

In \textit{Jenning's Estate}\textsuperscript{201} it was stated:

"Whatever is given for love of God, or for the love of your neighbor, in a catholic and universal sense—given from these motives and to these ends, free from the stain or taint of every consideration that is personal, private or selfish, is a gift for charitable uses. The love of God is the basis of all that is bestowed for His honor, the building up of His church, the support of His ministers, the religious instruction of mankind. The love of his neighbor is the principle that prompts and consecrates all the rest. The current of these two great affections finally run together, and they are at all times so near that they can hardly be said to be separated."

In this case it was decided, \textit{inter alia}, that a gift of certain gold articles, to be converted into a chalice for the celebration of mass which is to be presented to a designated church, is a charitable bequest and fails upon testatrix's death within thirty days after the execution of the will.\textsuperscript{202}

In \textit{Lawson's Estate}\textsuperscript{203} Moschzisker, J., approved the following definition, quoting from \textit{Fire Ins. Patrol v. Boyd}:\textsuperscript{204}

"A charity, in a legal sense, may be more fully defined as a gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life."\textsuperscript{206}

In a late case\textsuperscript{206} testatrix left a bequest to an Odd Fellows Home for Aged but died within thirty days of the execution of the will. Stern, J., held that the gift was to a charity, howbeit a private as distinguished from a public one, but within the statute and therefore invalid under the circumstances.\textsuperscript{207}

\textbf{SCHULTZ'S APPEAL}\textsuperscript{208}

Scarce twenty-one years after the passage of the Act of April 26, 1855\textsuperscript{209} a rule of construction of the act was adopted by the Supreme Court, which remains to this day despite the animadversions of eminent judges. Frederick Schultz was very ill and sent for a scrivener to write his will which was duly

\begin{footnotes}
\item[200]McLean \textit{v.} Wade, 41 Pa. 266 (1861).
\item[203]264 Pa. 77, 107 A. 376 (1919).
\item[204]120 Pa. 624, 15 A. 552 (1888).
\item[206]Lowes Estate, 326 Pa. 375, 192 A. 405 (1917).
\item[208]80 Pa. 396 (1876).
\item[209]Act of April 26, 1855, Sec. 11, P.L. 332.
\end{footnotes}
drawn and executed September 6, 1872. The testator died September 13, 1872 leaving certain collaterals. He had expressed a desire to leave the bulk of his estate to certain religious organizations but the scrivener advised that the will would be inoperative as to such bequests, if Schultz died within thirty days, as he eventually did. The suggestion was made by the scrivener that he could dispose of his estate by will unconditionally to some one, and if the latter would see fit, he could apply the estate to the purposes the testator had wanted. After this device was thoroughly explained the testator concluded to make Reuben Yeagle, a bishop of his church, as the residuary legatee, absolutely. Yeagle did not know of this arrangement, had no part in it, and learned the facts after the testator's death. He promptly signified that he intended to carry out the testator's wishes, although he understood that under the terms of the will the residuary estate was his absolutely. The balance for distribution in the hands of the executor was $10,043.57 and the auditor awarded the fund to Yeagle, holding the gift absolute, unimpressed with any trust and that Yeagle was not bound by any assurances given testator that he could be trusted to carry out his wishes, not having been a party in any way to such arrangement. The orphans' court overruled the exceptions to the auditor's report and entered a decree. This was assigned for error in an appeal to the Supreme Court. In affirming the decree and dismissing the appeal, Sharswood, J., thus concluded:

"It is urged, however, that this whole plan is nothing but a contrivance to evade the statute. No doubt such was the intention of the testator. It is said that it is a fraud upon the law and that the bequest ought therefore to be declared void. But that overlooks the fact that the absolute property in the subject of this bequest has vested in the legatee, and that he is entirely innocent of any complicity in the fraud of the testator. If the statute is practically repealed by this construction it is evident that it must be for the legislature to devise and apply a remedy, not the judiciary, whose province is not jus dare but jus diceri."

FLOOD v. RYAN

In this case the residuary clause was more elaborate than in Schultz's Appeal. In the latter the words were:

"As touching all the rest, residue and remainder of my estate, real, personal and mixed, I give, devise and bequeath the same unto Reuben Yeakle, now of Cleveland, Ohio, and his heirs and assigns forever."

In the former the language used was:

"All the rest, residue and remainder of my estate, real, personal and mixed, I give, devise and bequeath unto St. Teresa's Church, Broad and Catharine Streets, and St. Joseph's House for Homeless Industrial Boys, on Pine Street, share and share alike,

provided, however, in case of my death within thirty days from
the date hereof, I give, devise, and bequeath all my said residuary
estate unto Most Rev. P. J. Ryan, Archbishop of Philadelphia, ab-
solutely."

The action was ejectment by plaintiff as heirs at law of testator against
the defendant Ryan, who claimed title under the aforesaid clause of the will
duly probated, the testator having died within the thirty day period. It was
contended the gift violated Section 11 of the Act of April 26, 1855211 and
was a palpable evasion of its provisions. The Archbishop testified that he did
not know the testator and had never heard of him before his death and that as
head of the church he held title to the diocesan property; also he was advised
that the property devised was to him absolutely and he could legally do with
it as his own, nevertheless he frankly stated that he was bound in the forum
of conscience to carry out the wishes of the testator and that he would do.

In following the precedent of Schultz's Appeal212 Brown, J. declared:

"The devise is understood by the appellee just as the law con-
strues it—an absolute one—invoking no legal duty to anyone
from him in the enjoyment of it; and this is the crucial test of a
trust. There can be no cestui que trust if there is no trustee to
be compelled by law to be faithful . . . There is nothing in this
will to indicate that the devise to the appellee was to be in trust
for any religious or charitable use, on the contrary, from its face,
it appears that the testator, anticipating that the charitable dispos-
ition of his estate might fail, directed that if it should, his prop-
erty was to go to an individual, 'absolutely,' and unimpressed with
any trust, instead of to charitable and religious uses."213

To this legalistic casuistry, Mestrezat, J., in a dissenting opinion, inter alia, re-
plied:

"The question here, however, is not between a cestui que trust
and the trustee, nor does it involve the right of a cestui que trust
to enforce the provisions of a trust against a trustee. The ques-
tion is whether the devise to Archbishop Ryan was in fact to him
individually or to him as trustee for the church and charity pri-
marily given the property in the will, and therefore made to him
individually to evade the Act of April 26, 1855, P. L. 328 . . . The
will, therefore, read in the light of these facts, shows conclusively
that the residue of the testator's property was devised to the Arch-
bishop with the intention, and the devisee so understands that it
shall be held and used for the church and charity named in the
will . . . The will itself shows the intention of the testator to give
the residue of his property to the church and charity named in
his will. The Archbishop, the devisee, admits that he holds the
property for such uses. Under his admission Archbishop Ryan

211P.L. 328.
21280 Pa. 396 (1876).
would commit a fraud if he applied the property to his own use and withheld it from the church and charity. His integrity and high character are a positive assurance that he will not betray the trust reposed in him. The church and charity, therefore, get the property, as intended by the testator, in plain violation of the laws of Pennsylvania."

**BICKLEY'S ESTATE**

In the last of this trilogy of decisions the result was the same on quite similar facts but the dissidence was more articulate and emphatic, howbeit, futile.

The testator gave certain gifts to charities and then followed in the will with this clause:

"Should I die within thirty days after the date of said will, then and in that event, as to any provisions thereof which would fail to take effect by reason of such decease, I give, devise and bequeath that portion of my estate to Philip Mercer Rhinelander of Philadelphia."

The legatee was the Bishop of the Protestant Church in the Commonwealth of Pennsylvania. The lower court decided the gift was valid, the testator having died within the thirty days specified, and followed *Schultz's Appeal* and *Flood v. Ryan*. The Supreme Court affirmed the decree, Simpson, J., delivering an opinion more distinguished for its caustic criticism of *Schultz's Appeal* than its observance of *stare decisis*. The remarks of the learned justice, which he was constrained to describe as "cogent reasons" were, *totidem verbis*, as follows:

"If the question involved was an open one with us, or if it was of modern determination, we would reverse the decree in the present case, for the following reasons: (1st) The decisions are wrong in principle in that they make valid admitted attempts to evade the public policy of the Commonwealth as expressed in her statutes: nemo potest facere per obliquum quod non potest facere per directum. (2d) In Kessler's Est., 221 Pa. 314, 320-1, summarizing previous decisions, we said: 'The Act of 1855 is a remedial statute, and should be construed so as to give effect to the purpose for which it was enacted. While charities may be said to be favorites of the law, . . . yet the law discourages such gifts at or near the time of impending death, when the mental faculties are impaired, the will power broken and the vital forces weakened; because, under such circumstances, the importunities of designing persons, or the terrors of final dissolution, may induce dispositions of property contrary to natural justice, and without regard to the ties of kinship, which, under normal conditions, would be operative on the mind of the testator.' These conclusions being correct, as indeed the act itself proclaims them to be, then the decisions now under consideration, and those of like effect elsewhere,
enjoy the unique and unenviable distinction of applying the law to cases which are not within its spirit and purpose, and of refusing to apply it to those which are; for as to the wills of persons made less than one calendar month before death, but while they are in perfect health, 'when the mental faculties are (not) impaired, the will power (is not) broken, and the vital forces (are not) weakened,' all charitable gifts therein are void; whereas as to the wills of persons in extremis, when the 'terrors of final dissolution' may control their every act, a lawyer or scrivener, often sent for by attending spiritual advisers, will tell them how they may successfully evade the statute and dispose of their estates to charitable and religious uses. In other matters it has been the proud boast of our ancestors and ourselves throughout the centuries, that 'the reason the spirit of the law is the soul of the law,' 'for the letter killeth, but the spirit giveth life,' 2 Corinthians 3:6. (3d) They also tempt the legatee to commit grave moral wrong by retaining to his own use, money which he knows was not intended for him. 'Lead us not into temptation' is a command of the divine law and also the basis of a large part of the statute law of every civilized country; for he who tempts another to commit a tort or a crime is as guilty, in the eyes of the law, and oftentimes morally more guilty, than the man who commits it. If, in cases like the present, the legatee resists the temptation, and pays the legacy over to the charity for which it was actually intended, as every man worthy of the name does, he knowingly assists in evading the law, and thereby to a degree is led to future wilful violations thereof. (4th) The lawyer, whose office calls upon him to obey the law in letter and spirit, and the scrivener whose citizenship demands of him the same obedience, alike are tempted to advise their clients how to evade the law, instead of how to obey it; and the belief, sometimes stated, but more often acted upon without expression, that it is all right to disobey the law if you can avoid punishment for so doing, is seemingly approved by the public generally, aided and abetted by the draughtsman whose bank account is the measure of his conscience. Thus the tendency is to debase the character of all those connected with such transactions, and there grows up in the community an inclination to obey the law only when its arm is found to be too long to make disobedience safe; results which admonish us that error is necessarily somewhere coiled up in these devisions. (5th) In all jurisdictions, the courts, tardily recognizing the consequences flowing from their decisions allowing the law to be thus wantonly evaded, have seized upon slight circumstances in order to create a trust (Stirk's Est., supra; Russell v. Jackson, 10 Hare 204; Edson v. Bartow, 154 N. Y. 199) and then have destroyed it in order to give the estate to the heirs and next of kin, as the statute intended. This is itself potent proof of the law's recognition of the error of its position on the main question, and has resulted in illogical distinctions which have rendered uncertain the law on this subject. In other cases the courts have not been swift to change, by parol, written absolute estates into trust estates; nor would it
be here were it not for the necessity of counteracting, as far as
may be, the evasions of the public policy of the State, recognized
yet approved by the earlier decisions."

The sole justification for following the earlier cases was stare decisis and
the fact that the legislature through the passage of the years had, by its inac-
tion, tacitly approved the court's construction.216

The rule is still the law, unaffected by any later case,216 or by legislative
action except the elimination of the attesting witness requirement by the Act of
July 2, 1935 and the defining of the thirty day period by the Act of May 16,
1939.217 In Hartman's Estate 218 the drastic effect of the thirty day require-
ment is dramatically illustrated. Testatrix had executed a will July 29, 1931.
On July 28, 1932 she executed a second will revoking the former and dying
July 29, 1932. Both wills contained bequests to charities essentially similar but
different in details and one was increased. It was contended the latter will was
a codicil to the former and parol evidence was admitted by the auditor to prove
that it was not the intention of testatrix or her desire to revoke the former will.
The court refused to sustain the auditor and the Supreme Court affirmed the
decree of the court below. Parol evidence is not admissible to show testamen-
tary intention when the language of the will is perfectly clear and there is a
complete and plain will free from either latent or patent ambiguity. Said
Barnes, J.:

"The act must be literally read and construed, if affect is to
be given to the legislative intent, and cannot be stretched to save
a bequest clearly intended by the act to be void. Charitable or re-
ligious institutions, claiming bequests or devises, must bring them-
selves within it. As between them and the next of kin of a tes-
tator, there are no equities, and the rights of each are such only as
are given by the statute."219

In view of the recent amendments to Section 6 deleting the witness re-
quirement and defining the thirty day period, and also in view of the state of
the decisions just reviewed, the question arises whether Section 6 in its present
form is really worthwhile. Putting the query in another way the question is
whether the retention of the thirty day clause has not already worked more
harm than good, as appears in Hartman's Estate.

Chambersburg, Pa. A. J. WHITE HUTTON
January, 1943.

215See Opperman's Estate, 319 Pa. 466, 179 A. 735 (1935) for the rule that construction of
statute by the courts stands until legislature declares otherwise; 43 Dickinson L.R. 31 (1938).
217See note 193, supra.
219See list of cases cited by Barnes, J. following this quotation. Cf. Bingaman's Estate, 281 Pa.
497, 127 A. 73. On computation of thirty day period, see Act of May 16, 1939, P.L. 141, 20 P.S.
195 (#70), amending Sec. 6, Wills Act of 1917, P.L. 403; 34 D.L.R. 147. Cf. Act of May 16, 1939,
P.L. 141 (#70), repealing Sec. 11, Act of April 26, 1855, P.L. 328 and substituting similar pro-
vision to that of Act No. 71, supra.
The Order Nisi and Final Order issued March 4, 1942 and December 7, 1942, by the Pennsylvania Public Utility Commission, regulating the rates of The Peoples Natural Gas Company, dissipate many of the obscurities which have impeded the symmetrical development of the law governing rate regulation. Nearly every important rate case issue is comprehensively discussed and the succinct clarity of the discussion clearly reflects the culmination of long experience, careful deliberation and constructive intent. The orders will speak for themselves to those who read them, but they suggest certain comments which it is the purpose of this article to express.

In rate case deliberations, as in all fields of thought and reason, a danger exists that essential truths may be pressed to the point of falsity. For example, none can doubt the fairness and justness of the Smyth v. Ames doctrine that unconscionable original cost, inflated by fraud, is unavailable as an exact measure of rate base value. But this doctrine loses its validity when rephrased in attempted support of the use of estimated reproduction or current replacement cost as the sole measure of value. The United States Supreme Court and our Pennsylvania courts, recognizing this, have always carefully avoided promulgation of any exclusive rule or measure for fair value determination, and have refrained from expanding the individual truths of various principles beyond the scope of their application. It has been the consistent care of the courts to emphasize that the circumstances of each case must determine the weight to be given the diverse factors involved.

Usually, (and the Peoples cases were no exception) the utility contends for exclusive consideration of physical property, claiming that it is the property and not the cost which is taken if a rate order is confiscatory. The concept of property taking by rate regulation arose from the eminent domain precepts applied in the early decisions in default of more pertinent legal principles. The courts, confronted with a new problem, attempted to solve it by recourse to traditional concepts. However, it was soon realized that capitalization of current income—a useful test of value in eminent domain cases—led the court in a circle when applied in rate cases to determine proper future income. But when the circle
had been breached, the courts found themselves in a legal void which they
perforce proceeded to fill as best they could with such criteria as came to hand,
all in the name of "property."

It is obvious, if a moment's thought is given to actualities, that physical
property is never taken by any rate order. A rate order merely restricts income;
it does not confiscate property, except by legal fiction. Every utility retains ac-
tual ownership and possession and use of its property. It can sell or trade the
property or any part. Even if the property is held to have little or no value
for rate purposes, it may nevertheless have very great intrinsic or extrinsic mar-
ket value, and practical economic considerations are far more germane to proper
decision of rate cases than are the heterogeneous theories which cluster round the
clouded head of the physical property confiscation concept. And the courts,
even while apparently applying the property concept, have usually blunted its
implications by cautious reservations. For, as the basic principles of rate law
gradually coalesce into the shape of equitable realism, it becomes apparent that
the courts have, for the most part, realized the perils of dogmatism on so elusive
a subject of economic justice, and have carefully insisted that all factors must
be considered in every case. This discreet course of the decisions has provoked
the printed ire of pet theorists and cloistered but articulate thinkers who pre-
fer their law in neat capsules of specific formulas or rules, and it seems ap-
propriate in the interest of fairness to take laudatory note of the judicial care
with which the courts have handled a subject which was originally entirely out-
side the settled precincts of the law. It is salutary to remember that rate regu-
lation is still in a formative stage economically as well as legally, and that those
who presently proclaim ultimate dogmas of regulatory theory may share the fate
of the predecessors they excoriate. For the realm of rate economics offers a
most apposite instance of the apophthegm that "In the countries of the blind
the one-eyed are kings," and we may hope that the courts will continue their
endeavor to hold even the scales of constitutional justice without prescribing the
exclusive content of the scales.

An excellent example of judicial discretion appears in the case of Solar
Electric Co. v. Public Utility Commission,3 where the Pennsylvania Superior
Court, while refusing to permit the Commission to use an undepreciated origi-
nal cost rate base, indicated that it was the failure to give any weight whatever
to reproduction cost and not the general reasoning of the Commission which
constituted reversible error. In fact, when the Court itself came to make its
own determination of fair value it specifically stated that, in addition to repro-
duction cost, it considered "the book cost of invested capital as shown on the
company's books."4 Thus the Pennsylvania courts have left the Commission
free within the ambit of reasonable discretion to comply with the Shakespear-
ian precept that

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4Id. at 364, 9 A. (2d) at 469.
"We must not make a scarecrow of the law,  
Setting it up to fear the birds of prey,  
And let it keep one shape till custom make it  
Their perch and not their terror."  

And it is not through radical experiment that the Pennsylvania Commission has chosen to express its regulatory conscience. The Peoples orders clearly show a purpose to rely upon lucid exposition of common sense principles within the frame of law. Although the orders themselves avoid theory so far as possible, clarity of thought in analysis of the principles applied is aided by realistic appreciation of a basic cleavage between the concept of what is generally termed "property" and the concept of "investment."

Selection of "property" or "investment" as the proper designation of the item or thing to be valued will logically condition approach to any element of fair value, including accrued depreciation, and also will condition ultimate exercise of judgment upon the elements as severally determined. If the "property" —in the sole sense of physical property—is to be valued, then physical depreciation only can be consistently deducted, and no consideration whatever need be given to the amount of dollars actually taken from the consumers for depreciation and booked in the depreciation reserve. Depreciation of "property" is a physical matter. The depreciation of "investment" on the other hand, is a matter of return of dollars. The "property" depreciates regardless of the collection of depreciation reserve dollars from consumers, or the use to which those dollars are put. But every dollar of "investment" returned by the consumers reduces the "investment."

Also, the distinction between "property" and "investment" is of supreme importance in relation to annual depreciation. In the cases of Smith v. Illinois Bell Telephone Co., 6 Lindheimer v. Illinois Bell Telephone Co., 7 and the recent case of Federal Power Commission v. Natural Gas Pipeline Co., 8 the law is stated to be that investment and the experienced relation of the depreciation reserve to the investment as represented by the book fixed capital control the annual allowance. Since the reserve is merely the total of the annual charges, consistency demands that accrued depreciation be computed upon the same basis, although no court has formally recognized this cogent logical necessity. Certainly no logical distinction has ever been drawn justifying different bases of calculation for annual and accrued depreciation.

However, regardless of theoretical inconsistencies but adhering to the tenents of fair value, the Pennsylvania courts have emphasized that consideration must be given not only to reproduction cost, 9 but also to factors such as investment, 10

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6 Measure for Measure, Act II, Scene I.
7 282 U. S. 133 (1930).
8 7292 U. S. 151 (1933).
9 315 U. S. 575 (1942).
in reaching a conclusion which fairly reflects the application of informed judgment to the evidence. The validity of this emphasis is shown by the following tabulation illustrating the genesis of the more important rate base dilemmas confronting a commission.

**ILLUSTRATIVE CHART OF HYPOTHETICAL UTILITY**

<table>
<thead>
<tr>
<th></th>
<th>Start of Business</th>
<th>End of First Year</th>
<th>End of Second Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>Invested Capital</td>
<td>$100,000</td>
<td>$100,000</td>
<td>$100,000</td>
</tr>
<tr>
<td>Original Cost</td>
<td>100,000</td>
<td>105,000</td>
<td>110,000</td>
</tr>
<tr>
<td>Reproduction Cost New</td>
<td>100,000</td>
<td>110,000</td>
<td>120,000</td>
</tr>
<tr>
<td>Book Fixed Capital</td>
<td>100,000</td>
<td>105,000</td>
<td>110,000</td>
</tr>
<tr>
<td>Expensed Property</td>
<td>1,000</td>
<td>1,500</td>
<td></td>
</tr>
<tr>
<td>Book Depreciation Reserve</td>
<td>5,000</td>
<td>10,000</td>
<td></td>
</tr>
<tr>
<td>Observed Depreciation</td>
<td>5%</td>
<td>6%</td>
<td></td>
</tr>
<tr>
<td>Book Fixed Capital (Less Deprec. Reserve)</td>
<td>100,000</td>
<td>100,000</td>
<td></td>
</tr>
</tbody>
</table>

(Equity Value) 100,000

Relevant Fair Value Points:

1. No increase in Invested Capital.
2. Depreciation Reserve used for capital additions.
3. What weight shall be given depreciation accruals as against observed depreciation? Are the depreciation accruals really twice what they should be?
4. What weight shall be given (a) Depreciated Reproduction Cost (b) Depreciated Original Cost (c) Invested Capital (d) Book Cost less Depreciation Reserve (e) Expensed Property?

It will be noted that reproduction cost, original cost and the book factors tally exactly when the business begins. Everyone must admit that, as of the first year, the books of account truly and precisely reflect the actual facts. Let us follow through and attempt to find where, if anywhere, the books lose their validity.

The tabulation is almost self-explanatory. It shows that managerial judgment adopted $5,000 per year as a proper annual depreciation accrual. As Mr. Chief Justice Stone has said in the *Natural Gas Pipe Line Company* case, "the purpose of the amortization allowance and its justification is that it is a means of restoring from current earnings the amount of service capacity of the business consumed in each year. *Lindheimer v. Illinois Bell Tel. Co.*, 292 U.S. 151, 167. When the property is devoted to a business which can exist for only

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11315 U. S. 575, 592 (1942).
a limited term, any scheme of amortization which will restore the capital investment at the end of the term involves no deprivation of property. Even though the reproduction cost of the property during the period may be more than its actual cost, this theoretical accretion to value represents no profit to the owner since the property dedicated to the business, save for its salvage value, is destined for the scrapheap when the business ends. The Constitution does not require that the owner who embarks on a wasting-asset business of limited life shall receive at the end more than he has put into it."

The $5,000 annual depreciation accrual is shown as earned over and above all operating expenses plus dividends of $7,000 (or 7 per cent) annually. At the end of the first year everyone would determine net earnings by deducting from gross revenues all operating expenses, including the $5,000 amortization or depreciation amount. Thus the utility benefits from the annual depreciation charge in the reflection of a lower net revenue for regulation and other purposes. This does not impair the utility position in the financial field because it can show that, in addition to paying substantial dividends, it has been able to provide liberally for return of its investment.

At the end of the second year, again net earnings are determined by deducting from gross revenues all operating expenses including the $5,000 amortization or depreciation amount, and the utility again benefits in the reflection of a lower net revenue.

But we find that, even at the end of the first year, the original cost and the reproduction cost have increased without any increase in the capital invested. This situation is clearly ascribable principally to the purchase of additional property with funds received from consumers and represented on the books by the depreciation reserve figures or operating expenses. However, the mere fact that reproduction cost, original cost, and invested capital are no longer identical does not in any way impair the validity of the book figures nor imply that they do not correctly represent important facts. As the Commission recognized in the Peoples orders, all the indications of value should be studied, including the recorded actualities as well as the expert estimates.

The topic of accrued depreciation also will be clarified by exemplification. As we have seen, at the beginning of any utility enterprise, original cost, reproduction cost, and invested capital are identical. Again referring to the tabulation showing $100,000 as invested in creating a utility system, it appears that the obligations of the consumers initially are clearly to pay a return upon a rate base of exactly $100,000 under any theory, and to provide for a return of $100,000 to the investors over the useful life of the property, also under any theory. In other words everyone knows, during the first year, precisely what his rights and obligations are.

At the end of the second year, a total of $10,000 has been charged to operating expenses—$5,000 each year—and credited to the depreciation reserve. Suppose $10,000 has been expended for additional property without any in-
crease in investment, and no retirements have been made. We thus have original cost of $110,000, book cost of $110,000 and investment of $100,000. A vital point is the source of the $10,000 expended for additional fixed capital. Since it did not come from additional investment, it could only represent collections from the consumers. An inspection of the property discloses a 6 per cent physical deterioration. But what shall be done about the actual cash dollars represented by the depreciation reserve and the capital additions? If the utility had kept the depreciation dollars in a separate bank account to be used for retirement recoupment, the dollars obviously could not have been used to purchase additional property and the question would not arise. The funds for the additions would have been furnished as additional investment, and it would be clearly proper to provide a return on and of the additional investment. But the utility used the dollars dedicated to retirement recoupment for another purpose. It is no part of the obligation of the consumer to provide funds for plant additions—that is the obligation of the utility investors. If the sums collected for and dedicated to fulfillment of the consumer obligation to return capital investment are permitted to metamorphose into an accretion to the depreciation base, clearly the consumer will never be able to fulfill this obligation.

The Peoples’ treasurer testified that, although some dollars allocated on the books to depreciation reserve were used to purchase property, he did not know and no attempt had been made to determine how many such dollars were so used. The inequity of the situation was clearly demonstrated by the treasurer’s further specific testimony that the consumers would be expected to provide a return and depreciation on the dollars so used. This amounted to saying that dollars intended to recover or protect the investment and specifically and plainly dedicated by the utility to these purposes had actually been used by respondent to increase the plant and consequently the amounts needed each year for return and depreciation with the obvious exaction of duplicate costs from consumers.

The Supreme Court of the United States found occasion for succinct expression of the proper view in Columbus Gas & Fuel Co. v. Public Utilities Commission of Ohio, saying that when an amortization fund has been computed with reasonable liberality and is large enough to make provision for adequate reserves, “If the company is not satisfied to have the depletion allowance thus applied in renewal of its life, it may divide the fund among the stockholders and wind the business up. It cannot get its capital back at the expense of the consuming public and also at the same expense provide itself with a fresh supply to keep the business going.” (Italics supplied).

Similarly, where property items are paid for with dollars collected from the

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consumers and properly accounted for through maintenance or other operating expenses, it is unfair and unjust to reaccount for the items and include the associated dollars in fixed capital accounts for rate case purposes. The dollars having been duly provided by the consumers in the year of installation, should not be demanded again.

Turning to examination of the discussions and findings in the Peoples' orders we may usefully summarize (1) Reproduction Cost, (2) Expensed Property and Accrued Depreciation, and (3) Rates and Reparation.

1. Reproduction Cost

The Commission stated in the Order Nisi that "The element known as reproduction cost is peculiar in that it is never factual, but an estimate based upon an hypothesis," and approvingly quoted Mr. Justice (now Chief Justice) Stone's comment.16 "Public utility properties are not thus created full-fledged at a single stroke. If it were to be presently rebuilt in its entirety, in all probability it would not be constructed in its present form. When we arrive at a theoretical value based upon such uncertain and fugitive data, we gain at best only an illusory certainty."17 The Commission then pointed out that the uncertainties, approximations and fictions attendant upon the reproduction cost procedure made it pertinent to note that the expert witness sponsoring the reproduction cost estimate owned 102 shares of the stock of the utility's holding company, Standard Oil Company (N.J.). In the final order, the Commission reached its conclusion on this item in the words, "We do not believe that a reproduction cost estimate standing alone, must be accepted at its face value . . . ; nor do we believe that, standing with other evidence of value, it must nevertheless be given the preponderant weight or, as respondent contends, the sole weight, in fixing fair value. The same is true of any other opinion evidence."

2. Expensed Property and Depreciation Reserve

The Peoples company had claimed the expensed property and depreciation charges as operating expenses over the years, thus reducing its taxable net income and the net income available for return. Having secured these very substantial benefits year after year, the accounts were permitted to stand unaltered on the books until the attempted impeachment for momentary advantage in the rate cases. Success in the attempt would have stimulated similar efforts to adjust accounts according to the whims and fancies of utility officials, and would have impaired the integrity of both plant and income accounts.

Both with reference to expensed property and the depreciation reserve the

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17In less formal phraseology "most rare vision.... a dream past the wit of man to say what dream it was; a man is but an ass if he go about to expound this dream." (A Midsummer-Nights Dream, Act. IV, Scene I).
Commission emphasized that accounting entries originally made in accordance with proper accounting principles by fully competent officials, attested by official oath, reflected in reports to taxing and regulatory bodies, as well as financial services and stockholders, duly audited year after year by certified public accountants and relied upon by the Commission and all the other entities must be accorded substantial weight in fair value determination. This view is clearly correct, since the Pennsylvania Courts have not only required consumers to amortize rate case expenses, even where the rates involved were excessive, on the theory that the Commission should have enforced reasonable rates currently throughout the period of Commission supervision, but have held in most forceful terms that where the Commission has once fixed rates, no reparations can be awarded, even upon a subsequent finding that the rates have become unreasonable.

These considerations indicate the imperative necessity in the public interest of holding utilities to strict accountability for their book figures. The books and annual reports are the only consistently available sources of information and, if they cannot be relied upon by the Commission, consistent and current regulation is impossible.

3. RATES AND REPARATIONS

The Commission found that expenses other than for gas purchases were closely comparable from year to year, and that the production from Peoples' own wells was large enough to supply domestic and commercial needs. Considering these facts, together with respondent's repeated assertion that industrial rates are fixed by competition with other fuels, the Commission fixed past rates for domestic and commercial consumers as a percentage of the bills actually paid by them, and required the establishment of future rates based upon a fixed amount of revenues for a specified consumption.

There has been no opportunity within the confines of this article to do more than indicate some of the problems of rate determination and adumbrate the approach to those problems followed in the Peoples' orders. No attempt has been made to cite even a substantial portion of the many court and commission decisions recognizing the validity of the principles applied by the Pennsylvania Commission, nor to deal in detail with the very important issues suggested by the discussion. If however, this cursory review induces the reader to refer to the Peoples' orders it will fulfill the hopes of its author.

Harrisburg, Pa. 

January 4, 1943.

Samuel Graff Miller

20See also Louisville Gas & Electric Co. v. Federal Power Commission, 129 F. (2d) 126 (1942) for statement of importance of books in determining net investment.